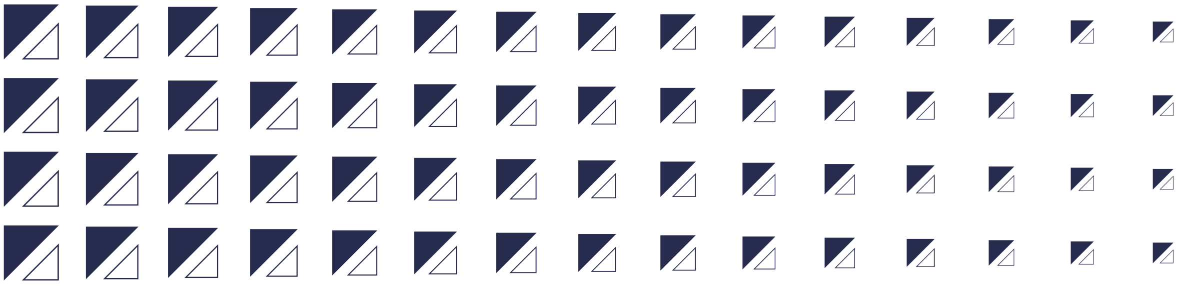

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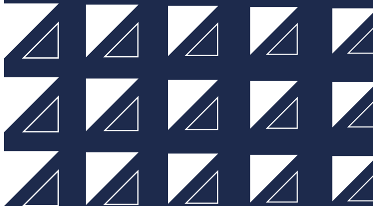

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Editorial

Apresentamos a Edição Especial, “Tecnologias e Resolução de Disputas”, da *Revista Brasileira de Alternative Dispute Resolution – RBADR*.

Na era digital, as tecnologias capturam e transformam cada vez mais as múltiplas esferas das nossas vidas. A área de resolução de conflitos também enfrenta essa transformação. A inteligência artificial ou as tecnologias blockchain são comumente utilizadas em processos de resolução de litígios, gestão de casos, etc.

Por um lado, devemos admitir que as tecnologias mencionadas têm potencial para melhorar significativamente a área. Por outro lado, as tecnologias proporcionam novas questões jurídicas e éticas para advogados, árbitros, mediadores, tribunais, investigadores e todo o ecossistema de solução de disputas.

É por isso que a realização de pesquisas nessa área, a descoberta de questões do uso de tecnologias na resolução de disputas e as perspectivas de seu desenvolvimento são significativas. Os pesquisadores podem abordar as questões e oportunidades mencionadas e oferecer soluções. Pensando nisso, decidimos publicar um número especial dedicado às tecnologias e à resolução de conflitos.

Este número reúne 17 (dezessete) artigos de todo o mundo que evidenciam a vocação internacional do periódico. No número, o leitor encontrará escritos da Polônia, Índia, Malásia, Rússia, Brasil, Ucrânia e Mongólia.

Os cinco anos de fundação da revista e a pluralidade de autores e artigos confirmam o viés internacional. Qualquer contribuição científica sobre a temática é bem-vinda.

Agradecemos a todos os leitores da revista, autores e à Editora Fórum de Belo Horizonte, pela parceria de sucesso e excelente trabalho.

Elizaveta Gromova
Ph.D., Associate Editor
Daniel Brantes Ferreira
Ph.D., Editor-in-Chief

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Editorial

We present a Special Issue, “Technologies and Dispute Resolution,” of the Brazilian Journal for Alternative Dispute Resolution – RBADR.

In the digital era, technologies increasingly capture and transform different spheres of our lives. The area of dispute resolution also faces this transformation. Artificial intelligence or blockchain technologies are actively used in dispute resolution proceedings, case management, etc.

On the one hand, we must admit that the mentioned technologies have the potential to improve the area significantly. On the other hand, technologies provide new legal and ethical issues for lawyers, arbitrators, mediators, courts, researchers and the entire dispute resolution ecosystem.

That is why conducting research in this area, finding issues of the use of technologies in dispute resolution, and prospects of its development are significant. Researchers can address the mentioned issues and opportunities and offer solutions. Bearing that in mind, we decided to publish a special issue dedicated to technologies and dispute resolution.

This issue comprises 17 (seventeen) papers from around the world evidencing the international vocation of the journal. There are papers from Poland, India, Malaysia, Russia, Brazil, Ukraine, and Mongolia.

Its five years of existence and the diversity of authors and writings confirm this. Any scientific contribution on the subject is welcome.

We thank all the journal readers, authors, and Editora Fórum from Belo Horizonte for the successful partnership and excellent work.

Elizaveta Gromova
Ph.D., Associate Editor
Daniel Brantes Ferreira
Ph.D., Editor-in-Chief

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The Consent Award in India: an Alternative Within an Alternative

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Abstract: Multi-tier Arbitration, also called Hybrid Arbitration, in India has not been introduced formally. It has been practiced in an ad-hoc manner. What comes close to hinting at the idea of hybrid arbitration in India is s.30 of the Arbitration and Conciliation Act 1996. This section makes it possible for the arbitral tribunal to encourage parties to settle their disputes by referring them to other ADR mechanisms, such as conciliation and mediation. Thus, s.30 represents a hybrid arbitration mechanism and reflects the acknowledgment by the legislature of providing parties a choice for resolving disputes through a consensual mechanism even if parties have referred their disputes to Arbitration. At the same time, parties retain the option of proceeding solely with arbitration and not referring their disputes to any other mechanism. Thus, parties still have the final say in resolving their disputes at any time and place they desire. Arbitrators have also been given the discretion to raise objections to the settlement reached between the parties, which they would have to state clearly. If, however, they accept the settlement, then as per the wishes of the parties, they may terminate the arbitration proceedings or enforce the settlement by passing an award based on that settlement. The author of this article has attempted to explain the very concept of the Consent Award, along with the mechanism of check and balance involved. The research methodology engaged by the author is explanatory, descriptive and analytical, for the author explains the whole process involved in reaching a consent award, and tries to assess the potentiality of the consent award in resolving the dispute with the help of the case-analysis method.

Keywords: Settlement. Consent Award. Multi-tier Arbitration. Consensual ADR mechanisms.

Summary: **I** introduction – **II** A Potent Section – Settlement under the 1996 Act – **III** From Settlement to Award – **IV** Recording the Settlement as Arbitral Award – **V** Settlement v. Consent Award – **VI** Enforcement Under the New York Convention – **VII** Conclusion – References

I Introduction

This is surprising for s.30[1] of the Arbitration and Conciliation Act, 1996[2] does empower the arbitral tribunal to encourage parties, during an ongoing arbitration, to use other alternative dispute resolution mechanisms and attempt an amicable resolution of their disputes. The settlement so reached can be enforced as an arbitral award.

Thus, new alternatives are being sought to avoid arbitration and resolve their disputes through an amicable settlement. This is where hybrid arbitration provides a solution. Hybrid arbitration or multi-tiered arbitration, as the name suggests, refers to those mechanisms which combine arbitration with another ADR mechanism to give an option to the parties to circumvent the arbitration process by reaching a settlement before submitting the dispute to the mercy of arbitration.

The Indian Arbitration and Conciliation Act, 1996 governs the arbitration process in India. This Act, along with its several amendments, is a culmination of a great many legislations of the past. It consolidates the law governing both domestic and international arbitration, *viz.* the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The 1996 Act also governs conciliation proceedings as well. Section 30 of this Act contains the potential for formally introducing hybrid arbitration in India. Section 30 can be interpreted to envisage a hybrid arbitration mechanism wherein parties may first submit their dispute to arbitration, and the arbitral tribunal may refer the dispute for mediation or any other ADR mechanisms so that parties get the opportunity to reach a settlement which shall be enforced as an arbitral award. If the dispute is settled under s.30, the arbitral proceedings shall stand terminated. Still, parties will always have the option of requesting the arbitrator to pass a binding settlement award based on the terms recorded in the settlement.

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[1] The Arbitration and Conciliation Act, 1996, s.30 (Settlement) which reads:

"(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute".

[2] The Arbitration And Conciliation Act, 1996 (Act No. 26 of 1996).

> This section acknowledges the possibility and need to resolve the dispute through other consensual ADR mechanisms rather than leave the disputes solely at the mercy of an arbitral award. This section thus provides a chance for the parties to attempt a settlement of their differences and thereby gain more control over the dispute resolution process by reaching a win-win solution.

The author through this article has tried to explore the new dimension in the field of arbitration, in the form of consent award, and critically analyse its scope, applicability, validity and effectiveness in dispute resolution mechanism.

The author used the primary and secondary data available such as legislation, books, leading judgements, annual reports, journals and articles published. The author, based on the data available, has attempted to bring out the effectiveness of arbitration in India, the problems associated with it, the preferences in choosing hybrid arbitration over arbitration, and the remedies to make arbitration an effective dispute resolution mechanism.

The author humbly proposes the adoption of hybrid arbitration i.e., merging arbitration with another more consensual dispute resolution mechanism, to be a worthy alternative to both litigation and sole arbitration. The author substantiates this stance by providing a detailed analysis of the popular forms of hybrid arbitration mechanism practiced around the world through the case-analysis method. Further, the author has dealt with in-depth analysis of s.30 of the 1996 Act, to illuminate a hereto dormant yet potent provision that encourages hybrid arbitration in India.

II A Potent Section

Until September 15, 2023, i.e., before the commencement of the Mediation Act, 2023, no particular law existed in India governing the settlements reached via mediation. A mention about mediation, however, is found in s.30 of the 1996 Act, as a mechanism for dispute resolution in the sphere of ADR. Section 30, thus is a potent section with a lot of potential, which unfortunately, has remained under-utilised.

s.30[3] of the Arbitration and Conciliation Act, 1996, extends the scope of the ADR mechanisms. It recognizes the mixing of arbitration, mediation and conciliation. It does not provide any specific time period when any other procedure could be initiated. The usage of words "at any time during the arbitral proceedings" in broader interpretation includes any instance before rendering the final arbitral award. The use of the term "other procedures" gives this provision a unique feature,

3 *Supra* note 1.

providing scope for future ADR methods that could be developed. Any settlement under this provision has the same status and effect as that of an arbitral award.

Even if the new Mediation Act, 2023 has received the assent of the Hon'ble President of India on September 14, 2023, and is now the first Act formalizing mediation in India, the potentiality of the very provision, i.e., s.30 of the 1996 Act is yet being underestimated. There is no mention of any process or protocol that may be followed in mediation conducted as a part of multi-tier arbitration.

However, s.12A,[4] Chapter IIIA,[5] The Commercial Courts Act, 2015 provides for Pre-Institution Mediation and Settlement and contemplates that the trivial commercial matters must be first referred to mediation, and the settlement arrived at, shall be tantamount to an arbitral award in respect of the status and effect, under s.30 of the 1996 Act. This reflects the importance of s.30 of the 1996 Act and emphasizes the utter requirement of its acknowledgment.

Settlement under the 1996 Act

Section 30 of the Indian Arbitration and Conciliation Act is inspired by Art.30 of UNCITRAL (United Nations Commission for International Trade Law) Model Law, which provides that parties may resolve their disputes by reaching a mutual settlement during the arbitration proceedings. The settlement so reached must be recorded as an arbitral award to ensure its enforcement.[6] Section 30 of the UNCITRAL model law welcomes a settlement award reached post the initiation of

[4] The Commercial Courts Act, 2015, s.12A (Pre-Institution Mediation and Settlement) which reads:

"(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre- institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."

[5] Ins. by Act 28 of 2018, s.10 (w.e.f. 3-5-2018).

[6] WADHWA, Anirudh; KRISHNAN, Anirudh. *Justice R S Bachawat's Law of Arbitration and Conciliation*. 6th ed. Lexis Nexis, p. 1619, 2018.

arbitral proceedings.[7] Section 30 of the Arbitration and Conciliation Act comes into play when parties reach a settlement during the arbitral process and governs the procedure for recording the settlement as an arbitration award.[8]

Section 30 empowers the Arbitral tribunal to make it possible for the parties to settle their disputes outside the conventional litigation process by adopting any of the prevalent ADR mechanisms, such as Mediation, Conciliation, etc., in between the arbitration proceedings. Though s.61 of the present Arbitration and Conciliation Act, 1996 provides statutory recognition to conciliation as an independent mechanism for termination of disputes germinating from legal relationships, be it contractual or non-contractual relationships, s.30 permits the adoption of conciliation or mediation in ongoing arbitral proceedings.[9] This section thus encapsulates the concept of Arb-Med and particularly Arb-Med-Arb,[10] and reflects a growing recognition for the adoption of consensual ADR mechanism for resolution of disputes.

s.30 provides for two forms of settlements. First is the settlement, which terminates the arbitral procedure and also terminates the mandate of the arbitrator. Secondly, a settlement agreement reached between the parties who subsequently request the arbitration tribunal to deliver the same as an arbitral award under s.31. This form of settlement does not terminate the arbitrator's mandate, and the mandate continues till the arbitrator passes the arbitral award. However, the arbitrator's mandate continues only upon the request of the parties and the mandate is terminated without the request of the party.[11] Such a settlement has the legal sanctity of an arbitral award and is final and binding on the disputing parties. It can be enforced as a decree of the court as provided for by the Code of Civil Procedure, 1908.[12]

s.30(1) confers upon the Arbitral tribunal a statutory mandate to nudge parties to conclude their dispute through a settlement. But in the end, it is the

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[7] REDRERN, Alan; HUNTER, Martin. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford University Press, United Kingdom, p. 514, 2015. Moreover, art.36(1) of the UNCITRAL Rules provides for a settlement to be recorded by an order or by an award: "If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award."

[8] *Prawinchandra Murarji Savla* v. *Meghji Murji Shah* (1998) 2 RAJ 273: 1998 (Supp.) Arb LR 314 (Guj.), in WADHWA, Anirudh; KRISHNAN, Anirudh. *Justice R S Bachawat's Law of Arbitration and Conciliation*. 6th ed. Lexis Nexis, p. 1620, 2018.

[9] PARANJAPE, N. V. *Law Relating to Arbitration and Conciliation in* India. 8th ed. Central Law Agency, p. 245, 2018.

[10] PANCHU, Sriram. *Mediation Law and Practice: The path to successful dispute resolution*. 3rd ed. Lexis Nexis, p. 229, 2022.

[11] *Tahirbhai Abdullabhai* v. *Md. Hussain* (2005) 1 RAJ 23 (Bom), in WADHWA, Anirudh; KRISHNAN, Anirudh. *Justice R S Bachawat's Law of Arbitration and Conciliation*. 6th ed. Lexis Nexis, p. 1620, 2018.

[12] BANSAL, Ashwinie K.; KAUSHIK, Rahul. *Arbitration and ADR*. 3rd ed. Universal Law Publishing Co. Pvt. Ltd., New Delhi, p. 75, 2012.

parties who get to decide whether they want to proceed with a settlement or not. However, such promotion of a settlement does not entitle the arbitral tribunal to bypass the arbitral procedure mutually decided by the parties. The parties thus get to resolve their disputes at any time and in any manner, they choose.[13]

In the end, parties are free to decide how to end their disputes finally. However, if the parties opt for attempting a settlement during the arbitral proceedings, then they must be encouraged to do so by the tribunal, which is dutybound to facilitate the settlement process through the adoption of mechanisms such as mediation or conciliation or other suitable ADR mechanisms.[14]

Section 30(2), after applying the rule of purposive construction, would permit the recording of the settlement of any part of the dispute irrespective of some issues remaining unresolved.[15] This section further creates a distinction between a party's right to terminate the arbitral proceedings post reaching a settlement and the right of parties to get their settlement to be recorded as an award.[16]

The arbitrator can raise objections to the settlement reached and has been equipped with complete discretion to accept the settlement or reject the same thereby ensuring the validity of the agreed settlement in the light of the Principle of Natural Justice.[17] In such instances, the arbitrator must state the full facts of the case along with the objections which the arbitrator has and which impedes the arbitrator from agreeing to the parties' request to record the settlement. Failure to do so could be construed as misconduct by the arbitrator.[18] Arbitrators must not be under any kind of pressure to put their signatures to the settlement arrived by the parties, for it is possible that the settlement might contain terms that are in conflict with binding laws or public policy, such as fundamental notions of fairness and justice, etc.[19]

If the arbitrator agrees to record the settlement and raises no objections to the same, then the arbitrator must record the settlement in the form of an arbitral award. If parties merely inform the arbitrator that they have settled and do not request a recording of the settlement, then the arbitrator must terminate the arbitral proceedings save there are other issues that require to be arbitrated.[20]

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[13] MALHOTRA, O. P.; MALHOTRA, Indu. *The Law and Practice of Arbitration and Conciliation.* 2nd ed. Lexis Nexis Butterworths, p. 938, 2006.
[14] *Supra* note 13.
[15] *Supra* note 6.
[16] *Ibid.*
[17] *Id.* at 1621.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

Settlements reached by conciliation can be challenged under s.34. In such cases, the term 'arbitration' would be read as conciliation. However, Mr. Panchu[21] feels that such challenges would be rare, especially in those cases where parties have reached a mutually consensual settlement.[22]

In ***Oil and Natural Gas Corporation Ltd.*** **v.** ***Oil Field Instrumentation***,[23] the Hon'ble Bombay High Court had held that if the proceedings under s.30 result in an award, then the aggrieved party must raise objections against the award at the earliest. However, the courts can condone the delay if the court feels that sufficient cause for the delay exists and condonation aligns with the interest of justice.[24]

In ***Nathan Steels Ltd.*** **v.** ***Associated Constructions***,[25] the Hon'ble Supreme Court held that when the parties arrived at a settlement, it is not an option for any of the parties to the settlement to reject the settlement by calling the settlement a mistake and then proceed to invoke the arbitration clause. If such conduct is permitted, it would violate the sanctity of a contract as the settlement is also a contract entered into by the parties.

However, the bare reading of s.30 doesn't clarify if the arbitrator should, on their initiative, proceed with the conciliation process and conduct the same, or should the arbitrator merely encourage parties to explore this option and leave it to them.[26] Sr. Adv. Sriram Panchu, in his book, observes that the former interpretation would be more beneficial than the latter, thereby giving more comprehensive options for the arbitrator.[27] However, consent of the parties is required before the dispute is referred to mediation, conciliation, etc., during the arbitration proceedings.[28] It must further be noted that as per s.80 of the 1996 Act,[29] the conciliator cannot be an arbitrator without the consent of the parties.[30]

Mr. Panchu argues that amalgamating arbitral and consensual roles in one person can create possibilities of compromise on confidentiality and efficiency, primarily, when the process is handled carelessly.[31] The same has been reiterated

21 Senior Advocate Sriram Panchu, Internationally recognized Indian Mediator, Senior Advocate and Arbitrator.

22 *Supra* note 10 at 292.

23 2004(3) Arb LR 368 (Bom).

24 KOHLI, Hari D. *New Case Law Referencer on Arbitration and Conciliation Act*. Universal Law Publishing Co. Pvt. Ltd., New Delhi, p. 207, 2008.

25 *1995 Supp. (3) SCC 324.*

26 *Supra* note 10 at 288.

27 *Ibid.*

28 *Id.* at 289.

29 *Supra* note 1, s.80 (Role of conciliator in other proceedings), which reads:

"Unless otherwise agreed by the parties,

(*a*) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(*b*) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings".

30 *Supra* note 10 at 289.

31 *Supra* note 10 at 289.

by Delhi High Court in ***Alcove Industries* v. *Oriental Structural Engineers***[32], wherein it was observed that parties might not be able to have honest discussions with the arbitrator who also plays the role of the conciliator for the arbitrator might get influenced by the information received in the conciliation session which might pollute the arbitral award.

It must be remembered that a settlement agreement reached between the parties during arbitral proceedings is made by the arbitrator, whereas a settlement agreement, as referred to under s.73 of the Act[33] is made by a conciliator. Such a settlement is, therefore, a result of undertaking an independent conciliation exercise.[34] However, the conciliation process envisaged under s.30 is to be more informal and flexible as compared to the conciliation exercise as mentioned under part III of the Act.[35]

If the dispute is settled by recourse to s.30, the arbitral proceedings will stand terminated. Still, parties have the option of requesting the arbitrator to pass an arbitral award on agreed terms recording the settlement. However, if the parties feel the need for enforcement due to a lack of trust in each other or to be extra cautious, they can request the arbitrator to make an award on the agreed terms under s.30(2) of the Act. Enforcing the settlement is a prudent act, for if in the future a party refuses to abide by the settlement agreement, the opposite party would have to take recourse through filing a suit of specific performance of contract or seeking damages for breach of contract, both of which are more time consuming than the enforcement of the settlement via an arbitral award.[36] It is also pertinent to note that the requirement of enforcement of the conciliation agreement arises only when conciliation is resorted to during the arbitral process. On the other hand, the settlement reached under the conciliation process as provided for by the

[32] *2008 (1) ARBLR 393 Delhi.*

[33] *Supra* note 1, s.73 (Settlement agreement), which reads:

"(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties."

[34] TRIPATHI, S.C. *Arbitration & Conciliation Act, 1996 with Alternative Means of Settlement of Disputes.* 8th ed. Central Law Publications, Allahabad, pp. 243-244, 2017.

[35] *Supra* note 12 at 74.

[36] *Supra* note 10 at 290.

Arbitration and Conciliation Act, 1996 has the binding nature of an arbitral award based on the agreement (as mentioned under s.74 of the Act[37]).[38]

Termination of Proceedings

The arbitration tribunal shall mandatorily cease to continue the arbitral proceedings once the parties inform the tribunal that they have arrived at a settlement because the settlement terminates the tribunal's mandate as nothing remains to be decided anymore by the arbitral tribunal. Parties are to take responsibility in determining the modalities to implement the settlement terms. It is pertinent to note that such a settlement does not have the same decisive finality as an arbitral award.[39]

It is not mandatory to record the settlement as an award. However, parties may record the settlement as an award to be on the safer side. It is, however strongly recommended that parties possess some document recording the terms of their settlement agreement so that there are no ambiguities amongst the parties as to what they have agreed to. This may take the form of an exchange of correspondence or a written settlement agreement if not recording the settlement as an arbitral award.[40]

In ***Kapila Textiles v. Madhav***,[41] the Hon'ble High Court of Karnataka observed that a compromise reached between the parties per se cannot be accepted as an arbitral award as per s.30 of the Arbitral and Conciliation Act, 1996. The same would become an arbitration award only after the tribunal – after receiving a written request from the parties – delivers the settlement agreement as an arbitral award as provided under s.31. Therefore, s.30 itself provides for a self-check mechanism to establish whether the settlement arrived at between the disputing parties can be termed as an arbitral award or not.

III From Settlement to Award

The importance of mediation as an alternative dispute resolution mechanism can be gauged by the words of Senior Advocate Mr. Sriram Panchu, who calls mediation the flagship of ADR processes wherein ADR does not stand for

[37] *Supra* note 1, s.74 (Status and effect of settlement agreement), which reads:
"The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30".

[38] PANCHU, Sriram. *Mediation Practice & Law: The Path to Successful Dispute Resolution.* 1st ed. Lexis Nexis Butterworths Wadhwa, Nagpur, p. 290, 2011.

[39] *Supra* note 13 at 942.

[40] *Ibid.*

[41] AIR 1963 Mys. 39.

Alternative Dispute Resolution mechanism but for Appropriate Dispute Resolution mechanism.[42]

The immense popularity of mediation stems from its emphasis on parties' needs and interests and provides full disclosure of competing interests. It gives parties significant autonomy and thereby confers on them the right of self-determination. Parties themselves work out a settlement that is mutually acceptable to both of them and considers all their interests. Furthermore, procedural flexibility and strict commitment towards privacy are also what make mediation an attractive dispute resolution mechanism over traditional litigation and arbitration.[43]

A unique way of making mediation settlement binding is provided for in s.30 of the Arbitration and Conciliation Act of 1996. This section enables the arbitral tribunal to encourage parties to opt for a mediation settlement to resolve their disputes if the tribunal feels that the dispute can be resolved in such a manner. Such a settlement is then recorded by the arbitral tribunal and enforced as an arbitration award. This means that an award that contains a compromise between the parties themselves is not an invalid award, provided the arbitrator is assured that the settlement is fair to all parties. If, however, the existence of compromise is contended, then the tribunal can go into the question, and if the settlement is found to be valid, the tribunal can give the award in terms of the settlement.[44]

By enabling the arbitration tribunal to encourage the parties to undertake the path of settlements via mediation, the legislature might have also hinted at the adoption of the Med-Arb, Arb-Med and Arb-Med-Arb[45] processes wherein the mediation settlement is enforced by the med-arbitrator as an arbitration award, thereby making the settlement binding on both the parties.

However, it is pertinent to note that in most cases, parties themselves comply with the terms and conditions of the mediation settlement. This has been vouched for by Mr. Sriram Panchu, who, in a webinar organized by the Youth Bar Association of India, proudly declared that an overwhelming majority of mediation settlements do not generally go to the courts for enforcements. This is because in a mediation settlement, both parties feel that they have signed an agreement that is in their best interest, and thus, they find no need for the interference of the courts, and go about enforcing it themselves. It is only in rare cases that a mediation settlement

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[42] PANCHU, Sriram. On the Mediation Process. Law Commission of India on ADR/Mediation, New Delhi, 2003.

[43] Justice Dr. D. Y. Chandrachud, "Mediation – Realizing the Potential and Designing Implementation Strategies". See generally AHUJA, V. K. *Krishna and Mediation*. 1st ed. National Law University and Judicial Academy, Assam, pp. 46-74, 2023.

[44] SINGH, Avtar. *Law of Arbitration and Conciliation*. 11th ed. Eastern Book Company, p. 294, 2021.

[45] See FERREIRA, Daniel B.; GIOVANNINI, Cristiane J. The Multi-Tiered and Hybrid Clauses of Conflict Resolution as a Solution to Times of Uncertainty: Some Experiences of Comparative Law. Revista Eletrônica de Direito do Centro Universitário Newton Paiva, n. 42, pp. 366-376, 2020.

undergoes the process of enforcement as one party deviates from the terms of the settlement. He adds that in his 30 years of mediation experience, he has not had even one instance wherein the parties felt the need to seek the enforcement of the settlement. If ever enforcement has been opted for, it has been done only in those cases wherein one party found it difficult to fulfil their obligations due to changes in their circumstances. However, even in such circumstances, parties prefer to come to the mediation table again to rework the settlement to meet their new needs. This shows that mediation settlements are generally adhered to due to the trust between the parties, both not wanting to ruin their relationship with each other by disobeying their obligations.[46]

On the other hand, arbitral awards, once passed, are final and binding on the parties, and no party can deviate from the award. The award, like a decree of the court, constitutes *estoppel per rem judicatam*, which prohibits parties from raising the issues decided in the arbitration award through re-arbitrating or litigating in future litigations between the same parties and, or their privies.[47]

Therefore, hybrid arbitration constitutes benefits of both consensual ADR mechanisms (mediation/conciliation) and non-consensual ADR mechanisms (arbitration), thereby giving parties an immense opportunity to resolve their dispute with the help of a wide range of self-driven solutions and adequate control over the process.

Moreover, when the tribunal is satisfied with the settlement's existence and if the settlement itself states that an award may be made on the terms contained therein, the tribunal does not require any additional request to deliver the settlement as an award.

IV Recording the Settlement as Arbitral Award

When the parties strongly feel that the surrounding circumstances of their case mainly necessitate enforcement of the settlement under s.36 or under a provision corresponding to s.48 of the 1996 Act in any jurisdiction which is a

[46] PANCHU, Sriram. *Singapore Convention: The Way Forward*. 10th Session of the Virtual Summer School, held on (July 29, 2020, at Youth Bar Association of India Webinar), *available at:* https://www.youtube.com/watch?v=7Kv6pLdzQk0 (last visited on July 07, 2022). See MASON, Paul E. A Convenção de Cingapura e seus benefícios para o Brasil. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, n. 4, pp. 181-193, 2021. See also COMETTI, Anna K. F; MOSCHEN, Valesca R. B. The Singapore Convention in the framework of the Investor-State Dispute Settlement System. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 4, n. 7, pp. 37-57, 2022.

[47] IKEYI, Nduka; MADUKA, Tochukwa. The Binding Effect of a Customary Arbitration Award: Exorcizing the Ghost of Agu v. Ikewib. Journal of African Law, SOAS, University of London, vol. 58, n. 2, pp. 328-349, 2014.

signatory to the New York Convention,[48] the parties are required to request the arbitral tribunal to deliver the settlement as a consent award.[49]

This is a pertinent step to be followed as the Arbitration and Conciliation Act contains no provision to enforce such settlements. What can be enforced under this Act or a corresponding statute in a country party to the New York Convention are only arbitral awards be they domestic international awards or foreign international awards. Thus, the arbitral tribunal, on the desire of the parties, must deliver a settlement as a consent award. However, the tribunal can refuse to do so if it has any objections to the same.[50]

Request by the Parties

The Arbitral Tribunal can record the settlement award only if the parties request for the same to the tribunal.[51] Article 34(1) of the UNCITRAL Arbitration Rules stipulates specifically the requirement of a request for recording the settlement to the tribunal be made by 'both parties', while this section uses the phrase 'if requested by the parties.' This seems to suggest that the UNCITRAL Arbitration Rules assumed that an arbitration can be between two parties only, whereas this section appears to have contemplated a multi-party arbitration.[52]

The language of the proviso further makes it unclear as to whether or not the request can be made by only one party or whether a joint request by parties is a mandatory requirement. One view is that a single party can also request to convert the settlement into an award and make the settlement award binding and enforceable.[53]

Having a mandatory requirement of requiring both parties to approach the tribunal to pass a settlement award makes the entire process vulnerable to either party backing out and jeopardizing the process.[54] One solution to this dilemma can be that the declared will of both parties to agree on a settlement award evidenced during the proceedings is sufficient to enable a single party to approach the tribunal for delivering the settlement as an award. This appears to be correct because the expression 'the parties' in the context of s.30(2) is compendiously used to cover one or more parties.[55]

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[48] See DRAHOZAL, Christopher R. The New York Convention and the American Federal System. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 1, n. 1, pp. 37-54, 2019.

[49] *Supra* note 13 at 942.

[50] *Ibid.*

[51] *Id.* at 938.

[52] *Ibid.*

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*

Sometimes, identical words in a particular provision can be subjected to different interpretations. Thus, the first part of s.30(2), mentions the word 'parties' which means all the parties involved in the arbitral proceedings. This is because the settlement must be between all the parties. In the second part of sub-section (2), the word 'parties' has been stated, which must be interpreted to imply any of the parties. When parties to a dispute reach a settlement, it implies an implicit request to record the settlement unless the settlement itself provides for concluding the arbitral proceedings (in lieu of the settlement) without passing an award. Thus, if the arbitral tribunal is satisfied as to the existence of the settlement, then – unless the settlement itself provides that the proceedings be terminated without passing an award – on a formal request made by some of the parties, the tribunal can deliver the settlement with an arbitral award.

Therefore, if the provision is not correctly interpreted, it will only cause hardship and grave inconvenience to the parties. It will further run contrary to the very object of sub-section (1) of section 30 of the Arbitration Act, which calls for the arbitral tribunals to encourage settlements.

In ***Union of India*** **v.** ***Hanuman Parshad & Brothers***,[56] the Hon'ble Apex Court held that it was held that in order to enable the arbitral tribunal to make an award on agreed terms, there has to be a request from the parties to be made to the arbitral tribunal.

Rendering a Consent Award: A Right Or an Obligation of the Tribunal?

The primary task of any arbitral tribunal before delivering a consent award is to determine whether or not it is competent to hear the dispute in question in the first place. This is important because the recording of settlement by arbitrators only leads to the disposal of disputes wherein arbitrators do not go into the merits of the disputes when recording the settlement. Thus, arbitrators must not proceed to record settlements of those cases which are either non-arbitrable or beyond their capabilities to resolve. Once the tribunal is satisfied with its competence to hear a dispute, it must proceed to examine other factors that may influence their decision to or not to record the settlement arrived at by the parties.[57]

The power and responsibilities of the Arbitral Tribunal can be ascertained from both the domestic law of the land and the terms of the arbitration agreement/ clause between the parties. The conversion of settlement agreements into awards

[56] 2001 (8) SCC 476.

[57] KRYVOI, Yaraslau; DAVYDENKO, Dmitry. Consent Awards in International Arbitration: From Settlement to Enforcement. Brooklyn Journal of International Law, vol. 40, n. 3, p. 838, 2015.

can be impugned, particularly if such agreements are found to be in violation of mandatory positions of the domestic law of the land.[58]

It is pertinent to note that the UNCITRAL Model Law expressly empowers arbitral tribunals to raise objections against recording settlement agreements as arbitral awards if the tribunal feels that parties have not settled a genuine dispute and that the consent award can be prone to misuse for improper purposes.[59]

In ***Mohammedhussain Abdullabhai and Others* v. *Shabbirbhai Abdullabhai and Others***,[60] the Hon'ble High Court of Bombay observed that before taking action on the contention of the parties of reaching a settlement under s.30(2) of the Arbitration and Conciliation Act, 1996, the tribunal must reassure itself of the presence of a settlement agreement under s.30(1) of the 1996 Act as s.30(1) does not mandate the settlement reached between the parties to be in the form of a written agreement signed by the parties. The arbitrator must follow this step because, as per s.30(2) the mandate of the arbitration tribunal ends as soon as the parties reach a settlement, and the arbitration proceedings are to be discontinued. Thus, the arbitrator has the authority to determine the existence of the settlement between the parties on the issues referred to the arbitral tribunal. This interpretation is in line with the provisions of s.30(2), and if this interpretation is not taken, s.30(2) itself would become redundant. The section implicitly mandates that the arbitrator should decide as to whether a settlement exists on the issues referred to the tribunal.

In ***Bhatia International v. Bulk Trading S.A. and another***,[61] the Hon'ble Supreme Court of India held that the conventional way of interpreting statutes is to decipher the drafter's intention of the said statutes. In case, the language of the statute can be subjected to multiple interpretations, the court must adopt that interpretation, which is in consonance with the true intention of the legislature.

Similar sentiments were echoed, in ***Shanon Realites Ltd.* v. *Sant Michael***,[62] wherein Lord Shaw stated, that where the words of the statute do provide room for alternate constructions, that interpretation should be chosen, which ensures the smooth working of the system which the concerned law governs. Any other interpretation which induces confusion or friction in the operation of the system must be rejected.

In ***Sanjeev Narula* v. *Tata Capital Financial Services Ltd.***,[63] the Hon'ble High Court of Delhi held that questioning of a consent award for want of jurisdiction after

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[58] *Supra* note 57 at 839.
[59] *Id.* at 840.
[60] LNIND 2017 BOM 566.
[61] (2002) 4 SCC 105.
[62] [1924] AC 185 (PC).
[63] LNIND 2017 DEL 2727.

the said consent award has been set in motion and acted upon by the parties, would constitute an abuse of process of the law and is impermissible.

Therefore, it is clear that the arbitral tribunal is not always bound to convert a mutual settlement into a consent award, until and unless the tribunal is absolutely convinced about the genuineness of the interests of the parties involved and the final resolution of the dispute. A consent award differs from a regular award, for the arbitral tribunal does not consider the merits of the disputes while passing the consent award. It only passes the settlement agreement of the parties as an award.[64]

Refusal to record Settlement as Award

Generally, arbitral tribunals are legally obligated to record the settlement reached between the parties as a settlement award. However, the statute also permits them to refuse to accede to the parties' request if the tribunal has any objection to this. However, there is a want of clarity as to the grounds which the tribunal can use to refuse the recording of settlement as an award.[65]

However, this provision can act as a safety valve in ensuring that the agreed award procedures are not misused by the parties, such as by incorporating terms that might be intended to mislead the parties. The law has provided the arbitral tribunal with discretionary powers to record or refuse the recording of the settlement award. Still, the wordings that have been used indicate that the measure has to be used only as a last resort and not as general practice. If, therefore, the arbitral tribunal refuses to make the agreed award without a valid reason, the Act does not provide any specific mechanism for forcing it to do so. Moreover, the matter can hardly fall within any of the grounds outlined in s.34(2) of the 1996 Act.[66]

At the same time, the Act also empowers the parties to terminate the mandate of the arbitrator(s), claiming the *de jure* or *de facto* inability of the arbitrators to perform their functions or that they have been performing their duties with unnecessary delays and thus have not been efficient in discharging their duties.[67]

Status and Effect of the Settlement Award

When the settlement is recorded as a settlement award, it stands on the same legal footing as an arbitral award with respect to the substance of the dispute. It can be corrected by the tribunal through a formal request by the parties or via

[64] *Supra* note 57 at 832.
[65] *Supra* note 13 at 943.
[66] *Ibid.*
[67] *Id.* at 944.

its own initiative. The tribunal can also interpret the award if the parties request the tribunal to do so. These awards can be subjected to judicial scrutiny under the grounds prescribed in s.34(2) of the Act. Like an arbitral award, settlements awards are legally binding on all the parties involved and can be enforced as a decree of the court under the Code of Civil Procedure, 1908.[68]

In ***Morgan Securities & Credits (P) Ltd.*** **v.** ***Morepen Laboratories Ltd.***,[69] the Hon'ble Delhi High Court held that awards based on settlement agreements possessed the same legal sanctity as regular arbitration awards and that there was no distinction between the two with respect to their effect on the substance of the dispute.

Though acknowledging the efficacy of the unenforced mediation settlements,[70] the fact remains that when parties reach a mutually agreed settlement, the majority of them prefer to have the same recorded as a consent decree or award before the court or tribunal, to provide it with recognition and consequent sanction under law.[71]

Recording of a settlement award is beneficial as the process of enforcement of the award becomes more straightforward because parties need not initiate court proceedings to get their settlement awards enforced. This is especially true when the award needs to be enforced in a foreign jurisdiction, as the award can be recognized and enforced as a New York Convention award. Therefore, it is generally recommended to record the settlement as a settlement award, which ensures a smooth future enforcement of the award by eliminating the need to approach the courts to implement the award.[72]

Recording of the settlement award is particularly beneficial when there are obligations of future performances on the parties towards each other as per the terms of the award, such as payment by instalments or any future transactions amongst the parties which need to be done, etc.[73]

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[68] *Supra* note 13 at 944.

[69] 2006 SCC Online Del 774: (2006) 3 Arb LR 159.

[70] On multiparty mediation in Brazil see FERREIRA, Daniel B; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A case analysis from Brazil. BRICS Law Journal, v. VIII, n. 3, pp. 5-29, 2021. DOI: https://doi.org/10.21684/2412-2343-2021-8-3-5-29. See also AWAD, Dora R. Mediação de conflitos no Brasil: atividade ou profissão. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 4, p. 57-66, 2020.

[71] KANUGA, Sahil; PANCHMATIA Raj. Mediated Settlements: The Way Ahead for India. Bar and Bench, May 27, 2019.

[72] *Supra* note 13 at 945.

[73] *Ibid.*

V Settlement v. Consent Award

Consent awards can be of two types. If all the issues have been mutually resolved, the resulting settlement so recorded as an award shall be the final award. If, however, only a few of the issues have been resolved and others remain unresolved, the resulting award shall be a partial award. It is, however pertinent to note that irrespective of the nature of the settlement, the issues which have been dealt with in the settlement award shall be final and binding on both the parties and shall be *res judicata* as between the parties. The mandate of the tribunal will be terminated, and the tribunal will become *functus officio* with regard to these issues. This highlights the major difference between a settlement and a settlement award, for the former is merely a contract between the parties, whereas the latter is a final adjudication on the issues recorded in it and has effects. Thus, in case a future dispute arises between the same parties on the issues already decided, the effect of a consent award will not be the same as compared to a settlement agreement between the parties.[74]

Respecting party autonomy is the cornerstone principle behind hybrid arbitration. The parties reach a settlement and then submit the draft of the proposed consent award to the tribunal. This shall especially be the case wherein the parties explicitly stipulate in their settlement agreement that the agreement is conditional upon issuance of the final award. Parties would have to undergo further proceedings to get the settlement recorded as a settlement award. If, however, the settlement is unconditional, then parties need not worry about future proceedings.

If the agreement is conditional upon the issuance of a consent award, then there will be the possibility of further proceedings. In that situation, the parties and the tribunal should provide that, if the consent award is not delivered, the tribunal would resume the arbitral proceedings and issue a final arbitration award.[75]

VI Enforcement Under the New York Convention

The absence of any definition for 'Arbitral Award' and 'Consent Award' in The New York Convention has raised many doubts as to whether enforcement of a consent award under the Convention is legally possible or not. The question can be answered only by considering the nature of the award, i.e., whether a consent award is in the form of a genuine arbitral award, or is just a mere contract between the parties.[76]

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74 BUHLER, Michael W.; WEBSTER, Thomas H. *Handbook of ICC Arbitration*. South Asian Edition. Thomson, Sweet & Maxwell, p. 381, 2010.

75 *Ibid.*

76 *Supra* note 57 at 850.

The UNCITRAL Model Law on International Commercial Arbitration defines 'award' and provides that an award based on the terms agreed by the parties shall have the same effect in law as that of a regular arbitral award adjudicating the merits of the dispute.[77]

If the award is repudiated or suspended in its place of origin, foreign courts shall proceed as per their national law in determining whether to recognize and enforce the award in question or not.[78]

The parties waive their chance of appealing the award when they request the tribunal to record their settlement as an arbitral award. The only exception arises if the award is impugned for violation of public policy. Such a 'waiver' by the parties originates from the principle of prohibition of contradictory behaviour by all parties to the proceedings.[79]

Therefore, when parties have been committed participants throughout the arbitral proceedings and submitted their settlement agreements to the tribunal for issuing the same as a consent award, the parties must be estopped from appealing against the award on grounds of procedural violations.[80] However, if the settlement agreement includes terms other than those mentioned in the arbitration agreement, then the tribunal must refuse to issue the award for want of jurisdiction.[81]

Consent awards are born out of choices and compromises between the parties, and are backed by the desire to achieve an internationally enforceable award. Understanding the difference between consent awards and "regular" arbitration awards helps the parties in successfully navigating their way from reaching a settlement to enforcing it.[82]

VII Conclusion

To conclude, s.30 of the Arbitration and Conciliation Act, 1996, recognizes the need for resolving disputes through consensual methods rather than arbitration solely. The section encourages both the arbitrators and parties to explore the option of settlement wherein parties would get more control over the procedure and outcome and reach a win-win solution.[83] Neither the parties nor arbitrator need to give reasons for their support and consent to the settlement.[84]

[77] *Supra* note 57 at 851.
[78] *Id.* at 853.
[79] *Id.* at 850.
[80] *Ibid.*
[81] *Id.* at 854.
[82] *Id.* at 868.
[83] *Supra* note 38 at 291.
[84] *Ibid.*

The procedure permitted under s.30 thus provides for hybrid arbitration in the Indian context even if the same does not fit into the definitions of "Med-Arb" or "Arb-Med" or several other practiced forms of hybrid arbitration. Despite its benefits being known the world over, it is surprising that the Indian law community has failed to realize the potential of hybrid arbitration, which has been embedded in black letters of the law. The time has come to reverse this trend, as hybrid arbitration has the power to introduce significant reforms in the conventional justice system.

Settlement of disputes by reaching an amicable agreement by the parties through their initiative or with the encouragement of an arbitral tribunal is highly recommended as an amicable resolution of disputes and avoids the imposition of an award made by the third party, which further avoids a win-lose situation, wherein one party loses face.[85] Consensual mechanisms generally lead to win-win solutions which help in preserving the relationships between the parties.[86]

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[85] *Supra* note 13, at 939.
[86] *Ibid.*

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Online Dispute Resolution (ODR): Mediação de Conflitos *On-line* Rumo à Singularidade Tecnológica?

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Resumo: Neste artigo exploramos as intersecções entre o instituto da Mediação, o sistema ODR (*Online Dispute Resolution*) e os sistemas de Inteligência Artificial, essencialmente quanto às possibilidades, cada vez mais concretas de automação do processo de resolução consensual de conflitos, permitindo-nos tecer considerações sobre uma futura e utópica "singularidade" tecnológica (?). Assim, ao analisarmos a evolução deste processo remoto de solução pacífica ao lado das tecnologias de IA, necessário se faz avaliar suas repercussões quanto aos aspectos culturais, éticos e mesmo aqueles que envolvem a necessária *accountability* do sistema.

Palavras-chave: Mediação. ODR (*Online Dispute Resolution*). Inteligência Artificial. Princípios éticos.

Sumário: **1** Breve Estado da Arte – Situando a Mediação no Contexto do *Online Dispute Resolution* **(**ODR**)** – **2** Inteligência Artificial **(**IA**)** e *Online Dispute Resolution* (ODR): Rumo à Singularidade Tecnológica? – **3** Discursos sobre Princípios Éticos que Envolvem a IA no Contexto do *ODR* – Referências

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1 Breve Estado da Arte – Situando a Mediação no Contexto do *Online Dispute Resolution* (ODR)

A mediação tal como conhecemos hoje é resultado de um árduo e longo percurso no contexto das soluções alternativas de conflitos, culminando com uma lei própria, de forma a propor a solução de controvérsias entre particulares, bem

como a autocomposição de conflitos no âmbito da administração pública,[1] qual seja, a Lei nº 13.140/2005.[2]

O parágrafo único do art. 1º da Lei da Mediação apresenta a mediação como uma "atividade técnica exercida por terceiro imparcial sem poder decisório que, escolhido ou aceito pelas partes, as auxilia e estimula a identificar a desenvolver soluções consensuais para a controvérsia".

Nesta trajetória, com vistas à necessidade de consolidação de uma política pública permanente de incentivo e aperfeiçoamento dos mecanismos consensuais de solução de litígios, o Conselho Nacional de Justiça (CNJ) nos acena com a Resolução nº 125/2010, de forma que instituem a conciliação e a mediação como instrumentos efetivos de pacificação social, solução e prevenção de litígios.

Neste passo evolutivo de fomento dos mecanismos consensuais de resolução de conflitos, outros foram os dispositivos legais que ampliaram o escopo de aplicação da mediação, como aqueles elencados no código processualista civil (arts. 3º, §§2º e 3º; 165 a 175, 319, VII e 334 da Lei nº 13.105/2015) e leis específicas, como a Licitações e Contratos Administrativos (Lei nº 14.133/2021).

Outro passo importante na direção da maior celeridade da prestação jurisdicional foi a entrada em vigor da Resolução nº 358/2020, que passa disponibilizar sistema informatizado para resolução de conflitos por meio da conciliação e mediação, ratificando as diretrizes elencadas na Lei nº 13.140/2015.

A mediação privada, portanto, é fruto da evolução dos dispositivos que ampliaram e normatizaram a aplicação desse método em âmbito público, propiciado pela Lei nº 13.140/2015.[3] Trata-se, assim, de um método autocompositivo que se utiliza de uma terceira parte imparcial, sem poder decisório, que atua de forma a auxiliar e estimular soluções consensuais sobre controvérsias verificadas entre duas ou mais partes.

A resolução de conflitos que se realizava na esfera judicial objetivava conter a crescente litigiosidade, sendo que a tecnologia veio trazer novas possibilidades, e mesmo um novo espectro para o quadro em questão (MAIA; GOUVÊA NETO, 2020).

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[1] Sobre mediação coletiva envolvendo a administração pública no Brasil vide FERREIRA, Daniel B; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A case analysis from Brazil. *BRICS Law Journal*, v. VIII, n. 3, p. 5-29, 2021. DOI: https://doi.org/10.21684/2412-2343-2021-8-3-5-29.

[2] Vide AWAD, Dora R. Mediação de conflitos no Brasil: atividade ou profissão. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 2, n. 4, p. 57-66, 2020. Vide também FARIAS, Bianca O. Mediação de conflitos em ambientes educacionais: um horizonte com novas perspectivas. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 2, n. 3, pp. 157-194, 2020.

[3] Vide BRAGANÇA, Fernanda; NETTO, Fernando G. M. O protocolo familiar e a mediação: instrumentos de prevenção de conflitos nas empresas familiares. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 2, n. 3, pp. 217-230, 2020.

A partir dos anos 1990, os softwares e redes de computadores se tornaram mais sofisticados e difundidos no cotidiano das pessoas, criando um complexo mundo *on-line*. Segundo Katsh (1996), as pessoas iriam se engajar e interagir umas com as outras, bem como com um rol variado de instituições, fazendo surgir, assim, o ciberespaço como conhecemos hoje.

Com o crescente aumento populacional do mundo digital,[4] assim como no mundo físico (*off-line*), fez surgir um conjunto de demandas nos mais variados setores da vida humana, particularmente, o comercial. O que fez com que fossem criados instrumentos e aparatos tecnológicos digitais capazes de promover soluções alternativas para as tensões identificadas nas relações, como, por exemplo, entre fornecedor (empresa) e usuário (consumidor).

A evolução das ferramentas da Tecnologia da Informação e Comunicação (TIC) trouxe novos horizontes para as então denominadas *ADR (Alternative Dispute Resolution)*[5] e, nesse compasso de otimização das ferramentas e técnicas voltadas para o apaziguamento dos conflitos *on-line*, deu origem à *ODR* (*Online Dispute Resolution*).

Em suma, o *ODR* é a aplicação da tecnologia da informação e comunicação na prevenção, gestão e resolução de conflitos (KATSH; RULE, 2016). Daniel Arbix (2017) a define como resolução de controvérsias em que as TICs possibilitam às partes em conflito ambientes e procedimentos ausentes nos mecanismos tradicionais de resolução de disputas.

Sem dúvida, a tecnologia persuasiva da *ODR* ganhou maior campo de atuação quando da crise pandêmica do vírus covid-19, momento em que muitas novas disputas foram resolvidas, prevenindo, dessa forma, o contato presencial entre as pessoas, de forma a evitar o contágio do vírus de potencial letalidade.

O sistema *ODR* ganhou significativa atenção nos EUA neste período pandêmico, pois conflitos como os de ordem comercial e familiar foram resolvidos através da mediação e gerenciamento dos casos, conforme resultados identificados no mapeamento de 70 organizações que se identificaram como provedores de *ODR* (SCHMITZ; MARTINEZ, 2021).

A experiência internacional nos mostra que o *ODR* se apresenta em constante evolução, com fóruns próprios de discussão, movimentando, sobretudo, as cortes judiciais dos países envolvidos (especialmente EUA), assim como associações de advogados que vislumbram a institucionalização dos *ODRs* a partir

[4] Vide VLADIMIROVICH, M. A; SERGEEVICH, E. K. Alternative dispute resolution in digital government. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 4, n. 7, p. 119-146, 2022. DOI: 10.52028/rbadr.v4i7.8.

[5] Vide FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R: Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings. *Technology in Society*, v. 68, 2022, 101872.

do desenvolvimento de padrões e melhores práticas relacionadas à ferramenta (SCHMITZ; MARTINEZ, 2021).

De forma a situar o sistema *ODR* no contexto brasileiro, este tem seu nascedouro nos conflitos identificados no comércio eletrônico, a exemplo do que ocorreu nos países centrais da economia. Atualmente, tem ampliado seu escopo para outros campos da vida humana, sejam essas demandas iniciadas *on-line* ou mesmo *off-line*.

As características do *ODR*, segundo Maia e Gouvêa Neto (2020), são aquelas que: a) permitem o acesso à Justiça; b) ajudam na prevenção de disputas de quaisquer naturezas, c) que fazem uso das TICs, d) permitem a economia de recursos, que proporcionam o fim das barreiras geográficas, e) se utilizam de volume massivo de dados (*Big Data*) de forma a estruturar a prevenção de disputas, f) podem ser especializadas segundo suas naturezas e contextos; g) flexíveis de forma que se amoldem às necessidades das partes envolvidas; h) tenham poder de persuasão, com base nas técnicas de resolução mediada de controvérsias.

No tocante à normatização da utilização e aplicação do *ODR* a partir do território brasileiro, ao contrário do que acontece na comunidade europeia, que estabeleceu diretiva[6] e regulamento[7] para tal tecnologia, não há regulamentação específica, mas encontra amparo em algumas normas, em especial, do Código de Processo Civil (CPC), que permite a realização de alguns atos judiciais através dos meios eletrônicos, em especial os constantes dos arts. 193 e 236, §3º.

Outra demanda que as ações de mediação pelo sistema *ODR* impõem ao caso brasileiro é a sua disseminação tanto mais democrática, que inclua no seu contexto parte da população vulnerável[8] que não possui os recursos e ferramentas da comunicação digital, devendo haver, em nosso sentir, maior articulação entre os entes públicos e as câmaras privadas.

A democratização da negociação como um procedimento de resolução de disputas e que vem sendo um *case* de sucesso é a plataforma digital "consumidor.gov", cuja gratuidade do serviço permite que consumidores e empresas interajam para solução consensual das variadas demandas decorrentes das relações de consumo.

Enfim, percebe-se que o panorama apresentado sobre o *ODR*, tanto contexto internacional como nacional, encontra-se neste compasso de contínua evolução e,

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6 Diretiva UE nº 23/2011 (Resolução Alternativa de Conflitos de Consumo).

7 Regulamento nº 524/2013 (Resolução de Litígios de Consumo *On-line*).

8 Segundo Pesquisa Nacional por Amostra de Domicílios Contínua (PNAD), o percentual de domicílios que utilizavam a internet no Brasil aumentou para 82,7% em 2019.

como todas as TICs, está incluída no contexto de disrupção digital, notadamente, pelo ingresso crescente das ferramentas de inteligência artificial.

2 Inteligência Artificial (IA) e *Online Dispute Resolution* (ODR): Rumo à Singularidade Tecnológica?

O termo Inteligência Artificial (IA) foi primeiramente cunhado em 1956, durante a Conferência de Dartmouth, pelo pesquisador da Universidade de Stanford, John McCarthy (2006), que considerava que todo aspecto do aprendizado ou qualquer outra característica relacionada à inteligência humana, poderia, *a priori*, ser tão precisamente descrita que uma máquina poderia simulá-la.

Outro ponto de vista também é atribuído ao pesquisador, qual seja, "tão logo a IA comece a funcionar, ninguém mais a chamará de IA". Ocorre que em nosso cotidiano convivemos com diversos artefatos que envolvem a IA, sendo que boa parte das pessoas sequer concebe sua presença.

Outro fato que tem sido fonte de discussão é se a IA é mesmo "artificial", pois, conforme o relatório da corte judicial australiana – "*AI Decision-Making and the Courts*" (2022), a IA não é artificial, pois que é feita de recursos naturais e humanos, os quais dependem de estruturas sociais e políticas mais amplas para sua implementação. Desta feita, o termo "inteligência complementar" seria mais apropriado para descrever um fenômeno que consiste em criar sistemas que possam resolver problemas humanos, mais do que duplicar a inteligência humana.

De fato, a definição de IA, como nos informa Alessa (2022), somente será precisa durante curto período de tempo, já que as tecnologias em torno da mesma seguem em constante desenvolvimento. Além do mais o autor afirma que, "enquanto o futuro é incerto, ainda é possível examinar as tendências atuais em IA e *ODR* para discutir o que poderá ocorrer no futuro" (ALESSA, p. 323).

O contexto histórico de desenvolvimento da IA tem se caracterizado por avanços e retrocessos, pois, desde meados dos anos 1950, à vista do que se dispunha em termos de poder de computação e dados, é o que traduzia o avanço técnico nesta área, pois, segundo Lee (2019), os dados treinam o programa para reconhecer padrões, fornecendo muitos exemplos, e o poder computacional permite que o programa analise esses exemplos em alta velocidade.

Portanto, não sendo diferente do avanço das demais tecnologias digitais, a IA dependia, sobretudo, do constante aperfeiçoamento dos artefatos e técnicas relacionadas ao maior poder de processamento computacional para que se realizassem os projetos sempre ambiciosos da IA.

Termos como rede neurais,[9] sistemas especialistas,[10] aprendizado profundo (*deep learning*) e *machine learning*[11] cercam a evolução dos projetos em IA, não merecendo aqui maior escrutínio, sob pena de perdermos o campo profícuo de discussão sobre a relações estabelecidas entre a IA e o *ODR*.

A integração da IA com o *ODR*, segundo Carneiro *et ali*. (2014), torna-se um campo autônomo dentro do escopo das *ADR (Alternative Dispute Resolution)*, sendo que na mediação através do *ODR* várias alternativas para a resolução de disputas deverão ser consideradas, pois que derivam dos vários modelos e técnicas operacionalizadas pela IA.

Neste ínterim, de forma que se assumam as diversas variáveis concernentes ao processamento algorítmico da IA na resolução de disputas pela mediação, prudente que se considere todos os elementos envolvidos, quais sejam, as duas partes em disputa (mediandos: requerente e requerido), a terceira parte (mediador), a quarta parte (elementos tecnológicos), conforme descreve Katsh e Rifkin (2001).

Ainda, para Austin (2017), alguns autores sugerem, ainda, a existência da "quinta parte" (provedores de tecnologia), que produz e entrega a quarta parte (tecnologia). Ora, qual o motivo de elencarmos tais partes no contexto de integração entre *ODR* e IA?

Uma resposta simples para um tema de grande complexidade, é que, cada parte envolve um processamento algorítmico que pode revelar automaticidades vinculadas às visões de mundo ou pontos de vistas próprios dos profissionais envolvidos nesta construção (advogados, profissionais da computação etc.), o que, de certa forma, obriga a tecnologia do *ODR* à necessária *accountability* com vistas à permanente neutralidade das inferências sobre as ações de mediação *on-line*.

Dessa forma, como realizar a efetiva *accountability* da *ODR*, de modo que possam ser aplicados procedimentos de neutralidade[12] para consecução dos objetivos das resoluções de disputas *on-line* pela mediação?

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[9] Redes neurais refletem o comportamento do cérebro humano, permitindo que programas de computador reconheçam padrões e resolvam problemas comuns nos campos de IA, *machine learning* e *deep learning* (*IBM Cloud Education* 2020)

[10] São ferramentas de apoio à decisão, capazes de reproduzir o modo de raciocínio de uma ou mais especialistas, em domínios específicos da área de conhecimento. A partir desta visão dos Sistemas Especialistas, passou-se a difundir a ideia de que a IA iria revolucionar o apoio à decisão, através do uso de novos conceitos, de novas tecnologias e aplicações (TRAHAND; HOPPEN, 1988)

[11] *Deep learning* (aprendizado profundo) é um ramo de aprendizado de máquina (*Machine Learning*) baseado em um conjunto de algoritmos que tentam modelar abstrações de alto nível de dados usando um grafo profundo com várias camadas de processamento, composta de várias transformações lineares e não lineares (DENG; YU, 2014).

[12] Alguns autores são reticentes quanto à possível neutralidade da tecnologia, dentre eles Veraszto *et al.* (2008) que critica tal concepção asseverando que "sabemos que a tecnologia não é neutra; um artefato aparentemente inócuo pode estar carregado de interesses políticos (e/ou outros). Sela (2018)

Tal como a evolução tecnológica dos dispositivos vinculados à IA, tem se ampliado o debate sobre a aplicação algorítmica no sistema *ODR* de segunda geração,[13] pois que, segundo Alessa (2022),

> estão preocupados com os efeitos negativos que os processos de *ODR* podem render, incluindo a falta de supervisão adequada ou excesso de confiança em procedimentos automatizados de decisão, levando à aderência prejudicial a quaisquer decisões proferidas. Tais afirmações são, sem dúvida, feitas pelos já mencionados defensores da IA como quarta parte, que sustentam a criação de outra parte (quinta parte – grifo nosso) no processo de resolução de disputas, além das duas originais, provavelmente será prejudicial ao resultado, especialmente se essa parte apresentar características não humanas. Há, portanto, uma falta de consenso relevante na literatura sobre os efeitos que o *ODR* baseada em IA pode ter. No entanto, a literatura destaca alguns problemas que podem surgir como resultado da implementação da IA e fornece um terreno fértil para análise adicional. (p. 325 – tradução livre)

Provavelmente, o exemplo mais paradigmático de um sistema *ODR*, é o *EBay Resolution Center*, uma das maiores plataformas de *e-commerce* dos EUA, pois se utiliza de um "questionário baseado em um sistema de expertise algorítmica que desempenha o papel de um mediador que coleta os fatos, identifica as preferências e sugere opções para resolução do conflito" (SELA, 2018).

Outra notável tecnologia *ODR*, de origem canadense, é o *Smartsettle*, que otimiza o processo de mediação através da superação dos problemas relativos às trocas de informações em ambiente não colaborativo. As partes definem, em conjunto, os temas controvertidos e, confidencialmente, elegem suas preferências relativas a cada tema e, por sua vez, o sistema automaticamente gera um "pacote de propostas" mais suscetíveis de serem aceitas pelas partes envolvidas. Tal procedimento é repetido até que se alcance uma solução que resulte no *status* em que as partes envolvidas tenham ganho mútuos (método ganha-ganha).[14]

Percebe-se que com a evolução dos dispositivos da IA e da programação algorítmica, se vislumbra a tendência cada vez maior de fusão entre a terceira

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nos informa que a "forma que um software é projetado e programado para operar não é neutro, mas sim reflete e promove valores particulares que afetam a forma como atende seus usuários (tradução livre).

[13] *ODR* de segunda geração vai além de permitir a comunicação e o acesso à informação pelas partes (primeira geração), este sistema emprega inteligência artificial para identificar normas e linhas de argumentação aplicáveis ao conflito, refinar interesses, objetivos e preferências das partes, sugerir soluções consensuais e apontar o resultado mais provável do litígio em um processo judicial (SELA, 2018, p. 100).

[14] Termo foi inicialmente apresentado por Cohen (2005) em 1963, em um curso de negociação de três semanas patrocinado pela *Allstate Insurance Company*. São negociações conhecidas pelo seu resultado que atribui ganhos aos dois lados da negociação, a conhecida negociação "ganha-ganha" (MARTINELLI; ALMEIDA, 2020).

parte (advogados, mediadores etc.) e a quarta parte (tecnologia), conforme análise de Maia e Gouvêa Neto (2020).

O que está em jogo nesta fusão é como o campo do *machine learning* será capaz de propiciar formatos cada vez mais autônomos de comportamentos concernentes à resolução de problemas, à aquisição e reconhecimento de novos padrões de acordo. Ainda que alguns sistemas *ODRs* ofereçam resoluções a partir de suas capacidades automatizadas, o modelo híbrido ainda subsiste, começando pela instrumentalidade humana com transição para a automatização da IA e vice-versa.

Pelo exposto, a questão que se coloca é: qual a perspectiva futura de singularidade[15] tecnológica envolvendo o sistema *ODR* e a IA? Magrani (2019, p. 264) nos informa que “com a tecnologia passando de simples ferramenta a agente influenciador e tomador de decisões, o direito deve reconstruir-se no mundo tecnorregulado, incorporando estes actantes a partir de um viés ‘meta’ (como uma metatecnologia), construindo as bases normativas para uma regulação ética das novas tecnologias do *design*”.

Alguns especialistas como Katsh e Rule (2016) destacam que, eventualmente, o sistema *ODR* poderá ser a maneira de resolver a maioria dos problemas em nossas vidas, com abordagens algorítmicas mais confiáveis do que as resoluções realizadas pelos humanos. A questão reside em que tempo isso irá acontecer.

A singularidade tem sido amplamente cogitada no contexto do *ODR*, todavia, algumas abordagens se concentram no *pacing* entre as expectativas sobre a tecnologia e o seu efetivo desenvolvimento. Há, como analisa Alessa (2022), uma explosão de predições otimistas, seguidas por uma recalibração das expectativas em vista do que se apresenta na realidade.

O que se pode afirmar, neste momento, com relação ao escalonamento tecnológico da IA na sua relação com o sistema *ODR* é que sistemas cada vez mais aperfeiçoados serão criados, de forma a substituir a burocracia e o contencioso por um processo mais eficiente que os tradicionais modelos.

Destaque-se, ainda, que o escalonamento tecnológico da IA não ocorre sem a existência de alguma familiaridade para com seus elementos. A maioria das tecnologias são caras em suas fases iniciais de implementação, sendo que seu verdadeiro potencial não é realizado, até que seja refinado e disponível em formas mais baratas (ALESSA, 2022).

Assim, é possível inferir que o limiar da singularidade tecnológica está intrinsecamente relacionado ao crescente poder de difusão da própria “cultura” da

[15] Para Kurzweil (2018), singularidade é um período futuro em que o ritmo da mudança tecnológica será tão rápido, seu impacto tão profundo, que a vida humana sofrerá mudanças irreversíveis. Significa dizer que a inteligência artificial das máquinas irá suplantar a inteligência humana (biológica).

IA pelas camadas da sociedade, pois, na medida em que o seu aperfeiçoamento estiver atrelado à maior distribuição de seus elementos e acesso facilitado por parte dos indivíduos, consequentemente, se articularão novos regramentos e *designs* éticos.

3 Discursos sobre Princípios Éticos que Envolvem a IA no Contexto do *ODR*

Ao se cogitar a ética no atual cenário de disrupção tecnológica, devemos ter cautela e levar em consideração os "vários parâmetros que norteiam a nossa sociedade cada vez mais moldada pela tecnologia" (MAGRANI, 2019).

Não se pretende nas poucas linhas deste trabalho aprofundar análises filosóficas sobre o conceito de "ética", mas sim situá-lo neste mundo de constante transformação, cuja contemporaneidade informacional nos remete à constante renovação dos padrões de conduta da sociedade. Queremos dizer que as transformações oriundas das revoluções técnico-científicas-informacionais[16] têm o condão de modificar as relações sociais, econômicas, políticas e culturais das sociedades.

Portanto, as concepções sobre ética também evoluem no tempo e no espaço, não devendo, decerto, subverter os ideais de preservação da vida e cultura humana. As regulamentações e regulações sobre o uso das tecnologias por parte das nações, por si só, são vozes representativas que impõem limites éticos, os quais emanam de tratativas entre os mais diversos entes da comunidade global.

A Organização para a Cooperação e Desenvolvimento Econômico (OCDE) elaborou importante documento, *Recommendation of Council on Artificial Intelligence*, de forma que todos os membros e partes interessadas adotem formas de promover o crescimento inclusivo, desenvolvimento sustentável e bem-estar, valores e justiça centrados no ser humano, transferência e explicabilidade, robustez, segurança, proteção e responsabilidade *(accountability)* no contexto do sistema de IA.

Já no contexto dos sistemas *ODRs*, uma Comissão da Organização das Nações Unidas (ONU), em 2017, elaborou um importante documento composto de Notas Técnicas sobre *ODR* (UNCITRAL 71/138),[17] que deve balizar a resolução de disputas *on-line* no âmbito do comércio internacional, de forma a viabilizar a progressiva harmonização e unificação da lei sobre comércio internacional, reconhecendo, desta feita, o crescente volume e importância das transações comerciais transfronteiriças.

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[16] Milton Santos, geógrafo, cunhou o termo "meio técnico-científico-informacional" que é um meio geográfico onde o território inclui obrigatoriamente ciência, tecnologia e informação (1998).

[17] Disponível em uncitral 71-138 notas técnicas sobre ODR.pdf

Outros estágios são propostos pela UNCITRAL, estas que se concentram na negociação, acordo facilitado e a participação de um elemento neutro/imparcial que aproxime as partes para a resolução da disputa no curso do procedimento.

Com o fito de prover assistência e segurança de todas as partes envolvidas nos *ODRs*, a Comissão da ONU sugeriu alguns princípios que devem sustentar a tecnologia *ODR*, quais sejam, justiça imparcial, transparência, devido processo legal e responsabilidade.

Nos EUA, o The National Institute of Standards and Technology começou a identificar padrões éticos sobre o uso de IA que podem ser úteis no suporte de decisões do sistema *ODR*. Nesse tocante, segundo Schmitz e Zeleznikow (2022), existem vieses potencialmente prejudiciais na IA, bem como preocupações acerca da confiança, precisão, explicação, interpretação, privacidade, robustez, segurança e proteção.

Ainda, os autores (SCHMITZ; ZELEZNIKOW*,* 2022, p. 10) destacam que três estágios que podem ser úteis no *ODR*, os quais devem decorrer da interação entre as partes interessadas (grupos, gerenciamento de risco e desenvolvimento de padrões), a seguir:

1. *pré-projeto*, onde a tecnologia é desenvolvida e aperfeiçoada;
2. *design e desenvolvimento*, onde a tecnologia é construída;
3. *implantação*, onde a tecnologia é aplicada a vários indivíduos ou grupos.

Quanto mais complexos os temas levados à resolução no sistema *ODR*, maiores são os desafios do processamento algorítmico no contexto da IA integrada ao *ODR*. Questões éticas emergem com maior profusão quando os temas se relacionam às disputas na seara da família e da vida privada, por exemplo.

A utilização da tecnologia *ODR* para resolução de disputas envolvendo a "família" tem sido comumente aplicada em países, como por exemplo, a Austrália,[18] apoiado pelo governo local, cujo *design* e desenvolvimento das ferramentas de IA geram predições a partir do processamento de algoritmos específicos, tendo resultados bastante satisfatórios.

Neste contexto de disputas que cercam as questões familiares, a depender do país, os custos de litígio são bastante elevados, sendo que no caso específico da Austrália, o governo oferece auxílio para as famílias com poucos recursos para que se habilitem ao programa e promovam a resolução de suas demandas da forma mais consensual possível.

[18] Na Austrália existe um tipo de *ODR* denominado AMÏCA - www.amica.gov.au voltado para resolução de disputas envolvendo divórcio, divisão de bens, pensão alimentícia e outras demandas da vida privada. Sugere um procedimento passo a passo que envolve formulários de questões em as partes em conflito devem se engajar para ao final se alcançar a resolução da demanda.

Com a crise pandêmica da covid-19, que criou o "novo normal", as pessoas aprenderam a resolver seus problemas de forma remota, através das tecnologias disponíveis e outras que, forçosamente, tiveram que se adaptar às situações emergenciais, não sendo mais possível esperar processos burocráticos do mundo analógico, ainda que sob o jugo da pandemia.

O panorama de hiperconectividade,[19] em comento, reforça a premissa de como a inovação tecnológica influencia nossas vidas e de como novos parâmetros relativos aos hábitos, costumes e culturas são moldados pela célere transformação digital.

Dessa forma, segundo Schmitz e Wing (2021), não é surpresa que os divórcios possam ser realizados *on-line* e que os pais separados também possam, colaborativamente, construir um plano de parentalidade para os filhos. Trata-se de um exemplo de ambiente mediação remota da tecnologia *ODR*, respeitadas as regras e padrões éticos indicados pelo International Center for Online Dispute Resolution (ICODR).

Segundo Wing (2016), os princípios éticos para resolução de disputas *on-line,* já mencionados anteriormente, são projetados para melhorar a qualidade, eficácia e escopo dos processos, particularmente no contexto de incrementação da IA.

A construção desses princípios pode fornecer uma "pedra de toque" para as melhores práticas, padrões, regras, qualificações e esforços de certificação na área de resolução de disputas *on-line* (WING, 2016).

De todo o exposto, compreendemos que a rápida expansão dos *ODRs* reforça a necessidade de consolidação de diretrizes e práticas que envolvam princípios éticos integrais, sobretudo, quando tecnologias convergentes como a IA apresentam novas e complexas perspectivas, desafiando a todos sobre o que nos aguarda no futuro próximo.

Abstract: This article aims to explore the intersections among Mediation, ODR (*Online Dispute Resolution*) and AI systems with emphasis on the increasingly concrete possibilities of automation of the process of consensual conflict resolution, thus allowing us to consider potential future e utopian technological "singularity" (?). Therefore, by analyzing the evolution of this remote process of consensual resolution and AI technologies, it is necessary to evaluate consequences in terms of cultural, ethical aspects and mainly those involving the necessary accountability of the system.

Keywords: Mediation. ODR (*Online Dispute Resolution*). Artificial intelligence. Ethical principles.

[19] O termo hiperconectividade encontra-se hoje atrelado às comunicações entre indivíduos (*person-to-peerson - P2P*), indivíduos e máquinas (*human-to-machine – H2M*) e entre máquinas (*machine-to-machine – M2M*) valendo-se, para tanto, de diferentes meios de comunicação. Há, neste contexto, um fluxo contínuo de informações e uma massiva produção de dados (MAGRANI, 2019).

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Use of AI Technologies in Dispute Resolution at the Pre-Trial Stage and in Court Proceedings

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Abstract: Considering the orientation of the sphere of legal proceedings, the processes of digitalization and intellectualization create new difficulties for the subjects of procedural decision-making, which is based on the factor of doubt. Doubt allows filtering out disputable information or initiating further information search. The use of AI in legal procedures adds an element of doubt to their effectiveness: a decision maker aiming to resolve a dispute may accept the AI system's suggestion or only consider it, which implies further verification. The study analyzes the directions and problematic points related to the integration of AI technology in judicial and expert activities of the Russian Federation and the People's Republic of China, including the problems of presenting the output in the interface, the limits of error tolerance, AI independence, etc.

Keywords: Artificial intelligence. Litigation. Efficiency. Doubt. Decision.

Summary: **I** Introduction – **II** The Doubt Factor in Resolving Controversies – **III** Decision Support Systems in Expert Activity – **IV** Decision Support Systems in Judicial Activities – **V** Practical Application of AI Technologies in Judicial Proceedings in the Russian Federation and the People's Republic of China – **VI** Problems and Risks of Application of AI Technologies in Legal Proceedings – **VII** Conclusion – References – Acknowledgements

I Introduction

> *Any technology that does not appear magical is insufficiently advanced.*[1]
>
> Gregory Benford[2]

1 Gregory Benford. Foundation's Fear. Harper Prism, 1997.

2 Gregory Benford (born January 30, 1941) is an American science fiction author and astrophysicist who is professor emeritus at the department of physics and astronomy at the University of California, Irvine.

The sphere of legal proceedings is ideologically designed to resolve disputes between individuals regarding the differentiation of their personal and mutual rights and obligations. While in civil proceedings each party has relatively equal opportunities to present its position, in the criminal proceedings of most countries of our planet the position of state authorities is the priority. Law enforcement officers and court officials, being human beings, are not without doubts and, due to cognitive biases, can make mistakes that can lead to serious consequences for society and individuals.

We consider two separate but related consequences of scientific and technological progress, which can reduce the negative impact of these subjective factors. First, it is digitalization, which in the context of legal activity mainly ensures the speed of transmission of documented information, as well as the possibility of its verification, including the establishment of the source of origin of the document and the persons involved in its creation. Secondly, over the last 15 years a number of technological solutions related to machine learning based on big data have emerged, which has so far led to scientific and practical discussions about the potential and limits of using intelligent systems in different fields of activity, including legal activity. These processes can be referred to as intellectualization. If the digitalization of jurisprudence is more focused on the document flow, i.e. the material environment of information carriers, intellectualization is aimed at human cognitive activity, the process of information evaluation and decision-making. If the errors and distortions resulting from digitalization most often lead to red tape and slow bureaucratic processes, then similar phenomena of intellectualization will inherently overlap with the process of making legally significant decisions, and therefore such processes require both legal, scientific and practical understanding.

Active introduction of digital technologies into all spheres of life is a modern global trend. Information systems, diverse in their application and purpose, have become an integral part of our daily life, and therefore, the digital transformation of even such a traditionally conservative area of legal relations as judicial proceedings has become inevitable.

The declaration of the principles of freedom of information, the commitment of the judicial community to the policy of information openness, as well as the support of the concept of creating a unified information space of the justice system have opened up opportunities for the introduction of the latest technologies, including artificial intelligence (hereinafter – AI) technologies, into the sphere of legal proceedings and alternative dispute resolution mechanisms.[3] Therefore,

[3] Alexander V. Macutchev, 'Modern possibilities and limits of artificial intelligence introduction into the system' (2022) 8 Actual problems of Russian law p. 47-58. DOI 10.17803/1994-1471.2022.141.8.047-058.

AI systems have become widespread in law enforcement practice, which aim to support decision-making and complement human skills in computer-assisted knowledge management; help decision-makers improve their performance, while decision-making tools automate these processes.[4]

At the same time, with the development of artificial intelligence, the prospect of further introduction into law enforcement practice of technologies that attempt to solve their tasks by emulating the cognitive, intellectual activity of a human becomes obvious. Despite the fact that these technologies have been applied in the field of judicial proceedings relatively recently, the effectiveness of their application already allows us to give them a positive assessment.

The application in digital systems of artificial intelligence methods such as heuristic search, natural language sentence recognition, knowledge representation, and logical inference has so far reduced the role of human beings in the work process and increased the efficiency, speed and sustainability of the justice system.

Modern court proceedings are a good example of skillful combination of advanced technical achievements with traditional rules of justice administration. Intelligent systems ensure the transparency, accessibility and predictability of legal proceedings, reduce their time and cost, resolve situations of judicial uncertainty and unify judicial practice, while preserving the creativity of the administration of justice.

AI systems are capable of performing simple (including analytical) operations faster and more accurately than humans, without losing concentration when performing monotonous and routine work. The introduction of AI systems should help to increase the quantitative characteristics of court proceedings: increase the speed of procedural communication in general and the speed of consideration of each specific case, the number of cases considered, as well as the time that the law enforcer will be able to spend on solving creative problems.[5]

II The Doubt Factor in Resolving Controversies

Doubt in philosophy represents the initial beginning of the apprehension of certainty.[6] It is necessary to distinguish doubt for the sake of doubt (for example, doubt of solipsism – denial of the existence of the objective world external to

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4 Lodder A., Zeleznikow J., 'Artificial Intelligence and Online Dispute Resolution'. In Wahab M, Katsh E, Rainey D, editors, Online Dispute Resolution: Theory and Practice. Den Haag: Eleven Publishers. 2012. p. 61-82.

5 Andrew V. Neznamov, 'Using artificial intelligence at legal proceedings: first experiences and first conclusions' (2020) 3 Russian Law: Education, Practice, Science. p. 32-39. DOI 10.34076/2410-2709-2020-32-39.

6 Ludwig Wittgenstein, On Certainty. Blackwell, 1969. –180 pages

man), from doubt, which fulfills the function of the criterion of truth, the method of differentiating it from delusions, illusions and deceptions. In legal science, this concept is characterized as an aspect opposite to subjective reliability, i.e. personal confidence of the subject in the truth of a certain evidence. Doubt is designed to strengthen, emphasize the shortcomings in the understanding of the available facts and defects in the decisions made, thus it expands the possibilities for their additional verification and support, increasing the evidentiary value of case materials, it can be defined as a concept located in the area of contradiction between knowledge and ignorance, contradiction and agreement, and performs the role of the main filter or tool when working with the data underlying the decision-making in the detection and investigation of crime.

Another important function of doubt in any practical activity, and especially when working with evidentiary information, is that it is a tool for switching from "fast" to "slow" thinking. Insufficient doubt (overconfidence) can cause certain cognitive distortions that increase the probability of mistake.

We adhere to the position according to which it is doubt that is the driving force of the entire course of investigation, including at the pre-trial stages. All actions taken by the subject of law enforcement can be conditionally divided into two categories: those aimed at obtaining fundamentally new information and those aimed at verification. Thus, most decisions of the law enforcer have a dual structure: either the opportunity to obtain previously unknown information is realized, or to verify certain facts (to find out the involvement of the suspect in the event of the crime, to check the alibi, to determine the actual relationship of the witness to the suspect, etc.). The present research is aimed at studying the second group of tasks in the context of the possibility of integrating AI systems into their solution.

It is obvious that the need to obtain initial information and the subsequent growth of knowledge derived from them to such a qualitative and quantitative level, which would allow planning the course of further investigation, is due to its formal nature, since each subsequent decision of the investigator is determined by the data obtained at the previous stage of forensic cognition. What induces the investigator to develop an array of useful information until it acquires, in the professional opinion of the subject of forensic cognition, the qualities of reliability and sufficiency? It seems that it is doubt that fulfills the described stimulating function.

For example, distrust in the testimony of one witness with simultaneous confidence in the words of another will be a good reason for a confrontation. This action is aimed at eliminating the existing discrepancies in the testimony of previously questioned persons, that is, it is mostly a certifying operation, although in the process it is not excluded (and even highly desirable) the possibility of

obtaining new information. The decision to conduct a confrontation is made by the investigator on the basis of identified contradictions, which can be understood as doubts about the reliability of any evidence or its fragment. A discrepancy can be considered significant when it prevents the correct and consistent assessment of evidentiary facts and directly relates to the subject of proof.

The role of doubt in identifying and resolving a contradiction is summarized as follows:

1. It activates the principle of negation of contradiction, according to which, if there are two or more judgments, at least one of them should be questioned (and it is not excluded that the third, unknown at this stage, will turn out to be true when choosing from two variants). In some cases it is methodologically correct to consider all such judgments as untrustworthy until the contrary is proved.
2. Psychologically, doubt acts as an initiating factor that encourages the investigator to make every effort to eliminate it and thereby improve the quality of the remaining evidence after such filtering.

To achieve the reliability described above, it is necessary to identify and eliminate all possible contradictions in the evidentiary model. In the presence of irremovable doubts about the truth of facts, an official (investigator, forensic expert, prosecutor, judge) must refuse to use them in procedural documents. Therefore, either the slightest uncertainty in the reliability of materials is eliminated by means of appropriate verification, or the flawed evidence is excluded from the array of data designed to confirm the position of the person.

There are two main forms in which doubt about the reliability of a piece of evidence may manifest itself:[7]

1. Doubt in the source of evidence. Thus, the results of numerous surveys of investigators, conducted by the author of this paper and other scholars, demonstrate that the greatest confidence of investigators is caused by the results of forensic examinations, rather than information obtained from citizens (witnesses, victims), for example. At the same time, practice shows that the testimony of the latter is often false or dishonest. From the above we can conclude that the increase in the probability of inconsistency of information with reality, with necessity entails an increase in distrust of the investigator to the source of such evidence. It should also be borne in mind that the probability of unreliable testimony directly depends on the goals and interests of the person concerned,

[7] Dmitry V. Bakhteev, 'Category of doubt in the investigation process as a factor of achieving fair and sufficient facts of evidence' (2014) 5 Criminalist's Library: scientific journal p. 110–113.

the possibility of determining which is determined, among other things, by the reflexive capabilities of the investigator, including his skills in interpreting verbal and non-verbal signals received, for example, during interrogation. If false or dishonestly provided information is identified, it should be excluded from the evidentiary base.

2. The next not less significant variant presupposes doubt arising from the comparison of facts with each other. In this case we can talk about the presence of two or more evidences with contradictory content. Moreover, such inconsistency may entail falsification of all disputed data. The elimination of doubt here is possible by obtaining new evidence that confirms one of the contradictory ones, or through a deeper evaluation of them, consisting in comparison with a greater number of other information available to the investigation.

Thus, we can conclude that doubt is directly related to the elimination of false or inaccurate evidentiary facts and, as a result, to the improvement of the quality of evidentiary information.

The second property of forensic knowledge – sufficiency – is also, although to a lesser extent, related to doubt. Without refuting the opinion that this characteristic of evidence is finally established by the judge, we still consider the assessment of the totality of certifying facts for their compliance with the criterion of sufficiency as an operation that permeates all stages of the process, including preliminary ones. We find confirmation of this position even in the legislative requirement to ensure the existence of sufficient grounds for bringing charges. In order to move the investigation forward and increase the level of evidence, the subject of investigation must doubt the sufficiency of the collected materials. If this is not the case, then there are two possibilities: either the investigation was carried out with the highest quality and there are no gaps in its information structure, or the investigator lacks experience to adequately assess the situation. That is, the fact of doubt acts as a kind of filter of sufficiency in the process of investigation.

From all of the above, the usefulness of doubt as a method of eliminating contradictions in legal proceedings becomes obvious. However, it can also have a negative impact on the investigation process. Doubt often represents not only and not so much a critical assessment of the current situation or evidence obtained, but also the impossibility of overcoming the existing difficulties, thus it acts as an indirect sign of a difficult situation of investigation, while not always contributing to its resolution. For example, doubt in the need to appoint resource-intensive expertise, which the investigator tries to overcome by obtaining additional evidence, can lead to tactical risk or organizational disorder.

We propose to consider doubt in judicial proceedings according to the model proposed by N. N. Taleb as «a hard lever of interaction between antiskepticism and fallibilism, i.e. between two extremes – 'what to doubt' and 'what to accept'».[8] That is, reaching a conclusion «beyond a reasonable doubt» requires engaging doubt to filter out the inevitable contradictions in legal proceedings.

Modern systems based on machine learning technology provide the forensic expert, judge and other participants in legal proceedings with additional opportunities to verify information, but the question should be asked: are intelligent technologies a tool for creating or eliminating doubts when resolving contradictions? We believe that this criterion should be the basis for the application of intelligent systems in law enforcement: developing the idea stated in the introduction, if digitalization is designed to simplify and speed up processes in human activity, i.e. to lead to quantitative improvements, then intellectualization should ensure more effective, i.e. less contradictory actions of human law enforcement.

III Decision Support Systems in Expert Activity

An artificial intelligence system can act as a source of information (for example, when monitoring and detecting open or partially open sources on the Internet), or as a means of processing and filtering information (for example, when analyzing mail server logs), or as a system for forming or supporting expert decisions when investigating a controversial situation. In all of these cases, preliminary empirical confirmation of the effectiveness and reliability of such systems is required. Despite the seemingly obvious prospects, the technology in question is not without significant drawbacks (including lack of transparency), so the practical implementation of such systems requires consolidated work of both law enforcement officers and private organizations, as well as scientists. Understanding the technology of functioning of artificial intelligence systems, the principles of accumulation and use of big data, which accompany (visibly and invisibly) any human activity, including investigative activity, can open new opportunities in detection and resolving controversial situations.

Implementation of artificial intelligence in can be realized in the following areas:

- provision of expert evaluations within the framework of forensic examination (application of artificial intelligence in expert legal systems, automated systems for support of legal decisions based on artificial intelligence, other expert systems);

[8] Nassim Nicholas Taleb, 'The Black Swan' 545 (2019)

- increasing the efficiency of certain areas of forensic expert research through computer vision technology: first of all, trace and habitoscopic, as well as document research – detecting signs of forgery of handwriting or other document details, recognizing the appearance of a person depicted in a photograph or video recording, eliminating noise or interference in the analysis of phonograms, etc. Tasks of this type can be solved by traditional software complexes, but the use of artificial intelligence systems can reduce the level of false positive or false negative results in expert research, and certain steps in automation and introduction of intelligent systems in expert activity are already being taken;
- search for computer files inaccessible to traditional software, hidden, for example, by steganography or alternative data streams (ADS),[9] establishing the primary source of information on the Internet during the production of computer-technical research;
- identification of facts of possible abuse of law, falsification of examined objects and expert opinions;
- facilitating decision-making in large cases, based on inaccurate, insufficient or poorly defined information, requiring large amounts of specific knowledge.

The interaction between a forensic expert and an AI system can be described as follows: an interested subject submits an array of information to the input of an artificial intelligent system; the system, trained on similar materials, processes the request and issues a decision; a person receives the system's decision and, based on it, organizes its further activity. Let us consider this on the example of the functioning of the intellectual system developed at the Department of Criminalistics of the Ural State Law University named after V. F. Yakovlev, «SigVer», designed to detect handwritten signature forgery.[10] The functionality of the application implies that the user uploads to the program the photos of the original and the disputed signature. The photos are processed: strokes are differentiated from the background, pressure is determined by the intensity of the strokes, etc. After that, when you click on the «compare» button, the system gives its evaluation based on the results of comparing the signature images. This system has the function of specifically supporting human decision making, not making the decision for the human. In this place there is already a bottle neck: two boundary groups of scenarios are possible in which a person using such an application can either fully

[9] Ryan M. Harris, Using artificial neural networks for forensic file type identification: Master's Thesis (West Lafayette, Indiana: Purdue University, 2007).

[10] Dmitry V. Bakhteev and Roman O. Sudarikov, 'NSP dataset and offline signature verification' (2020) 1266 Communications in Computer and Information Science. DOI 10.1007/978-3-030-58793-2_4.

rely on the result of such a system's work and mindlessly trust it, or, on the contrary, ignore its decisions. At the same time, intermediate variants, according to which an expert checks the solution of an AI system using «classical» handwriting methods, in fact, make the whole project meaningless: if a person has to check the solution of the system, spending his own time and energy on it, is the intellectualization of this activity so necessary?

The form of this assessment affects the human perception of the intellectual system's decision. The result of AI work in this and other projects on intellectualization of expert activity can be presented as a text of the expert's conclusion (we believe that in this case there is a substitution of the decision, not the work of an intellectual assistant), quantitative data, for example, in percentages, graphical expression of data, for example, in the form of a gradient color scale, where bright red is a reliable forged signature, white – corresponds to an uncertain conclusion in expert conclusions, bright green – a reliable original signature. The exact probability value and textual response of the system are not available in this case, which reduces the degree of influence on the human decision, but this method is not intuitive.

In addition, for the use of AI systems in forensic examination, it is necessary to solve the issues of legislative fixation of the legal status of such systems, the grounds for their use and the definition of «permissible mistakes rate», beyond which it is necessary to involve a human expert.

IV Decision Support Systems in Judicial Activities

The scientific literature is represented by a variety of opinions of researchers about the directions in which the use of intelligent systems in the field of judicial proceedings is possible.

Summarizing, let us highlight the key, most developed directions of the use of artificial intelligence technologies in legal proceedings of various legal systems.

1. Use of AI as *an aid to the progress of legal proceedings*.

Use in the office management system to optimize and perform such functions as sorting papers, creating files and subpoenas, printing copies, preparing and sending correspondence, searching for files to attach new documents, creating documents according to a template, correspondence with other government agencies

without human intervention;[11] recording of court proceedings;[12] [13] professional legal translation in court proceedings,[14] which will reduce the time required to process a case by eliminating the need for an interpreter; statistical reporting;[15] transcription of audio protocols of court hearings, identification of individuals in court hearings using biometric technologies.[16] It is also possible to automatically determine the specialization of judges by categories of cases and the distribution of cases among judges taking into account their workload, work schedule, specifics of the case and other criteria.[17]

2. Use of intelligent judicial decision support systems as *an auxiliary tool not directly related to the case resolution function.*

Automated systems for analyzing and interpreting legal norms; the use of AI to conduct expert examinations of legal acts; information and analytical support through the creation of an electronic courtroom with an AI judge, an AI advisor to the judge,[18] [19] or a companion judge to a human judge, including on the evaluation of a range of evidence.[20]

The advantage of using artificial intelligence technologies as an assistant (partner) of a judge is the ability to very quickly analyze, compare, process significant arrays of normative legal material and existing judicial practice, which a person can often miss, to prepare the necessary drafts of court documents.[21]

[11] Dmitry V. Bakhteev and Lyudmila V. Tarasova, 'The application of artificial intelligence in commercial courts of the Russian Federation: perspectives and issues' (2021) 26 Vestnik of Kostroma State University p. 249-254. DOI 10.34216/1998-0817-2020-26-4-249-254.

[12] Vasily Laptev, 'Artificial intelligence in court: how it will work' available at https://pravo.ru/opinion/232129/ (last visited on October 10, 2023).

[13] Victor I. Kachalov, Oksana V. Kachalova, E. Elena V. Markovicheva, 'Possibilities of using information technologies when making procedural decisions by the court in a criminal case' (2022) 477 Bulletin of Tomsk State University p. 222-229.

[14] Peter M. Morhat, 'Possibilities, peculiarities and conditions of application of use of artificial intelligence in the legal practice' (2018) 2 Court Administrator. p. 8-12.

[15] Poskryakov R., 'The use of artificial intelligence in judicial work' (2019) 16 Ogaryov-Online. p. 2.

[16] Victor V. Momotov, 'Judicial Proceedings in Russia in the Context of New Digital Technologies' (2023) The materials of the International Scientific and Practical Conference 'ARTIFICIAL INTELLIGENCE AND BIG DATA IN THE JUDICIARY AND LAW ENFORCEMENT: REALITIES AND NEEDS'. p. 267-271.

[17] Poskryakov R., 'The use of artificial intelligence in judicial work' (2019) 16 Ogaryov-Online. p. 2.

[18] Dmitry V. Bakhteev and Lyudmila V. Tarasova, 'The application of artificial intelligence in commercial courts of the Russian Federation: perspectives and issues' (2021) 26 Vestnik of Kostroma State University p. 249-254. DOI 10.34216/1998-0817-2020-26-4-249-254.

[19] Peter M. Morhat, 'Possibilities, peculiarities and conditions of application of use of artificial intelligence in the legal practice' (2018) 2 Court Administrator. p. 8-12.

[20] Vasily Laptev, 'Artificial intelligence in court: how it will work' available at https://pravo.ru/opinion/232129/ (last visited on October 10, 2023).

[21] Oleg A. Stepanov, Denis A. Basangov, 'On the prospects for the impact of artificial intelligence on judicial proceedings' (2022) 475 Bulletin of Tomsk State University. p. 229-237. DOI 10.17223/15617793/475/28.

Administer the issuance of digital writs of execution and follow up on their legal fate omitting, prepare necessary drafts of court documents.[22]

Performing the functions of evaluating the evidence presented in the case: determining the category and legal properties of the transaction (form, date, authenticity of electronic signature); checking the calculation of claims (amount of penalty, real damage or lost profits); determining the omission of the limitation period and the term for appeal to the court; proposing reconciliation of the parties (options for amicable agreements or the prospects of using mediation procedures); calculating «deepfakes» using AI and other falsifications

Examination of procedural documents received by the court in order to identify their non-compliance with the requirements of procedural legislation. The use of decision support systems by the court as a system of sentencing in criminal proceedings. Analysis and systematization of court practice.[23]

3. Taking into account the high transformative potential of AI systems with regard to processing and analyzing a large array of data, we consider reasonable the proposals to introduce in the distant future in court proceedings *artificial intelligence technologies as expert systems that do not replace the judge*. Expert systems assume that artificial intelligence can not only summarize data, analyze the situation and identify possible options for applying the law, but also develop a draft decision for consideration by a judge.[24] [25]

Such systems are able to perform automated research of judicial acts to develop solutions to various legal problems by accessing and examining relevant databases and evaluating them, for example, where the facts are undisputed, the applicable law is clear, and similar precedents are known.[26]

It is relevant to use expert systems for drafting judicial acts on the basis of analyzing the text of the procedural appeal and materials of the court case, on undisputed claims, where decision-making is not associated with the analysis of legal relations of the parties and to a greater extent has a technical nature. For example, in writ proceedings when considering civil or administrative cases.

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22 Vasily Laptev, 'Artificial intelligence in court: how it will work' available at https://pravo.ru/opinion/232129/ (last visited on October 10, 2023).

23 Victor V. Momotov, 'Prospects for the use of artificial intelligence in the judicial system of the Russian Federation' available at http://www.ssrf.ru/news/lienta-novostiei/36912 (last visited on October 15, 2023).

24 Dmitry V. Bakhteev and Lyudmila V. Tarasova, 'The application of artificial intelligence in commercial courts of the Russian Federation: perspectives and issues' (2021) 26 Vestnik of Kostroma State University p. 249-254. DOI 10.34216/1998-0817-2020-26-4-249-254.

25 Oleg A. Stepanov, Denis A. Basangov, 'On the prospects for the impact of artificial intelligence on judicial proceedings' (2022) 475 Bulletin of Tomsk State University. p. 229-237. DOI 10.17223/15617793/475/28.

26 Peter M. Morhat, 'Use of artificial intelligence in the administration of justice as a way of overcoming judicial discretion' (2018) 5 Law and State: Theory and Practice. p. 6-11.

According to V.V. Momotov, it seems reasonable to study the possibility of applying such algorithms to simple similar disputes with a «template» plot, the resolution of which also does not require a comprehensive and thorough study of the evidence collected in the case.[27]

Here we can provide an example of the Russian Superservice «Justice Online», which represents the basis of digital justice and is planned to be launched in 2024. The Superservice implies the possibility not only to participate in court proceedings remotely through the public services portal, including filing documents with courts of all levels, remote access to case materials, and receiving court decisions in a personal account, but also the possibility of automated drafting of court acts using artificial intelligence technologies based on the analysis of the text of the procedural appeal and court case materials.

It should be noted that the use of expert systems does not mean transferring the functions of administration of justice from a human to a computer, but only providing AI with analytical tools that will allow to predict future decisions and create their layout by analogy with those analyzed by the expert system, which will increase their objectivity and validity and minimize errors in the actions of judges.

Without infringing on the fundamental basis of the administration of justice – judicial discretion, which implies the possibility for a judge to choose the most appropriate option to solve a case on the basis of his or her inner conviction – artificial intelligence will be able to guide the judge to choose the best alternative among all possible solutions, taking into account the analysis of practice.

This technology, with its ability to assess the prospects for resolving a legal dispute, taking into account current practice and the actual circumstances of the case, would also be useful for litigants, as it could provide recommendations on alternative methods of dispute resolution and the prospects for pre-trial settlement.

Technological solutions could help potential litigants to get an idea of the most likely outcome of a future dispute, the timing of its resolution and the amount of legal costs, thus encouraging parties not to take the conflict to extremes and preventing the initiation of disputes doomed to failure.

Expert systems have a number of undeniable advantages over humans. Having a heuristic search algorithm, the ability to accumulate information and experience, AI systems have a large knowledge base, which, once entered into the machine, is retained forever. A human has a limited knowledge base, and if the data are not used for a long time, they are forgotten and lost forever.

[27] Victor V. Momotov, 'Judicial Proceedings in Russia in the Context of New Digital Technologies' (2023) The materials of the International Scientific and Practical Conference «Artificial intelligence and big data in the judiciary and law enforcement: realities and needs». p. 267-271.

Expert systems are resistant to external influence, they have no biases, they do not make hasty conclusions, as their activities are based on knowledge, while a person is easily influenced by external factors that are not directly related to the task at hand.

Artificial intelligence algorithms can eliminate human bias in judicial decision-making, thereby improving the quality of the decisions made.[28]

These systems cannot replace human beings in solving tasks, but rather resemble tools that enable them to solve tasks faster and more efficiently, being a tool in their hands.[29]

V Practical Application of AI Technologies in Judicial Proceedings in the Russian Federation and the People's Republic of China

It seems most interesting to analyze and take into account practical experience in the application of artificial intelligence systems in the sphere of judicial proceedings to consider the legal systems of Russia and China.

In the Russian Federation, within the framework of the Federal Target Program «Development of the judicial system of Russia for 2013-2024», a high level of implementation of measures to create e-justice and electronic document flow has been achieved, the possibility of data storage on cloud servers has been provided, which has opened new opportunities for the introduction of more sophisticated artificial intelligence technologies into the formed digital judicial environment.

The activities of federal courts of general jurisdiction in the Russian Federation are supported by the State automated system «Justice». Arbitration courts use a complex of integrated software and hardware, including systems for the automation of court proceedings, the information systems «My Arbitrator», «Arbitration Case File» and «Arbitration Court Decision Bank». These automated information systems ensure electronic document flow in criminal, civil, arbitration proceedings and administrative proceedings, forming a unified information space of federal courts of general jurisdiction and arbitration courts, as well as the use of electronic documents as evidence.

On December 5, 2019, the Council of Judges of the Russian Federation approved the Concept of Information Policy of the Judicial System for 2020-2030, according to which the prospects for the use of artificial intelligence in court

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[28] S. Yassine, M. Esghir, and O. Ibrihich, 'Using Artificial Intelligence Tools in the Judicial Domain and the Evaluation of their Impact on the Prediction of Judgments' (2023) 220 Procedia Comput. Sci. p. 1021-1026. https://doi.org/10.1016/j.procs.2023.03.1422023.

[29] Drzhevetsky Y., 'Expert systems as an Applied Field of Artificial Intelligence' (2011) 1 Proceedings of the International Symposium 'Reliability and Quality'. p.152-154.

proceedings may be associated with the release of judges from technical and legal monotonous, uncomplicated work, which, according to experts' estimates, takes up to 80% of judges' working time.

At the moment in the Russian Federation there are technical and technological prerequisites for the active application of weak artificial intelligence capable of solving highly specialized tasks. At the same time, it should be noted that the issues of application of artificial intelligence systems by the judiciary have not received sufficient legal regulation in connection with which, in the activities of state bodies, including the judiciary, do not apply systems of fully automatic decision-making.

At the end of 2018, specialists of the Department of Theory and History of State and Law of Perm State Research University developed a program of information-technological support of judicial decision-making «Laser». The presented demo of the working version of «Laser» allowed to make sure of the real possibility of implementing the program for generating judicial acts.

With the help of the algorithm, judges will «move» strictly through the stages of the trial, will be able to consistently record the course of the trial and record the arguments of both sides. As a result, the program will create the text of a reasoned decision, thus helping judges to formulate the reasoning part of the judicial act faster and more accurately.

The working version of the program shows that the automation of legal activities in the planned direction will not lead to the rejection of the essential features of justice, but will seriously accelerate the production of a reasoned judicial act through the use of information technology. The legal part of the work in this direction consists in determining the sequence of options arising before the judge in the process of deciding cases of a certain category, and the rules of movement along the forks of the algorithm on the basis of legislative and doctrinal provisions, i.e. algorithmicizing of the judge's decision of the case. The sequence of intermediate decisions (through yes/no) and the introduced reasoning allow to form a reasoned decision at the expense of information means, systematization of made choices and their coordination between themselves and stencil parts of the judicial act.[30]

In 2021, the Belgorod Region launched a pilot project to test AI technologies in court proceedings. The project involved three court stations of justices of the peace who were connected to the AI system to prepare templates for court orders

[30] 'On the results of the IX Perm Congress of Legal Scholars 'Legal regulation of digitalisation of society: priority tasks'' Lex Russica, no. 12 (145), 2018, pp. 161-174.

to collect three types of taxes from citizens: property, transportation and land taxes.

Within the framework of the experiment, the AI functionality was reduced to reviewing the application for issuing court orders sent by the Department of the Federal Tax Service of Russia for the collection of debts from individuals (note that the program had to recognize not only incoming documents, but also attributes: the collector, debtor, subject, amount of collection), then enter one information system, find the tax debtor, in another system to specify his TIN and residence address, check the necessary information in the third system. Then the program makes a decision according to the given logic – to refuse due to violation of the rules of jurisdiction, due to violation of the terms of appeal to the court, violation of the tax period, etc., or to satisfy the claim. In case of a positive decision, the program opens a template of the court order and inserts the details of the debtor into it, after which it sends the generated order by e-mail to a court employee for its verification.

According to Mr. O. Uskov, Chairman of the Belgorod Regional Court, the result of the experiment proved that it is possible to generate standard court orders based on the texts contained in the applications submitted to the court. It is also possible to automate the process of registration of procedural applications received by the court.

The conducted experiment showed a significant reduction in the time spent by the judge due to the fact that there is no need to form a document, but only to check it, as well as a reduction in the possibility of employee errors due to the technical preparation of the document.

The results of the pilot project for two months of its application are as follows: the time spent by a judge or a member of the court staff on the preparation of a judicial act decreased by 84%, and the time spent on filling in a court case card in the electronic filing cabinet decreased by 96%.[31]

It should be noted that Russian scientists are developing the software of writ proceedings for arbitration courts. This includes cases involving the recovery of debts owed to resource supplying organizations. The prospects of using artificial intelligence systems in courts of general jurisdiction for the purpose of automated preparation of draft court orders in cases of collection of debts on loans by writ of mandamus are also being assessed.

[31] Alex Sugar, 'In the framework of PMJF, the prospects for automation of court proceedings were considered' available at https://www.advgazeta.ru/novosti/v-ramkakh-pmyuf-rassmotreli-perspektivy-avtomatizatsii-sudoproizvodstva/ (last visited on October 10, 2023).

In order to improve the efficiency of Russian judicial proceedings, it is planned to introduce the «Justice Online» superservice starting from 2024, the operation of which provides for the use of artificial intelligence technologies.

According to the Chairman of the Council of Judges of the Russian Federation V.V. Momotov, the Superservice «Justice Online» will use artificial intelligence technologies. «Justice Online» should become the basis for a unified information space of courts, to ensure accessibility and openness of justice. It will combine the possibilities of remote format of filing and receiving court documents in electronic and digital form, remote participation in the judicial process. Superservice will be integrated with other information systems, including the Cloud Digital Platform for the provision of state (municipal) services; the Digital Profile; and the National Data Management System. In addition, the work of the Superservice involves automated drafting of court acts based on the analysis of the text of the procedural appeal and court case materials using AI algorithms.[32]

One of the examples of application of high technologies in the activities of Russian courts is the «Moscow City Court Hotline» system, which is a single reference center developed on the basis of an AI system. This system has been applied since September 13, 2023 so far only in the courts of general jurisdiction of Moscow.

The service allows processing all telephone appeals and eliminates the busyness of the telephone line when citizens apply. Employees of the center answer phone calls from citizens, providing them with information on the procedural stage of the case, time and place of the court session, formation of the list of jury candidates.[33]

It is no exaggeration to say that China is a world leader in the digitalization of all spheres of society without exception. Therefore, it is relevant to study the best Chinese experience in the field of informatization of court proceedings.

The unique experience of integration of modern digital technologies into the judicial process in China has a 33-year history and dates back to 1990. Since that year the development of a criminal law expert system for sentencing and other judicial decisions began, which was eventually implemented in the activities of more than 100 courts, in the practice of prosecutors and law firms.

The conceptual idea of the PRC leadership was the need for intensive digital development of the justice sector to combat corruption in the judiciary, ensure uniformity in the interpretation and application of legislation, and improve the

[32] Victor V. Momotov, 'Electronic Justice in the Russian Federation: Myth or Reality' available at http://www.ssrf.ru/news/vystuplieniia-intierv-iu-publikatsii/42272 (last visited on October 10, 2023).

[33] Vyacheslav Lebedev, 'The experience of digitalisation of Moscow SJCs will be disseminated throughout Russia' available at https://pravo.ru/news/249095/ (last visited on October 16, 2023).

quality of judicial proceedings in general. In order to achieve these goals, a large-scale digitalization was attempted as part of the reform of the Chinese People's Court.

Digitalization involved the establishment of a national computerized court monitoring system, systems for electronic uploading of documents to court databases, automated preparation and verification of documents, and online monitoring of case processing. The informatization of justice was implemented through the establishment of automated information systems. Since 2007, Chinese courts at all levels have been connected to the national e-justice system.[34]

Since 2006, Shandong Province has started to utilize an expert criminal justice system for sentencing using AI technology.[35]

Since 2013, publicly accessible judicial information databases have been put into operation: the China judgments online portal, which contains information on civil, administrative and criminal court judgments; the China trial live broadcast platform, which provides live broadcasts of court proceedings; the China judicial process information online platform, which provides online access to information on court proceedings and publishes updates on the status of court proceedings; and the China executive information online platform, which contains information on the execution of court decisions.

In 2016. The Beijing High Court launched the Intelligent Judge («robot judge») system. The system generates court decisions based on machine learning algorithms, identifies judicial errors and corrects them.

This technology stipulates the necessity in the process of proceedings to enter all data known at the time of consideration of the case into the case file, on the basis of which the program, analyzing the legislation, qualifies the act and determines the corpus delicti. In this case, the system is not autonomous, the judge retains the right to change the decision proposed by the program. Chinese researchers note the benefits of this experiment (e.g., AI has reduced the workload of judges, relieved them of routine duties, and unified the legal language used by numerous Chinese judges).[36]

This program allows judges to understand the issues of proof of charges based on the information on punishment contained in criminal court cases, and suggests the optimal type and amount of punishment. The AI recognizes speech, identifies contradictions in testimony as well as written evidence and alerts the

[34] Alexander V. Macutchev, 'Modern possibilities and limits of artificial intelligence introduction into the system' (2022) 8 Actual problems of Russian law p. 47-58. DOI 10.17803/1994-1471.2022.141.8.047-058.

[35] JI, W., 'The Change of Judicial Power in China in the Era of Artificial Intelligence' (2020) 7(3) Asian Journal of Law and Society. p. 515-530. doi:10.1017/als.2020.37.

[36] Alexander V. Macutchev, 'Modern possibilities and limits of artificial intelligence introduction into the system' (2022) 8 Actual problems of Russian law p. 47-58. DOI 10.17803/1994-1471.2022.141.8.047-058.

judge. The algorithm analyzes information about the defendant's personality and, comparing it with data contained in other sentences, suggests the kind of punishment that judges most often impose in similar circumstances. This makes it possible to unify justice in the country with the largest population and number of judges (more than 100,000) in the world.[37]

In 2017. The State Council of the People's Republic of China approved the Next Generation Artificial Intelligence Development Plan, which proposes the concept of a "smart court" that utilizes AI technologies along with digital technologies.

As part of this concept, since 2017, the first world history court in Zhejian province of Hangzhou, China. The world's first electronic Internet court has been operating in Hangzhou, Zhejian Province since 2017 to hear disputes arising from online sales contracts, online services, as well as small financial loans; disputes related to copyright infringement on the Internet; violations of personal rights and freedoms on the Internet; disputes related to the liability of the manufacturer of goods under online sales contracts; disputes about domain names on the Internet; administrative disputes arising in connection with the management of the Internet. It should be noted that these are not online courts, but stand-alone courts, where the entire procedure and actions, as well as procedural documents are carried out through digital technologies.[38]

All court sessions are held online, evidence is provided digitally, and it is also processed electronically. An analysis of the court's work in the first two years of operation showed that sittings took 67% less time, and the duration of cases was reduced by 25%.[39]

Since 2018, intelligent online court technology has been implemented in Beijing and Guangzhou courts. These courts apply the principle of «online process for online disputes», according to which all stages of the court procedure (filing a lawsuit, accepting a case for consideration, verifying the admissibility of evidence and its examination, hearing and judgment) should be conducted online. According to statistics, the Internet court takes an average of 38 days to reach a verdict, which is half the time compared to the traditional process. In addition, in almost all cases the verdicts rendered were not appealed by the parties.[40]

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[37] Oleg A. Stepanov, Denis A. Basangov, 'On the prospects for the impact of artificial intelligence on judicial proceedings' (2022) 475 Bulletin of Tomsk State University. p. 229-237. DOI 10.17223/15617793/475/28.

[38] Rusakova, Ekaterina, 'Integration of "smart" technologies in the civil proceedings of the People's Republic of China' (2021) 25 RUDN Journal of Law. p. 622-633. DOI: 10.22363/2313-2337-2021-25-3-622-633.

[39] ''Who are the judges?': how artificial intelligence helps humans in court' available' at https://sk.ru/news/a-sudi-kto-kak-iskusstvennyj-intellekt-pomogaet-cheloveku-v-sude/ (last visited on October 16, 2023).

[40] Evgeny V. Dragilev, Lyudmila L. Dragileva, Lyudmila S. Drovaleva, Sergey A. Palamarchuk, 'Informatisation of the Judicial System of China' (2022) 8 Juridicheskaya nauka. p. 54-59.

China's Supreme People's Court expects that a unified national system of «intelligent Internet courts» will be established in the near future, which will not only work interconnectedly in a unified digital space, but also be equipped with artificial intelligence technology.

From 2019 China's Supreme People's Court, as part of the development of digital experiments, has introduced «mobile courts» in 12 cities and provinces in China («micro-courts»), the operation of which is implemented on the basis of a special mini-program included in the popular application WeChat, located on the Chinese mobile social platform.

«Mobile courts» allow users and judges to perform various actions via a smartphone using facial recognition technology and other electronic identification systems. Thus, the possibility of conducting remote hearings, presenting evidence online has emerged. This requires the availability of cell phones equipped with an operating system with support for the WeChat application, which combines the functions of messaging, money transfers, online payment.

The «mobile micro-court» application has made it possible to go to court «whenever, and wherever», including «video mediation», audit and counseling procedures, which are available through this application on a cell phone. For the convenience of users, there is the possibility to view all case files, provide evidence, and contact all participants. All these innovations are not only aimed at meeting the higher demands of the population, but also demonstrate a commitment to ensuring justice through high technology,[41] as evidenced by the active promotion of online filing of lawsuits, registration and institution of cases, as well as the openness of access to perform these actions even by foreign parties. Mobile mini-court, is available not only to users of smartphones, but also personal computers. Installing this application on a computer will make it easier for the user to download the documents required for the case.[42]

A well-known example of AI integration in Chinese justice is the application of System 206 («Shanghai Intelligent Criminal Case Support System»), a software for use in criminal proceedings as part of the Intelligent Information Criminal Procedure System of the Shanghai High People's Court.

The System 206 integrates all documents (investigative and prosecutorial and supervisory documents, as well as records of investigative actions) on a particular criminal case, starting with the application (report, complaint) about a crime, into an automatically created electronic folder.

[41] Rusakova, Ekaterina, 'Integration of "smart" technologies in the civil proceedings of the People's Republic of China' (2021) 25 RUDN Journal of Law. p. 622-633. DOI: 10.22363/2313-2337-2021-25-3-622-633.

[42] Irina V. Khoroshko, 'Foreign experience of the electronic form of civil proceedings on the example of the Republic of Singapore and the People's Republic of China: the history of origin and current state' (2022) 2 Man: Crime and Punishment. p. 183-187. - DOI 10.33463/2687-1238.2022.30(1-4).2.183-187.

The system includes several databases, including standards for the classification and evaluation of forensic evidence, information on criminal cases and convictions. These databases contain more than 45 million documents provided by security agencies, prosecutors and courts, including unsolved cases and cases in which arrests were not authorized or prosecutions were refused. All this information is used by System 206 algorithms for self-learning, which allows them to analyze new cases later.

The features of System 206 are: 1) the use of digital manuals and guidelines to collect evidence and check its reliability and consistency based on specially developed mathematical models, as well as the ability to collect audio-video recordings of various stages of the investigation, from the crime scene examination to the moment of detention and interrogation of suspects; 2) the use of AI technologies to support interrogations, including a natural language processing system that provides diagnostic criteria for evaluating the utterances of the suspects; and 2) the use of AI technologies to support the conduct of interrogations, including a natural language processing system that provides diagnostic criteria for evaluating the utterances of suspects. All these functions are available online and are also realized in the form of special applications for smartphones, which can be installed by judges, investigators and other participants in the process. The developers of the current versions of System 206 invariably emphasize that at present its role is auxiliary, and the decision on the case is made solely by the judge, not by artificial intelligence.[43]

The application of assistive artificial intelligence technologies during the trial is accomplished as follows. As the trial proceeds, System 206 will automatically identify, select, and display (on courtroom screens) evidentiary materials. In a smart courtroom, the following three features are typically utilized during a trial. 1) Intelligent speech recognition: System 206 can instantly and efficiently convert speech into a recording. 2) Intelligent information capture: the System uses technologies such as intelligent case element capture, voice recognition and understanding, etc. to automatically capture and display relevant evidence according to the questions and answers of the defendant, prosecutor and judge. 3) Intelligent Evidence Display: with the functions of displaying evidence, checking evidence, viewing the chain of evidence and judgment, as well as speech and verbal evidence, the System can display relevant materials in the courtroom, such as evidence defects and evidence contradictions found during the trial. The

[43] Evgeny V. Dragilev, Lyudmila L. Dragileva, Lyudmila S. Drovaleva, Sergey A. Palamarchuk, 'Informatisation of the Judicial System of China' (2022) 8 Juridicheskaya nauka. p. 54-59.

combined real-time interaction of these three functions provides intelligent support for the entire trial process in real time.[44]

It is also worth mentioning an interesting development – the Xiaofa robot, launched in 2017 at the Beijing Internet Court. The robot answers visitors' questions in a childlike voice, and its main function is to explain complex legal issues in layman's language. The robot can answer more than 40,000 court and 30,000 legal questions, which has greatly accelerated the process of going to court. The choice of voice is also not random, as it allows litigants to balance their psychological state. China currently has more than 100 robots in courts across the country, as the process of creating intelligent justice is more efficient, moreover, some of the robots have specializations, such as in business, law or specific disputes.[45]

The People's Republic of China continues to actively modernize its judicial system through the use of AI technologies, big data analysis, and cloud computing to ensure universal access to justice and ensure the quality of legal proceedings. In this regard, the Supreme People's Court of the People's Republic of China stated that by 2025 the use of artificial intelligence in the judicial system will expand, which correlates with the plans of the country's leadership to create an internal metaverse.

VI Problems and Risks of Application of AI Technologies in Legal Proceedings

One of the main problems with the use of AI in litigation is that it is based on computational procedures rather than situational logic and does not know how to deal with contexts.[46]

Taking into account that the artificial intelligence system does not «think» but follows a set of calculations pre-programmed in it for mathematical analysis of data and probability inference, it seems difficult to achieve the task of training AI in contextual intellectual procedures that allow applying legal norms taking into account the conditionality of the situation of speech communication. Obeying algorithms, artificial intelligence evaluates the circumstances of the case from the point of view of the laws of formal logic, while the specifics of legal relations (for

[44] Alexander F. Rekhovsky, 'Use of Artificial Intelligence in Chinese Criminal Procedure' (2021) Technologies of the XXI century in Jurisprudence: Proceedings of the III International Scientific and Practical Conference. p. 69-77.

[45] Rusakova, Ekaterina, 'Integration of "smart" technologies in the civil proceedings of the People's Republic of China' (2021) 25 RUDN Journal of Law. p. 622-633. DOI: 10.22363/2313-2337-2021-25-3-622-633.

[46] Azizbek Atazhanov and Bahadir Ismailov (2020). Foreign experience of introducing modern technologies in the justice system. Society and Innovation, 1 (2/S), 269-284. doi: 10.47689/2181-1415-vol1-iss2/S-pp269-284.

example, the partly irrational nature of family and criminal cases) imply the need to take into account the peculiarities of the human psyche, principles of morality and ethics.

In addition, when making a decision, the court is guided by a number of evaluation and value criteria enshrined in the law: for example, the principles of justice and humanism when imposing punishment, the requirements of reasonableness and good faith in civil law. The understanding of such general categories is formed in a person in the process of socialization, upbringing, personality formation – all this cannot be reproduced in a software algorithm.[47]

Most obvious is the risk that legal decision-making will become obscure and that the law itself will adapt to the use of rich data sources at the expense of relatively unquantifiable values such as mercy.[48]

It is rightly noted that it is hardly possible to take into account the principles of international law, constitutional law, in unity with which law enforcement and legal interpretation activities should be carried out.[49]

It is not uncommon that dispute resolution is based on the general principles and meaning of legislation in the absence of special normative regulation, in which case the judge, taking into account an objective assessment of all the actual circumstances of the case, decides to apply the analogy of law or law, which is a manifestation of heuristic principle, creative intuition and does not imply the possibility of finding a strictly logical solution to the AI problem.

Proposals for the introduction of decision support systems in the implementation of the court's authority to evaluate evidence cause legitimate concerns in the scientific community. Many researchers point out that AI systems cannot take into account the principle of freedom to evaluate evidence, be guided by the categories of inner conviction and conscience, which are the basis of the administration of justice and are much more complex categories than software algorithms.[50] [51]

Given that it is objectively impossible to identify the entire system of factors that determine the evaluation of evidence by the court, and therefore to typify such factors, due to the individual characteristics of each case considered in court, it is

47 Victor V. Momotov, 'The Supreme Court believes robots can never replace a judge' available at https://tass.ru/obschestvo/6296926 (last visited on October 15, 2023).

48 Irina A. Umnova-Konyukhova, 'The judiciary and Artificial Intelligence: The Legal Aspects of Interaction' (2021) 1 Social and Humanities. Domestic and foreign literature. Series 4: State and Law. p. 106-114. DOI 10.31249/rgpravo/2021.01.11.

49 Anton Vasilyev, Transformation of Law in the Digital Age. 2020.

50 Vasily. Y. Fedorovich, Olga V. Khimicheva, Alexey V. Andreev, 'Introduction of informatisation technologies and artificial intelligence technologies as prospective directions of development of modern criminal proceedings' (2021) 2Vestnik Moscow University of the Ministry of Internal Affairs of Russia. p. 205-210. DOI 10.24412/2073-0454-2021-2-205-210.

51 Maya D. Zhuravleva, 'On the introduction and use of artificial intelligence systems in civil proceedings' (2021) 1 Humanities and Political and Legal Studies. p. 20-28. - DOI 10.24411/2618-8120-2021-1-20-28.

premature to talk about the creation of universal algorithms that would fully replace the judge with artificial intelligence.

At the same time, we believe it is reasonable to transfer to AI the technical functions of evaluating evidence, when, based on the analysis of information, AI will be able to detect contradictions in the factual data presented by the participants of the process as evidence, and only transfer the said data to a human for their subsequent comprehension, without taking part in the final conclusion. The efficiency of both the human and the intelligent system should be taken into account: a legal decision is supposed to determine what is true on the facts of the particular case. An 80% probability would mean that one in five cases would be decided wrongly, which would not be justice.[52]

As a risk of introducing AI technologies in judicial proceedings, their potential independence, autonomy from humans, is noted.

The artificial intelligence system is spontaneously improving, influencing and subjugating humans; it can grow into a dangerous world for humans, which becomes an imminent threat.[53] As a risk of introducing AI technologies in judicial proceedings, their potential independence, autonomy from humans, is noted.

The artificial intelligence system is spontaneously improving, influencing and subjugating humans; it can grow into a dangerous world for humans, which becomes an imminent threat.[54]

Taking into account that AI systems are autonomous self-organizing programs with the ability to self-adaptation, self-regulation and self-learning, nevertheless, we believe that AI technology, taking into account the current level of their development, are not truly intelligent systems, because they have their own limits and do not have the ability to reasonably understand what they do and why. But it is obvious that with the development and improvement of technologies, the above problem will become more and more relevant.

Considering the prospects of application of AI decision support systems in the field of judicial proceedings, it is impossible not to mention that in the scientific community there are doubts about the possibility of ensuring the objectivity of the decision made by artificial intelligence, the need to ensure the technological independence of AI from third parties. It is pointed out that the objectivity will largely depend on the professional level of the developer who created the algorithm,

[52] Katie Atkinson and Tevor Bench-Capon and Danushka Bollegala (2020) ‘Explanation in AI and law: Past, present and future’. 289 Artificial Intelligence. DOI: 10.1016/j.artint.2020.103387.

[53] Victor V. Momotov, ‘The Supreme Court believes robots can never replace a judge’ available at https://tass.ru/obschestvo/6296926 (last visited on October 15, 2023).

[54] ‘On the results of the IX Perm Congress of Legal Scholars ‘Legal regulation of digitalisation of society: priority tasks’’ Lex Russica, no. 12 (145), 2018, pp. 161-174.

who, in addition, providing technological administration and having access to the program, will be able to influence it to a certain extent.

The researchers' concern about the order of interpretation of the adopted algorithmic decisions is justified, since the technical complexity of automated systems and the logic of decision-making is often opaque and inaccessible to the public, interested parties are usually not provided with an explanation of the rationale behind the decision-making process.[55]

Artificial intelligence judges are a black box due to the opaque nature of the technology itself and the resulting uncertainty of the legal, social and ethical implications of its use.[56] [57] [58]

In this regard, the principle of "user control" enshrined in the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, which provides for the possibility for a judge to reject a decision proposed by artificial intelligence and make his or her own decision on the merits, becomes relevant. For litigants, this principle ensures the possibility of direct appeal to the court without the use of artificial intelligence, as well as the right to challenge the decision made with the help of artificial intelligence.

These concerns will become irrelevant if there is a balance in the relationship between AI and humans, which should be based on the auxiliary rather than determinative nature of AI, i.e. by implementing the principle of user control, according to which justice professionals should at any time be able to review court decisions and the data used by AI to obtain the result, and have sufficient information to make decisions independently.[59]

Another aspect of the risks of application of AI technology in justice is the inevitable involvement of a large number of persons in the work of an intelligent system of personal data, which creates uncertainty regarding the accuracy of the system's assessment of such data and the potential possibility of their leakage. At the same time, AI systems in the processing of personal data can be used both to obtain data and to protect them: on the one hand, only machine processing of data

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[55] Elena V. Alferova, 'Algorithmized decision making and the right to interpret it' (2021) 1 Social and Humanities. Otechestvennaya i zarubezhnaya literatura. Series 4: State and Law. p. 49-61. DOI 10.31249/rgpravo/2021.01.05.

[56] JI, W. 'The Change of Judicial Power in China in the Era of Artificial Intelligence' (2020) 7(3) Asian Journal of Law and Society. p. 515-530. doi:10.1017/als.2020.37.

[57] Han-Wei Liu, Ching-Fu Lin, Yu-Jie Chen, 'Beyond State v Loomis: artificial intelligence, government algorithmization and accountability' (2019) 2 International journal of law and information technology. p. 122-141.

[58] Ran Wang, 'Legal technology in contemporary USA and China' (2020) 39 Computer Law & Security Review. doi.org/10.1016/j.clsr.2020.105459. https://www.sciencedirect.com/science/article/pii/S0267364920300649.

[59] Alexander V. Macutchev, 'Modern possibilities and limits of artificial intelligence introduction into the system' (2022) 8 Actual problems of Russian law p. 47-58. DOI 10.17803/1994-1471.2022.141.8.047-058.

allows to exclude the possibility of their dissemination or use to the detriment of the personal data subject, on the other hand, such technology can be used to protect them and help the subject of personal data processing to protect such information. For example, Elinar has developed software that makes it possible to identify an individual without the possibility of personal data leakage. For example, if a customer submits a copy of his passport to an organization, the artificial intelligence system divides the image of the document into many small parts, and subsequent identification is made in relation to these fragments, without the overall appearance of the document. A full copy of the passport is not contained in the system, and human operator access to the database may also be difficult or excluded.[60]

We suggest to consider the introduction of AI in justice not as a potential replacement of a judge, but as a technological tool to ensure the greatest efficiency and productivity of judges' labor.

VII Conclusion

The conducted research allows us to conclude that the development of information technologies has proved the prospect of introducing artificial intelligence technologies in the sphere of court proceedings. At the same time, the key factor is the possibility of using AI systems in the activities of courts exclusively in conjunction with a human judge and the possibility of their functioning under human control.

Despite the dynamic development of AI technologies, their use in the judicial systems of China and Russia is still fragmentary and limited to individual experiments. However, the existing experience in the use of intelligent systems has shown the high efficiency of digital transformation of justice by optimizing the judicial process through the transfer to intelligent decision support systems of part of the routine functions of the case management department and the court; increasing the qualitative characteristics of legal proceedings (increase in the number of cases and speed of their consideration) and, as a result, improving the quality of justice.

Today, the idea of continuing automation is gaining more and more support in the scientific and practical communities. However, for the full implementation of artificial intelligence systems in legal areas of human activity, among others, it is necessary to reduce to the necessary minimum the possible negative consequences of such integration, which, in turn, puts before modern legal science the task of studying not only the legal, but also the technological foundations of artificial intelligence systems. In order to implement artificial intelligence, the state needs

[60] Elinar: official site. https://www.elinar.com/artificial-intelligence/gdpr-solution-ai/.

to get a clear answer from the scientific community about the opportunities and risks of this technology, and the scientific community can provide this information only by being in close informational contact with developers and operators of artificial intelligence.

In conclusion, let us emphasize once again that people tend to trust automated systems, as a result of which machine learning technologies, which objectively, due to their imperfections, cannot replace humans today, carry the risk of replacing the user's decision with an artificially generated answer, while it is required that a person only takes into account the opinion of the system, but the final decision is made independently. Accordingly, the task is to make it so that a human being is not excluded from doubting the validity of the conclusion offered to him, which is achievable by means of a small modification of the interface. Thus, in order to ensure an exceptionally auxiliary role of artificial intelligent systems in the realization of the function of decision support, in addition to training the subjects of application of such systems, it is necessary to assess how a person perceives and interprets the proposed conclusion.

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Unleashing Alternative Dispute Resolution (ADR) in Resolving Complex Legal-Technical Issues Arising in Cyberspace Lensing E-Commerce and Intellectual Property: Proliferation of E-Commerce Digital Economy

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Abstract: The rapid growth of cyberspace has brought about numerous legal and technical challenges, often requiring innovative solutions for effective dispute resolution. The exponential growth of the digital era has ushered in a dynamic landscape known as cyberspace, replete with intricate legal and technical challenges. The online interactions and intellectual property rights become increasingly prevalent, that's why the disputes and conflicts arise within this virtual realm. Navigating these multifaceted complexities requires innovative approaches to dispute resolution that transcend traditional legal paradigms. Alternative Dispute Resolution (ADR) emerges as a compelling solution offering a versatile toolkit for resolving disputes that meld intricate legal considerations with complex technological dimensions. By probing the depths of its methodologies, exploring its advantages and limitations, and addressing the integration of technical expertise into the dispute resolution process, we pave the way for an in-depth understanding of how ADR not only bridges the gap between law and technology but also propels the evolution of dispute resolution mechanisms in the ever-evolving realm of cyberspace. The paper explores the applicability of ADR methods, such as mediation, arbitration, and negotiation, to navigate complex disputes in online environments, focusing on e-commerce and intellectual property realms. By analyzing legal frameworks and practical implications, this paper highlights the benefits and challenges of employing ADR to resolve intricate disputes arising in the digital landscape.

Keywords: ADR. Cyberspace. Digital Economy. IPR. Legal-Technical Aspects.

Summary: **1** Introduction – **1.1** Objectives and Scope – **1.2** Methodology – **2** Cyberspace and Complex Legal-Technical Issues: Need for Specialized Dispute Resolution – **3** Alternative Dispute Resolution (ADR): Overview, Advantages and Limitations of ADR – **3.1** ADR in the Digital Age – **4** ADR in E-commerce Disputes: Cross-Border Transactions and Jurisdictional Challenges – **4.1** Online Payment Disputes and Fraud: Application of ADR Mechanism – **5** ADR in Intellectual Property Disputes – **6** Complex Legal-Technical Issues and ADR: Technical Expertise in ADR – **6.1** Role of Mediators and Arbitrators – **6.2** Data Privacy and Confidentiality Concerns – **7** Conclusion, Future Trends and Adaptations – References

1 Introduction

Alternative Dispute Resolution (ADR) stands as a beacon of adaptability and efficacy in resolving complex legal-technical issues arising in the dynamic landscape of cyberspace. The traditional avenues of litigation, rooted in physical courtrooms and conventional legal procedures, often prove inadequate when addressing the intricate interplay between technology, commerce, and intellectual property in the digital sphere.[1] ADR, with its diverse methodologies and flexible approaches, offers a paradigm shift in dispute resolution, steering it away from the rigidity of traditional litigation and towards a more agile and tailored framework. One of the primary domains where ADR demonstrates its prowess is in the realm of online commerce. The proliferation of e-commerce has revolutionized how transactions are conducted, breaking down geographical barriers and expanding marketplaces beyond borders. Yet, this newfound accessibility comes with its own set of complexities. Disputes arising from cross-border transactions, where parties may be subject to different legal systems, can quickly become convoluted in traditional legal proceedings.[2] ADR, with its emphasis on neutrality and flexibility, offers a platform where parties can navigate these jurisdictional intricacies more effectively. Mediation, for instance, can provide a structured yet informal setting for parties to collaboratively resolve their differences, ensuring that cross-border disputes do not become entangled in bureaucratic mazes.

Cyberspace, characterized by its global connectivity and rapid evolution, spans a spectrum of activities from e-commerce transactions to protection of intellectual property rights. The intricacies embedded within these digital interactions often transcend geographical boundaries, rendering traditional litigation processes cumbersome, time-consuming, and expensive. This is particularly evident when confronting disputes that intertwine legal issues with intricate technical aspects, necessitating expertise that straddles the domains of law and technology. ADR, with its diverse range of methods, such as mediation; arbitration, and negotiation, presents an elegant alternative that aligns with the dynamic nature of cyberspace while catering to the specific demands of these complex disputes. Through real-world case studies, prevailing legal frameworks, and practical considerations, it delve into the symbiotic relationship between ADR and cyberspace, unraveling the pivotal role ADR plays in efficiently addressing complex disputes while fostering an environment conducive to innovation and equitable resolutions. As it traverses the terrain of alternative dispute resolution in the digital landscape, it seeks to

[1] Cometti, 2022.
[2] Lide, 1996.

illuminate how ADR serves as a lighthouse, guiding parties through the tumultuous waters of legal-technical disputes in cyberspace.[3]

The landscape of intellectual property (IP) disputes in cyberspace presents another arena where ADR shines. The rapid dissemination of digital content has exacerbated issues related to copyright infringement, trademark disputes, and domain name conflicts. In these cases, the intricate intertwining of legal principles and technological nuances necessitates a resolution mechanism that possesses legal insight and technical expertise. Arbitration, a prevalent ADR technique, offers a compelling solution.[4] By allowing parties to select arbitrators with domain-specific knowledge, arbitration bridges the gap between legal interpretation and technological intricacies. This aligns well with the demands of IP disputes in cyberspace, where the delineation between legal and technical issues is often blurred.

The fluidity of ADR is particularly advantageous in the digital age, where technological advancements are relentless and legal frameworks can lag behind. The malleability of ADR mechanisms like negotiation and mediation allows parties to adapt to the ever-evolving nuances of complex disputes in cyberspace. This adaptability is essential when considering the diverse nature of conflicts that can arise, ranging from breaches of online contracts to unauthorized use of digital assets.[5]

The dynamic interplay between complex legal-technical issues in cyberspace, especially in e-commerce and intellectual property, requires a dispute resolution mechanism that mirrors this dynamism. Alternative Dispute Resolution, with its range of methodologies and adaptability, stands as an ideal approach to address these challenges. By circumventing the constraints of traditional litigation and embracing the fluidity demanded by the digital age, ADR offers a transformative lens through which to resolve disputes, fostering efficiency, expertise, and fairness in the intricate world of cyberspace.

1.1 Objectives and Scope

The primary objectives of this research are to comprehensively explore the multifaceted role of Alternative Dispute Resolution (ADR) in effectively resolving the intricate legal-technical issues that arise within the expansive realm of cyberspace, with a specific focus on the domains of online commerce and intellectual property. The research aims to elucidate the applicability, benefits, and challenges of

[3] Yaroshenko, 2022.
[4] Perritt Jr, 1999.
[5] Turner, 2000.

utilizing ADR methods to navigate the complexities posed by the convergence of legal intricacies and technological advancements in the digital age.

The scope of this research extends to a detailed analysis of the various ADR techniques, such as mediation, arbitration, and negotiation, in the context of resolving disputes that emerge from cross-border e-commerce transactions and intellectual property conflicts within cyberspace. The study will examine case studies, legal frameworks, and practical implementations to provide insights into how ADR mechanisms can be effectively employed to address jurisdictional challenges, copyright infringements, trademark disputes, and other complex issues unique to the digital landscape.

Also, this research aims to delve into the implications of incorporating technical expertise within the ADR process, considering the intricate technical dimensions intertwined with legal disputes in cyberspace. The study will explore the role of mediators and arbitrators with specialized knowledge in technology and intellectual property to ensure equitable and informed resolutions. The research also intends to highlight potential challenges in implementing ADR in the digital domain, including data privacy, confidentiality, and enforceability of decisions. By delving into the specific contexts of online commerce and intellectual property, the study aspires to provide valuable insights into how ADR methodologies can be harnessed to ensure efficient, fair, and technologically informed resolutions for the complex disputes that define the digital era.

1.2 Methodology

The research methodology for investigating the use of Alternative Dispute Resolution (ADR) in addressing complex legal-technical issues in the context of Cyberspace, particularly concerning E-Commerce and Intellectual Property within the rapidly evolving digital economy, is designed to be both comprehensive and multifaceted. This research will encompass exploratory, descriptive, and explanatory approaches to uncover the underlying dynamics. Through an extensive review of existing literature to assess the effectiveness of ADR mechanisms in resolving disputes arising in the digital realm. Additionally, a critical analysis of the legal frameworks, ethical considerations, and the influence of technology will be undertaken. Ultimately, this research aims to generate valuable insights and recommendations for enhancing the role of ADR in addressing the proliferation of complex legal-technical issues in the Cyberspace-driven E-Commerce and Intellectual Property sectors of the digital economy. By examining the role of Alternative Dispute Resolution in resolving complex legal-technical disputes in cyberspace, this research paper aims to contribute to the understanding of how ADR methods can be harnessed to address the evolving challenges posed by

the digital realm. The paper underscores the importance of embracing ADR as a powerful tool to ensure efficient and equitable resolutions in the digital age.[6]

2 Cyberspace and Complex Legal-Technical Issues: Need for Specialized Dispute Resolution

Cyberspace has ushered in an era of unparalleled connectivity, transforming the global landscape of interactions, transactions, and information dissemination. As individuals, businesses, and governments increasingly operate within this digital ecosystem, many complex legal-technical challenges have emerged, presenting intricate issues that demand novel approaches to dispute resolution. Cyberspace, characterized by its borderless nature and rapid technological evolution, has given rise to conflicts that transcend the boundaries of traditional legal systems and as necessitates the emergence of specialized dispute resolution mechanisms.[7]

The complexities that arise within cyberspace are manifold. Cross-border transactions conducted through the virtual realm can quickly entangle parties in disputes that involve differing legal systems, regulatory frameworks, and cultural norms. The fluidity of the digital environment often blurs the lines of jurisdiction, creating a dilemma for traditional litigation to navigate.[8] Moreover, the rapid pace of technological innovation introduces challenges that are entirely novel and deeply intertwined with legal interpretations. For instance, issues such as data breaches, cybersecurity breaches, and unauthorized access require a nuanced understanding of both the legal implications and the technical aspects of the violations.[9] Traditional litigation, rooted in physical courtroom settings and long-established legal procedures, frequently struggles to accommodate the unique dynamics of cyberspace. The need for a more efficient, adaptive, and technologically-informed means of resolving disputes has become increasingly evident. Alternative Dispute Resolution (ADR) methods, tailored to the intricacies of the digital age, offer a promising path forward. Mediation, arbitration, and negotiation within the digital context recognize the evolving nature of legal-technical conflicts and provide an avenue for swift and relevant resolutions.[10]

Against this backdrop, the necessity for specialized dispute resolution mechanisms becomes abundantly clear. The challenges posed by cyberspace require not only legal expertise but also technical acumen. Specialists well-versed in both the legal nuances and the technological intricacies are uniquely positioned to facilitate

[6] Piestsov, 2022.
[7] Derevyanko, 2022.
[8] Haloush, 2008.
[9] Katsh, 1995.
[10] De Werra, 2016.

resolutions that uphold fairness and reflect the complex nature of disputes. Such specialists can provide an avenue for parties to engage in meaningful discussions that consider legal rights and technical feasibility, ensuring that resolutions are both legally sound and practically viable.

The advent of cyberspace has undeniably reshaped the nature of conflicts and disputes, infusing them with intricate legal-technical dynamics often elusive to traditional litigation. The demand for specialized dispute resolution mechanisms, as evidenced by the challenges of cross-border transactions, cybersecurity breaches, and jurisdictional ambiguities, emphasizes the need for innovative approaches. Alternative Dispute Resolution methods incorporating legal and technical expertise are poised to bridge the gap, providing a path toward swift, effective, and equitable resolutions within the complex digital landscape.[11]

3 Alternative Dispute Resolution (ADR): Overview, Advantages and Limitations of ADR

Alternative Dispute Resolution (ADR) stands as a transformative paradigm within conflict resolution, offering an array of innovative methodologies that depart from the rigidity of traditional litigation. Unlike the adversarial nature of court proceedings, ADR methods are characterized by their collaborative and solution-oriented approach, seeking to find common ground between disputing parties rather than establishing winners and losers. Mediation, arbitration, negotiation, and other ADR techniques have gained prominence as flexible and efficient alternatives that address various disputes across various contexts, including the intricate legal-technical challenges posed by the digital domain.[12] The advantages of ADR are multifaceted and compelling. Foremost, ADR offers parties a degree of autonomy and control over the resolution process that is often absent in traditional litigation. By allowing disputants to actively engage in shape the outcome, ADR fosters a sense of ownership over the agreement, thereby increasing the likelihood of compliance and reducing future conflicts. Additionally, the collaborative nature of ADR encourages open communication, enabling parties to understand each other's perspectives and underlying interests. This can lead to more durable solutions that account for not only legal rights but also the broader context in which the dispute arose.[13]

One of the hallmark advantages of ADR is its flexibility. ADR methods can be tailored to the unique dynamics of each dispute, allowing for customized processes that cater to the specific needs and preferences of the parties involved.

[11] Ware, 1999.
[12] De Werra, 2016.
[13] Teitz, 2001.

This flexibility is particularly pertinent in the digital age, where disputes frequently straddle legal and technical realms. In these cases, the ability of ADR to adapt its approach to address complex legal-technical challenges positions it as an apt choice for resolving conflicts arising in the intricate cyberspace landscape.

ADR is often faster and more cost effective than traditional litigation. Court cases can extend over significant periods, incurring substantial legal fees and resource allocation. ADR, on the other hand, streamlines the resolution process by offering expedited procedures that result in quicker resolutions.[14] This time efficiency is paramount in an era where the pace of business transactions and technological advancements is relentless.

ADR is not without its limitations as its consensual nature relies on the willingness of all parties to participate in the resolution process actively. If one party is uncooperative or adamant, achieving a mutually acceptable outcome can prove challenging. Furthermore, the informality of ADR methods, while advantageous in many respects, can also potentially lead to uneven power dynamics or results that are not in line with legal principles. Alternative Dispute Resolution presents a comprehensive departure from traditional litigation, offering a range of advantages particularly resonant in addressing complex legal-technical disputes in the digital age. By promoting collaboration, flexibility, and efficiency, ADR methods hold the potential to navigate the intricate challenges posed by cyberspace conflicts effectively. However, recognizing its limitations is essential, and a judicious approach is required to harness its strengths while mitigating potential shortcomings.[15]

3.1 ADR in the Digital Age

In the digital age, the landscape of conflict resolution has been significantly reshaped by the advent of Alternative Dispute Resolution (ADR) methods. As our world becomes increasingly interconnected and transactions transcend geographical boundaries, traditional litigation approaches often prove ill-suited to the unique challenges posed by the digital domain. ADR emerges as a beacon of adaptability, offering tailored solutions that align with the dynamic nature of the digital age.

The rapid pace of technological advancement, coupled with the complexities of legal intricacies, has given rise to many conflicts that extend beyond the confines of traditional courtrooms. ADR methods, with their flexible and collaborative nature, provide a much-needed avenue for parties to address disputes with a focus on both

[14] Mitchell, 1998.
[15] Bol, 2003.

legal principles and the intricacies of technology. This is particularly relevant in the digital age, where issues such as e-commerce transactions, intellectual property disputes, data breaches, and online defamation require not only legal expertise but also an understanding of the underlying technicalities. ADR methods, including mediation and arbitration, offer a significant advantage in the digital context: they provide parties with the opportunity to choose neutral experts who possess both legal knowledge and technical prowess. In a world where disputes often arise from technical miscommunications or misunderstandings, including experts who can bridge the gap between legal interpretations and technological realities is invaluable. This, in turn, ensures that resolutions are not only legally sound but also reflective of the intricate technological landscape in which they occur.[16]

The digital age emphasizes on expediency and efficiency. The instant nature of online transactions and communication demands that conflicts be resolved swiftly to minimize disruptions and maintain trust within the digital ecosystem. Traditional litigation, with its often lengthy and cumbersome processes, can hinder the fast-paced nature of the digital world. ADR methods circumvent this by providing mechanisms for efficient and timely resolutions, aligning well with the inherent demands of the digital age. However, as the digital age unfolds, ADR also faces unique challenges. Ensuring data privacy and security during online proceedings is of paramount importance, particularly when sensitive information is shared during virtual mediation or arbitration sessions.[17] Additionally as technology continues to evolve, adapting ADR processes to integrate artificial intelligence (AI), blockchain technology, and online dispute resolution (ODR) platforms will be essential to remain relevant and effective in a rapidly changing landscape.[18] The digital age ushers in a new era of dispute resolution, where the complexities of technology converge with the intricacies of legal frameworks. ADR methods, with their emphasis on collaboration, flexibility, and expertise, emerge as a natural fit for this environment. By incorporating legal and technical knowledge, ADR not only addresses the nuances of digital disputes but also paves the way for efficient, equitable, and technologically informed resolutions that are essential in the complex and fast-paced digital landscape.

[16] Haloush, 2008.
[17] Victorio, 2000.
[18] Lasprogata, 2001.

4 ADR in E-commerce Disputes: Cross-Border Transactions and Jurisdictional Challenges

The realm of e-commerce has witnessed an exponential surge in transactions and interactions, redefining how business is conducted globally. However, this digital frontier is not exempt from disputes; in fact, the intricate nature of online commerce often gives rise to conflicts that necessitate innovative solutions. This is where Alternative Dispute Resolution (ADR) is a pivotal force in resolving e-commerce disputes, offering a tailored approach that addresses the unique challenges of the digital marketplace. Cross-border e-commerce transactions, while fostering global trade, introduce complexities that can swiftly escalate into disputes. Jurisdictional ambiguities and varying legal frameworks across countries pose significant challenges when pursuing traditional litigation. ADR methods, particularly mediation and arbitration, offer a way to navigate these complexities by providing a neutral platform that transcends geographical boundaries. Through virtual meetings and technology-driven communication, parties can engage in discussions that bridge legal differences, facilitating resolutions that are both efficient and globally recognized.[19]

The financial implications of e-commerce disputes cannot be underestimated. The pace of online business is rapid, and disruptions due to conflicts can have significant repercussions. ADR methods offer a swift resolution process that can mitigate these negative impacts. Mediation, for example, encourages parties to collaborate and find common ground, enabling them to maintain relationships and business continuity. Arbitration, on the other hand, provides a more formalized process that leads to a binding decision, offering a quicker resolution compared to protracted court battles. ADR methods align with the flexibility inherent in the e-commerce landscape. The adaptability of ADR allows parties to craft solutions that go beyond legal remedies. In scenarios where parties may value ongoing business relationships or reputational integrity, ADR provides a holistic approach that considers both legal claims and the broader context of the dispute. This becomes particularly pertinent in the digital realm, where maintaining online reputation and goodwill is paramount for business success. The utilization of ADR in e-commerce disputes is not without challenges. The digital environment raises concerns about the security of virtual proceedings, as parties share sensitive information and confidential data. Ensuring secure communication platforms and addressing data privacy concerns are critical to the successfullys implementing ADR in the e-commerce context. Additionally, the enforceability of ADR decisions

[19] Turner, 2000.

across different jurisdictions remains a consideration, although international conventions and agreements can bolster the recognition and enforcement of ADR outcomes.[20]

The fast-evolving landscape of e-commerce is accompanied by a distinct set of conflicts that require agile and effective resolutions. Alternative Dispute Resolution offers a comprehensive approach tailored to the digital era, allowing parties to navigate jurisdictional complexities, maintain business relationships, and swiftly resolve disputes. By combining legal expertise with the technical nuances of online transactions, ADR is an indispensable tool in fostering equitable, efficient, and adaptive resolutions in the vibrant world of e-commerce.[21]

The proliferation of e-commerce has ushered in a new era of global trade and connectivity, enabling transactions that transcend geographical boundaries. However, the borderless nature of online commerce also introduces a unique set of challenges, mainly when disputes arise. Among these challenges, cross-border transactions and the accompanying jurisdictional complexities are critical focal points for Alternative Dispute Resolution (ADR) methods. Cross-border e-commerce transactions involve parties from different jurisdictions, each subject to their own legal systems, regulations, and cultural norms. When disputes emerge, questions of which jurisdiction's laws apply and where the debate should be resolved can quickly escalate into complex legal battles.[22] Traditional litigation often struggles to cope with such disputes, given the intricate web of laws that could potentially apply. ADR methods offer a way to effectively navigate this labyrinth of jurisdictional challenges, providing a neutral and flexible platform that transcends geographical limitations. Mediation, one of the cornerstones of ADR, is particularly adept at addressing cross-border e-commerce disputes. Through facilitated communication and negotiations, parties can collaboratively navigate the intricacies of different legal systems. A mediator, skilled in law and e-commerce practices, can guide parties toward a mutually acceptable resolution that considers the nuances of each jurisdiction. This approach allows parties to focus on their underlying interests and common ground, bypassing the complexities of conflicting legal frameworks.[23] Arbitration also presents a compelling solution in cross-border e-commerce disputes. Parties can choose a neutral arbitration forum and establish their own rules, providing a degree of control over the process often lacking in traditional litigation. This mechanism ensures that both parties are on a level playing field, irrespective of their home jurisdictions. Additionally, the enforceability of arbitration

[20] Marques, 2021.
[21] Hang, 2000.
[22] Edwards, 1985.
[23] Menkel-Meadow, 2015.

awards under international treaties like the New York Convention facilitates the recognition and execution of decisions across different countries, bolstering the legitimacy of ADR outcomes in cross-border contexts.

ADR methods hold promise, they also encounter specific challenges in this domain. Ensuring equal access to ADR for parties of varying resources and legal knowledge remains a concern. Additionally, aligning ADR decisions with the laws of multiple jurisdictions requires careful consideration to ensure fairness and compliance. When parties have unequal bargaining power, the choice of ADR methods and the selection of neutrals become paramount to achieving equitable resolutions.[24] In assumption, cross-border e-commerce transactions bring forth a complex set of jurisdictional challenges that demand innovative solutions. Alternative Dispute Resolution methods offer a versatile approach to address these challenges, providing a mechanism for parties can overcome jurisdictional complexities and efficiently resolve disputes. By harnessing the flexibility and adaptability of ADR, cross-border e-commerce disputes can be navigated in a manner that fosters fairness, collaboration, and efficiency, ultimately preserving the global potential of online commerce.

4.1 Online Payment Disputes and Fraud: Application of ADR Mechanism

In the e-commerce landscape, where online transactions have become the backbone of modern business, the prevalence of online payment disputes and fraud has become a critical concern. As consumers and businesses increasingly rely on digital payment systems, conflicts stemming from failed transactions, unauthorized charges, and fraudulent activities have emerged as significant challenges.[25] To address these issues effectively applying Alternative Dispute Resolution (ADR) mechanisms offers a promising avenue for swift, fair, and efficient resolutions. Online payment disputes can encompass a range of scenarios, from customers disputing charges for products they never received to disagreements over the quality or functionality of digital goods. These disputes, if left unresolved, can lead to strained customer relationships, damage to reputation, and potential legal actions.[26] ADR emphasizing on collaboration and understanding, provides a constructive framework to navigate these conflicts. Mediation, for instance, enables parties to engage in facilitated discussions, allowing them to clarify misunderstandings, address concerns, and work towards a mutually acceptable

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[24] Vaughn, 1998.
[25] Bandle, 2011.
[26] Fiadjoe, 2013.

resolution. By preserving customer-business relationships and avoiding adversarial litigation, ADR methods contribute to sustaining the crucial trust in the digital commerce landscape.

The fraudulent activities in online payments present another dimension of complexity. Unauthorized transactions, phishing scams, and identity theft can disrupt the e-commerce ecosystem and erode consumer confidence. Traditional legal proceedings can be cumbersome and time-consuming in addressing such cases. Here, ADR offers an expedited and effective alternative. Arbitration, for example, can provide a streamlined process for resolving fraud-related disputes. By appointing experts with legal intricacies and cybersecurity practices, parties can ensure that resolutions are well-informed and technically sound. This approach becomes especially relevant when dealing with complex fraud cases that necessitate a nuanced understanding of both legal frameworks and digital forensics.[27]

However, the application of ADR in online payment disputes and fraud encounters specific challenges. Data privacy and security during virtual proceedings is paramount, as sensitive financial information is often shared. Online platforms utilized for ADR must adhere to robust security measures to safeguard confidential information. Additionally, the enforceability of ADR decisions in cases involving international parties should be considered, potentially requiring the recognition of awards across jurisdictions.[28] There is a rise in online payment disputes, and fraud underscores the need for efficient and specialized resolution mechanisms. Alternative Dispute Resolution methods, with their flexibility, expertise, and expedited processes, offer a tailored approach to address these challenges. By applying ADR to online payment conflicts, businesses can enhance customer trust, streamline dispute resolution, and navigate the complexities of fraud-related cases with a blend of legal acumen and technical understanding. Ultimately, ADR's application contributes to the sustainability of the digital commerce ecosystem, fostering fairness and transparency in the face of evolving challenges.[29]

5 ADR in Intellectual Property Disputes

Intellectual property (IP) disputes form a critical juncture where legal intricacies and creative innovations intersect. With the surge of digital content sharing and the globalization of ideas, resolving IP conflicts has become more intricate than ever. Alternative Dispute Resolution (ADR) methods offer a tailored approach to navigating

[27] Sternlight, 2006.
[28] Barrett, 2004.
[29] Cheung, 1999.

the complexities of these disputes, which often demand a balance between legal expertise and technical understanding.

Domain name disputes, a common issue in the digital age, exemplify the efficacy of ADR in the realm of intellectual property. The Uniform Domain-Name Dispute-Resolution Policy (UDRP) is framework that leverages arbitration to address disputes over domain names resembling existing trademarks. This streamlined approach not only ensures swift resolutions but also minimizes the risk of domain name hijacking or unauthorized use. By employing specialized arbitrators with domain-specific knowledge, the UDRP harmonizes legal principles with the technical nuances inherent in domain name disputes, exemplifying how ADR bridges the gap between the legal and technical aspects of intellectual property.

The Copyright and trademark infringement, prevalent in the digital era, further demonstrates the suitability of ADR in intellectual property conflicts. The convergence of legal interpretations and technological considerations necessitates an approach that can address both dimensions. Mediation, with its emphasis on negotiation and collaborative problem-solving, offers an avenue for parties to explore potential solutions that respect IP rights while acknowledging the evolving landscape of digital content sharing. This approach is particularly relevant in cases involving the transformative use of copyrighted material or disputes over trademarked logos in online spaces.[30]

ADR's adaptability extends to addressing digital piracy and counterfeiting, where copyright holders seek to protect their creative works from unauthorized distribution. Arbitration, with its ability to expedite proceedings and offer binding decisions, is a viable option for IP holders to efficiently tackle these challenges. Arbitrators well-versed in both IP law and technological methods of content identification can navigate the intricacies of copyright enforcement in the digital realm, ensuring that resolutions are well-informed and balanced.

So, implementing ADR in intellectual property disputes also poses specific considerations. The enforceability of ADR decisions across various jurisdictions requires careful attention, as different legal systems may interpret and recognize these decisions differently. Additionally, selecting arbitrators or mediators with the requisite expertise is pivotal to ensuring equitable resolutions that reflect both legal and technical dimensions.

Intellectual property disputes in the digital age demand an approach that bridges the gap between legal principles and technological realities. Alternative Dispute Resolution methods provide a tailored framework for addressing these complexities. By combining legal expertise with technical understanding, ADR

[30] Blackman, 1997.

methods offer an effective means to navigate domain name disputes, copyright and trademark conflicts, and challenges related to digital piracy and counterfeiting. This application of ADR underscores its relevance in fostering equitable, informed, and efficient resolutions within the dynamic landscape of intellectual property.[31]

6 Complex Legal-Technical Issues and ADR: Technical Expertise in ADR

In the realm of complex legal-technical issues, where the convergence of intricate legal matters and advanced technological intricacies is commonplace, the role of technical expertise within Alternative Dispute Resolution (ADR) mechanisms becomes instrumental. These disputes often extend beyond the scope of traditional legal comprehension, requiring a nuanced understanding of the underlying technological aspects to reach effective and informed resolutions.

The incorporation of technical experts within ADR processes is pivotal in addressing the unique challenges presented by complex legal-technical conflicts. Such experts possess a comprehensive grasp of the legal frameworks and the technological intricacies involved. In intellectual property disputes, for instance, where the unauthorized use of digital content may require intricate digital forensics to establish infringement, technical experts can provide insights that complement the legal arguments. Their ability to decipher complex algorithms, digital signatures, and encryption methods ensures that resolutions accurately reflect the technological landscape, enhancing the credibility and legitimacy of outcomes.[32]

Mediation, a collaborative ADR method, benefits significantly including technical experts. These experts can facilitate productive discussions by clarifying technical misconceptions and fostering a common understanding between parties. By acting as intermediaries between the legal and technical aspects of the dispute, they help parties appreciate the implications of their arguments and proposed solutions in both realms. This minimizes misunderstandings and facilitates consensus-building, leading to resolutions that are not only legally valid but also technically sound.

In arbitration, technical experts can serve as arbitrators or advisors, offering insights that guide decision-makers toward well-informed judgments. By assessing evidence and arguments with legal and technical lenses, they contribute to well-rounded decisions that account for the intricacies of complex legal-technical issues. Arbitrators with specialized technical knowledge also lend credibility to the

[31] Samuelson, 1999.
[32] El-Ebiary, 2021.

process, assuring parties that their disputes are being considered by individuals who comprehend the nuances of their conflicts.

The integration of technical experts in ADR is not without challenges, as ensuring the impartiality of these experts is paramount, as their judgments may significantly influence outcomes. Balancing their technical expertise with neutrality and fairness demands careful selection and a robust code of conduct. Furthermore, the cost implications of involving technical experts in ADR processes should be considered, as their specialized knowledge often comes at an additional expense. As these conflicts necessitate a harmonious understanding of both realms, the input of experts who bridge the gap between law and technology enhances the efficacy and legitimacy of ADR outcomes. By offering nuanced insights, facilitating discussions, and guiding informed decisions, technical experts contribute to a comprehensive and well-rounded approach that addresses the multifaceted dimensions of complex legal-technical disputes.[33]

6.1 Role of Mediators and Arbitrators

In complex legal-technical issues, the role of mediators and arbitrators takes on a significant and multifaceted character. These neutral third parties are pivotal in facilitating the resolution of disputes that involve intricate legal and technological aspects, playing a crucial role in ensuring that both realms are adequately addressed to arrive at fair and informed outcomes.

Mediators:

Mediators serve as impartial facilitators in guiding parties through the resolution process. In cases of complex legal-technical disputes, mediators hold the responsibility of creating an environment conducive to constructive dialogue and problem-solving. Their role becomes particularly relevant when there's a need to bridge the gap between parties with varying levels of legal and technical understanding. Mediators help distill intricate technical concepts into more accessible terms, enabling effective communication and negotiation. Mediators in complex legal-technical disputes also possess the skill of reframing issues to highlight common interests and shared concerns. This ability is essential in fostering collaboration, as parties may become entrenched in legal or technical details that hinder progress. By focusing on underlying interests and potential solutions, mediators can guide discussions away from adversarial posturing and towards mutually agreeable resolutions. The mediators can facilitate the integration

[33] Kahn, 2020.

of technical expertise. In disputes where the technological dimension is significant, mediators can bring technical experts into discussions to clarify misconceptions and provide insights that enhance understanding. Their role extends to ensuring that resolutions are not only legally acceptable but also technically viable, reinforcing the legitimacy of the outcomes.

Arbitrators:

Arbitrators, on the other hand, take on a more authoritative role in complex legal-technical disputes. Selected for their expertise in both legal and technical matters, arbitrators render decisions that are binding on the parties involved. Their role encompasses thoroughly reviewing evidence, arguments, and expert testimonies to arrive at well-informed conclusions.

In these disputes, arbitrators act as adjudicators who weigh the legal merits and technical intricacies. Their technical understanding allows them to assess evidence pertaining to both legal rights and technical feasibility. This becomes particularly pertinent in disputes related to intellectual property, cybersecurity breaches, and technology-driven contractual disagreements. Arbitrators' specialized knowledge enables them to craft decisions harmonizing legal principles with technical realities.[34] These decisions are not only legally sound but also grounded in an accurate assessment of the technical dimensions at play. This aligns with the need for outcomes considering both aspects in disputes that often transcend traditional legal boundaries. Both mediators and arbitrators must exercise caution in maintaining impartiality. Ensuring that their technical expertise does not bias their decisions or interactions with the parties is crucial to upholding the integrity of the ADR process. Additionally, their ability to adapt and remain open to learning about evolving technologies is essential, given the rapidly changing landscape of complex legal-technical issues.[35]

The mediators and arbitrators play pivotal roles in navigating complex legal-technical disputes. Through mediation, they facilitate constructive dialogue, promote collaboration, and integrate technical insights to achieve resolutions that bridge legal and technological considerations. In arbitration, their expertise ensures that decisions are well-informed, balanced, and reflective of the intricate legal-technical landscape. Their role becomes instrumental in ensuring that disputes in the modern era, characterized by complex interactions between law and technology, are resolved fairly and effectively.[36]

[34] Haloush, 2008.
[35] Mania, 2015.
[36] Kaufmann-Kohler, 2004.

6.2 Data Privacy and Confidentiality Concerns

In the context of Alternative Dispute Resolution (ADR), mainly when dealing with complex legal-technical issues, data privacy and confidentiality concerns take center stage due to the sensitive nature of information often involved. In a landscape where technological advancements are rapidly reshaping how disputes are resolved addressing these concerns becomes paramount to maintaining trust, ensuring compliance with regulations, and upholding the integrity of the process.

Data Privacy Concerns:

Data privacy protects personal and sensitive information shared during ADR proceedings. Parties may need to disclose financial records, proprietary technology details, or unique identifiers during discussions. With the advent of digital communication platforms, ensuring the security of this data is critical. Encryption, secure communication channels, and stringent access controls are essential to safeguard sensitive information.

In complex legal-technical disputes, where technical blueprints, software code, or trade secrets may be discussed, data privacy gains even more prominence. Confidentiality clauses in agreements between the parties and mediators/arbitrators are vital to underscore the commitment to safeguarding the disclosed information. Additionally, selecting platforms that comply with data protection regulations, such as the General Data Protection Regulation (GDPR) in Europe, is crucial in international disputes.

Confidentiality Concerns:

Confidentiality within ADR pertains to the non-disclosure of information shared during proceedings. The assurance that sensitive discussions and documents will remain confidential encourages parties to engage openly, ultimately leading to more productive negotiations and effective resolutions. This is particularly significant in complex legal-technical disputes, where proprietary technological information and trade secrets may be at stake.

Confidentiality agreements between parties, mediators, and arbitrators play a central role in establishing the scope and boundaries of confidentiality. These agreements often dictate how information can be used post-resolution and outline the consequences of breaches. Technical aspects, such as secure communication channels and restricted document access, further bolster confidentiality measures.

However, balancing data privacy and confidentiality with the transparency required for a fair dispute resolution process can be challenging. Transparency ensures that all parties can access relevant information, enabling them to make informed decisions. Striking the right balance involves setting clear expectations,

communicating confidentiality measures, and obtaining consent from parties to use specific communication channels or data-sharing methods.

Data privacy and confidentiality concerns represent critical considerations in applying ADR to complex legal-technical issues. As technology continues to evolve, ensuring the security of sensitive information and the integrity of the process remains paramount. By implementing robust data protection measures, confidentiality agreements, and transparent communication channels, ADR practitioners can create an environment that fosters trust, promotes productive discussions, and upholds the privacy rights of the parties involved.[37]

7 Conclusion, Future Trends and Adaptations

In the ever-evolving landscape of the digital age, Alternative Dispute Resolution (ADR) emerges as a beacon of adaptability and efficacy in resolving the intricate web of complex legal-technical issues that arise within cyberspace, particularly in the realms of online commerce and intellectual property. As the proliferation of e-commerce reshapes global trade, and the dissemination of digital content becomes ubiquitous, the need for a dispute resolution mechanism that can adeptly navigate the challenges presented by this dynamic environment becomes increasingly evident.

The convergence of law and technology in the digital realm demands a multifaceted approach beyond traditional litigation's rigid confines. ADR methods offer the flexibility required to address cross-border transactions, copyright infringements, trademark disputes, and the complexities of digital piracy. The synergy between legal insight and technical expertise within ADR mechanisms ensures that resolutions are not only legally sound but also technologically informed, a vital factor in an era where legal-technical disputes are inextricably linked.

Online commerce, driven by its borderless nature, encounters jurisdictional hurdles that can quickly escalate into intricate conflicts. ADR's capacity to transcend geographical boundaries offers a compelling solution, fostering efficient resolutions and preserving cross-border business relationships. In the intellectual property domain, where digital assets are susceptible to unauthorized use and replication, ADR mechanisms like arbitration and mediation can seamlessly integrate legal and technical insights to yield outcomes that reflect the intricacies of digital content disputes.

[37] Katsh, 2004.

The successful application of ADR in cyberspace also requires addressing challenges such as data privacy, enforceability across jurisdictions, and integrating technical experts into the resolution process. By effectively navigating these challenges, ADR emerges as a transformative force that aligns with the demands of the digital age. Its role in promoting collaboration, efficiency, and equitable outcomes underscores its suitability in resolving the complex legal-technical issues arising in the dynamic spheres of online commerce and intellectual property within cyberspace.

The proliferation of e-commerce and the digital dissemination of intellectual property signal a profound transformation in the modern landscape. Alternative Dispute Resolution stands as an adaptable and effective mechanism for addressing the intricate challenges presented by this transformation. By offering a harmonious fusion of legal principles and technical understanding, ADR not only fosters fair and swift resolutions but also navigates the intricate crossroads of law and technology, ensuring that the digital era's disputes are met with solutions that are both forward-thinking and just. The integration of artificial intelligence (AI) and automation into Alternative Dispute Resolution (ADR) processes represents a paradigm shift that holds the potential to revolutionize the way conflicts are resolved in today's digital landscape. As technology continues to evolve, adopting AI and automation in ADR offers the promise of enhanced efficiency, objectivity, and accessibility while addressing the complexities of modern disputes. AI's data analysis capabilities can significantly streamline the initial stages of dispute resolution. During case assessment, AI algorithms can swiftly analyze vast amounts of information to identify patterns, relevant legal precedents, and potential solutions. This not only expedites the process but also equips parties and neutrals with comprehensive insights into the strengths and weaknesses of their positions, fostering informed decision-making from the outset.

In mediation, AI-powered tools can facilitate communication and negotiation between parties. Chatbots and virtual assistants can engage parties in real-time discussions, clarify misunderstandings, and guide them through potential solutions. These tools offer an accessible and impartial medium for parties to express their concerns and preferences, helping to level the playing field and mitigate power imbalances. Arbitration benefits from AI's ability to process and analyze vast amounts of evidence. Automated tools can assess the credibility of witnesses, evaluate technical documentation, and even predict potential outcomes based on historical data. This augmentation of arbitrator decision-making ensures that resolutions are not only legally sound but also grounded in an extensive review of relevant information. Ensuring that AI algorithms are unbiased and ethically sound requires vigilant oversight to prevent unintended discrimination or perpetuation

of existing biases. Transparency in how AI processes function is essential to maintaining the trust of parties, arbitrators, and mediators. Furthermore, preserving the personal touch that ADR often provides particularly in mediation requires a delicate balance between automation and human intervention.

The incorporation of AI and automation into ADR processes has the potential to redefine how disputes are approached and resolved in the digital era. By leveraging data analysis, communication enhancement, and evidence evaluation, AI bolsters efficiency and objectivity while still preserving the essence of ADR—facilitating productive discussions and fair outcomes. Striking the right balance between technology and human involvement will be pivotal in harnessing the transformative power of AI to reshape the landscape of Alternative Dispute Resolution.

The concept of blockchain technology, with its decentralized and secure nature, holds the potential to revolutionize Alternative Dispute Resolution (ADR) processes, particularly in the context of complex legal-technical disputes. As a transparent and tamper-proof digital ledger, blockchain can enhance the efficiency, transparency, and trustworthiness of ADR mechanisms, addressing challenges such as evidentiary integrity, enforceability, and data security. One of the significant advantages of blockchain in ADR is its ability to ensure the authenticity and immutability of evidence. In disputes involving technical intricacies, such as intellectual property conflicts or contract breaches, blockchain can securely record relevant data, documents, and timestamps. This creates a transparent audit trail that parties, mediators, arbitrators, and courts can access. This ensures that evidence presented during ADR proceedings cannot be tampered with or manipulated, enhancing the credibility of the process. Smart contracts, a core feature of blockchain, can automate and enforce certain aspects of ADR agreements. In settlement agreements, for instance, smart contracts can automatically trigger payments or other actions once predefined conditions are met. This reduces the need for manual intervention and enhances the efficiency of implementing resolutions, particularly in complex disputes involving multiple parties and intricate conditions.

Also, blockchain technology addresses the challenge of enforceability across jurisdictions. With blockchain's immutable records and cryptographic signatures, parties can establish credible evidence of agreements reached during ADR processes. This aids in enforcing decisions and awards, especially in scenarios where cross-border recognition may be a concern. Additionally, blockchain's decentralized nature can mitigate the reliance on centralized authorities for authentication, thereby reducing bureaucracy and expediting cross-border enforcement.

Ensuring the privacy of sensitive information within blockchain transactions is essential, especially in cases where confidentiality is paramount. While blockchain enhances data security, its implementation must adhere to data protection regulations such as GDPR to safeguard personal and confidential information. Additionally, educating stakeholders parties, neutrals, and legal professionals about blockchain's mechanisms and benefits is crucial to ensure its successful adoption. Blockchain technology potentially transform the landscape of Alternative Dispute Resolution, particularly in addressing the intricate challenges posed by complex legal-technical disputes. By enhancing evidentiary integrity, automating enforcement, and facilitating cross-border enforceability, blockchain offers a transparent and secure foundation that can augment the efficiency and credibility of ADR processes. While challenges and considerations persist, blockchain integration represents a promising step toward a more innovative and practical approach to resolving disputes in the digital age.

The integration of Alternative Dispute Resolution (ADR) into the realm of complex legal-technical issues arising in cyberspace, particularly within the contexts of online commerce and intellectual property, presents a multitude of implications and opportunities. To navigate these challenges effectively and capitalize on the benefits, specific recommendations emerge-

Implications:

Efficiency and Accessibility: ADR offers a more time-efficient and accessible approach to resolving complex disputes, aligning with the fast-paced nature of the digital era.

Customized Resolutions: The flexibility of ADR allows for tailored solutions that consider legal principles and technical intricacies, ensuring that resolutions are holistic and comprehensive.

Preserving Relationships: Collaboration and open communication promoted by ADR methods can help maintain business relationships, which is essential in the interconnected world of online commerce.

Global Recognition: ADR's adaptability to cross-border disputes contributes to its worldwide recognition and reinforces its potential for addressing jurisdictional challenges.

Informed Decisions: By incorporating technical experts, ADR ensures that decisions are well-informed and grounded in both legal and technological realities.

Recommendations:

- Education and Awareness: Stakeholders in the digital realm, including businesses and legal professionals, should be educated about the

benefits of ADR in addressing complex legal-technical issues. This awareness will encourage its adoption and integration into dispute-resolution strategies.

- Technical Expertise: Incorporating technical experts as neutrals, advisors, or consultants in ADR processes is essential to address the nuances of technology-driven disputes accurately. Establishing criteria for their selection and role is pivotal.

  Data Privacy and Security: Implement robust data protection measures when employing ADR in cyberspace disputes. Ensure secure communication channels, comply with data privacy regulations, and prioritize the confidentiality of sensitive information.
- Enforceability and Compliance: Parties should include provisions in ADR agreements specifying the recognition and enforceability of outcomes across jurisdictions. Engage legal experts to ensure that resolutions align with international conventions and local laws.

  Hybrid Approaches: Consider hybrid approaches that combine ADR with online dispute resolution (ODR) platforms, leveraging technology to facilitate communication, evidence submission, and real-time discussions.
- Regulatory Alignment: Collaborate with legal and regulatory bodies to ensure that ADR mechanisms align with emerging laws and standards related to e-commerce, data protection, and intellectual property.
- Continuous Learning: ADR practitioners and professionals should engage in ongoing learning and training to stay updated on the latest technological advancements and their implications for dispute resolution.

The embracing of ADR for resolving complex legal-technical issues arising in cyberspace offers numerous benefits, ranging from efficiency and accessibility to tailored solutions. By raising awareness, incorporating technical expertise, ensuring data privacy, and aligning with legal regulations, the implications of ADR can be maximized while addressing the unique challenges of the digital era. This integration ultimately fosters equitable, efficient, and informed resolutions that align with the demands of the modern world.

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O Instituto da Mediação sob a Perspectiva do Direito Comparado – Brasil x China e as Contribuições e Diferenciações do Modelo Chinês do Brasil

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Resumo: O presente artigo objetiva fazer estudo comparado dos institutos autocompositivos no Brasil e na China, em relação aos métodos de resolução de conflitos, e apontar os pontos que inspiraram as culturas ocidentais. Como objetivo específico, pretende-se analisar quais pontos de inspiração do direito chinês ao direito brasileiro e o que difere em nosso ordenamento para aquele, no tocante às resoluções de conflitos. A justificativa está na influência do direito chinês nas culturas ocidentais e, por sua vez, nos institutos jurídicos brasileiros quanto aos métodos de resolução de conflitos. Para tanto utilizou-se a metodologia qualitativa, eminentemente comparatista, por meio de pesquisa bibliográfica e estudo analítico da literatura disponível e atual sobre o tema, em sintonia com as posições doutrinárias mais sólidas possíveis, dentro de uma perspectiva lógica e fundamentada. Por essa razão, por meio desta pesquisa busca-se responder os seguintes questionamentos: o que o modelo de direito chinês pode ensinar ao modelo de direito brasileiro? A legislação e a sociedade brasileira estão

preparadas para esta mudança de padrão? Após o estudo, conclui que a perspectiva posta pelo direito chinês foi correlacionada como base de inspiração e contraponto no direito brasileiro, referenciando e estimulando a positivação em nosso ordenamento de métodos de resolução de conflitos. Difere-se, no entanto, o direito brasileiro do direito chinês, visto que na China não existe a obrigação que um arcabouço jurídico venha aguilhoar o diálogo entre os indivíduos conflitantes, enquanto no Brasil, país positivista, o instituto só começou a ser difundido após edição de legislação própria.

Palavras-chave: Direito comparado. Mediação. Métodos autocompositivos. Direito brasileiro. Direito chinês.

Sumario: **1** Introdução – **2** O Modelo de Direito Chinês – **3** A Legislação Brasileira e o Panorama da Mediação – **4** A Mediação Regulamentária: o que os Chineses Podem Ensinar aos Brasileiros? – **5** Considerações Finais – Referências

1 Introdução

O instituto da mediação, apesar de estar presente nas pesquisas acadêmicas e doutrina há um tempo considerável, é muito novo quando se trata da admissão jurisdicional – o que acontece efetivamente apenas após a publicação do Código de Processo Civil de 2015. Por essa razão, o desencadeamento de inúmeras interrogações em relação à concretização em ambiente do processo de conhecimento judicial – a conhecida possibilidade de "mediação intrajurisdicional" (REGLA, 2015[1]) –, quer seja pela evidente dissensão de elaboração de uma alocução alinhada à cultura do litígio jurisdicional, ou pela clarividente falta de capacitação profissional dos operadores do direito para atuarem nessa maneira de composição de controvérsia.[2]

De certo modo, o conceito de transportar a mediação para o interior de um processo de conhecimento judicial assente que se verifique nem tanto a carência de administrar-se de maneira apropriada a quantidade de processos que esperam uma estabelecida conclusão jurídica – o que, de fato, verte-se como uma consequência provável pela maneira adequada de composição de controvérsias –, entretanto, o foco primordial seja a modificação do prisma em relação à visão de afrontamento de extrema burocratização ou de "excessiva rigidez" (REGLA, 2015[3]) concedida à resolução de controvérsias que alcançam o Poder Judiciário.

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[1] REGLA, Josep Aguiló. *El arte de La mediación.* Madrid: Trotta, 2015, p. 104.

[2] Sobre a relevância das cláusulas híbridas e escalonadas vide: FERREIRA, Ana B. C. P. Cláusulas escalonadas: repercussões da mediação na arbitragem. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 3, n. 6, p. 21-36, 2021. Veja também: FERREIRA, Daniel B.; GIOVANNINI, Cristiane J. As cláusulas multi-etapas e híbridas de solução de conflitos como solução para tempos de incertezas: algumas experiências do direito comparado. *Revista Eletrônica de Direito do Centro Universitário Newton Paiva,* n. 42, p. 366-376, 2020 e SEVERO, Luciana. Importância, funcionalidades e relação das cláusulas escalonadas na mediação e arbitragem. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 2, n. 4, p. 67-82.

[3] REGLA, Josep Aguiló. *El arte de La mediación.* Madrid: Trotta, 2015, p. 56.

O ponto é que se originando de conjecturas tão diversas em questões de argumentos, mencionar uma fusão entre mediação e processo judicial reporta a certo revés metodológico – e ainda filosófico – de apreender-se a probabilidade de se aprimorar, concomitantemente, linguagens diversas de procura de resoluções pelo combate de controvérsias com consequências judiciais.

Desse lugar surge a inquietação de se diligenciar, em prisma comparado, com culturas jurídicas diferentes da brasileira, de maneira a se alcançar elementos necessários – e, provavelmente, aptos para atuar com focos dispares acerca dos métodos de autocomposição de controvérsias de litígios – para o entendimento de procedimentos hodiernamente adotados e que albergam o trabalho atual das cortes de julgamento. A pertinência do estudo comparatista assiste, exatamente, na inquietação de ter uma compreensão mais aprimorada da nova realidade, na expectativa iminente de se alcançar a efetiva aplicação dos direitos na sociedade.

Em se tratando de debater, destarte, em relação a um método de autocomposição de conflitos, a escolha nesta pesquisa, concentra-se na arguição de métodos de resolução de demandas contíguo a culturas bastante diversas que apensam, em sua ordenação de constituição, técnicas e ferramentas de enfrentamento de controvérsias por vieses não apenas jurídicas, contudo, aquinhoada pela tradição cultural de determinada sociedade.

Nesse caminho científico que será percorrido, objetiva-se realizar um estudo comparado dos institutos autocompositivos no Brasil e na China, analisando a cultura e disposições legais frente aos métodos de resolução de conflitos autocompositivos existentes na China, apontando as influências e inspirações na cultura consensual brasileira atual. Especificamente, objetiva-se analisar quais pontos de inspiração do direito chinês ao direito brasileiro e o que difere em nosso ordenamento para aquele, no tocante às resoluções de conflitos.

Quanto à metodologia a ser utilizada, será qualitativa, eminentemente comparatista, realizada por meio de pesquisa bibliográfica e estudo analítico da literatura disponível e atual sobre o tema, em sintonia com as posições doutrinárias mais sólidas possíveis, dentro de uma perspectiva lógica e fundamentada.

Por meio desta pesquisa busca-se responder os seguintes problemas de pesquisa: o que o modelo de direito chinês pode ensinar ao modelo de direito brasileiro? A legislação e a sociedade brasileira estão preparadas para essa mudança de padrão?

Dessa forma, opta-se pelo aprofundamento no estudo comparado à cultura legislativa e jurisdicional chinesa, lugar onde a regulação através das leis distancia-se dos ensinamentos do filósofo Confúcio (século V a.C.). Para os chineses, é dever de cada indivíduo responsabilizar-se por solucionar seus conflitos por meio de uma convicção moral extrajurídica e não apenas baseada na legalidade.

É a ética inerente a esta sociedade que induz o cotidiano, sendo de responsabilidade de cada um a resolução por suas controvérsias. Algo bastante distinto do que acontece no Brasil, em que até mesmo as possibilidades de mediação ocorrem por meio de uma terceira pessoa, e é a esta confiada autoridade para conduzir o processo ou procedimento de conhecimento amplo deste conflito.

Entretanto, existem panoramas de mudança. Inicialmente, através da edição da Resolução nº 125 do Conselho Nacional de Justiça (CNJ), em 29 de novembro de 2010, e depois pela publicação da Lei Federal nº 13.140/15, conhecida como "Marco Legal da Mediação", e finalmente, pela efetivação do novo Código de Processo Civil (Lei Federal nº 13.105/15), em que há conferido e expressivo destaque ao instituto da mediação. O foco do presente artigo, portanto, é por meio da perspectiva comparatista, investigar nas raízes culturais chinesas e no seu enfoque extrajurídico informações capazes de induzir o intérprete brasileiro a encontrar a assertiva e adequada composição das controvérsias que apresentem consequências também na seara jurídica.

2 O Modelo de Direito Chinês

Primeiramente, para se entender a ordem social concatenada às tradições chinesas, existe a necessidade de se inteirar das informações históricas deste país, que se manteve longe de influências estrangeiras – e, primordialmente, de uma colonização de tradições ocidentais – até o século XIX.

Esse entendimento tem como pressuposto, inobstante uma compreensão teleológica, uma proximidade filosófica das tradições culturais da sociedade chinesa, que está alicerçada em uma interação natural entre os homens, o céu e a terra. Em um contexto filosófico, seria a busca por uma resposta naturalística – algo bastante próximo a ideia de um direito natural habitual da tradição ocidental clássica – que permite a identificação de uma ordem cósmica, que seja capaz de arregimentar os fenômenos naturais e diferir, tais normas invariáveis, das regras postas pelos homens, livres por seu estado de seres autônomos, e nessa mesma dose, responsáveis pela organização ou pela desorganização do mundo (DAVID, 2002).[4]

Na herança cultural chinesa, o equilíbrio entre a natureza e o homem e entre os congêneres é o que possibilita a felicidade. Para que esse equilíbrio entre os homens seja possível, a ideia de conciliação e consonância é a que deve predominar. A lide, as deliberações por maioria, ou mesmo a concepção de autoridade e de imposição apartam a autonomia de assimilação que deve predominar nas relações. Persuasão e sugestões validadas pelos indivíduos

[4] DAVID, René. *Os grandes sistemas do direito contemporâneo*. Tradução Hermínio A. Carvalho. 4. ed. São Paulo: Martins Fontes, 2002, p. 78.

presentes no processo jurídico encaminham o Direito a uma chamada "função menor". O objetivo é de que os sujeitos consigam desfrutar de uma perfeita liberdade para decidir, sem que precisem submeter a terceiros o que lhe é entregue.

Quando, de certa maneira, distancia-se da sociedade o comando da legislação expressa, os costumes encerram por cumprir um papel primordial na ordem da conduta assertiva a ser adotada pelos indivíduos. Conforme preceitua Wolkmer:[5]

> Toda a cultura tem um aspecto normativo, cabendo-lhe delimitar a existencialidade de padrões, regras e valores que institucionalizam os modelos de conduta. Cada sociedade esforça-se para assegurar uma determinada ordem social, instrumentalizando normas de regulamentação essenciais, capazes de atuar como sistema eficaz de controle social. Constata-se que, na maioria das sociedades remotas, a lei é considerada parte nuclear do controle social, elemento material para prevenir, remediar ou castigar os desvios das regras prescritas. A lei expressa a presença de um direito ordenado na tradição e nas práticas costumeiras que mantêm a coesão do grupo social. (WOLKMER, 2012)

Por ter em seu nascimento os ensinamentos supramencionados, os rituais adotados pelos costumes manifestam as influências do Confucionismo na China.

Com um foco generalizador e imaterial, os princípios de Confúcio objetivam a harmonia das relações sociais. A maioria massiva da população chinesa é adepta dessa forma de educação, denominada *Li*, maneira esta que define quais são as regras de decência e convivência social. Um conceito primordial, que fundamenta esse ensinamento é a honra do homem chinês, que julga ser humilhante ter que levar suas questões sociais a julgamento, preferindo o consenso e a mediação entre as partes, determinando que só após o fracasso de se chegar a um acordo é que o cidadão poderia acionar o poder judiciário (CAVALCANTI, 2009).[6]

Em igual sentido, a família, como centro cultural de pequena abrangência, reproduz-se como o núcleo organizado para que o "comandante" do clã admita os critérios cabíveis para conduzir as decisões de seus componentes, impedindo decisões arbitrárias.

Em um tipo de avizinhação secundário da Moral e do Direito, são os fundamentos morais chineses que devem conduzir, em um primeiro momento, as deliberações. Uma índole preventiva deve ser assumida antes de qualquer intenção de condenação; o esclarecimento deveria ser anterior a uma ordem e, assim,

[5] WOLKMER, Antônio Carlos. O direito nas sociedades primitivas. *In: Fundamentos da História do Direito.* 7. ed. Belo Horizonte: Del Rey, 2012, p. 106.

[6] CAVALCANTI, Fernanda Daniele Resende. *Mediação Interdisciplinar e sua integração com o Poder Judiciário de Pernambuco.* Dissertação (Mestrado). Universidade Católica de Pernambuco, Recife, 2009.

sucessivamente. A sociedade ordenada dessa maneira possibilita que a comunidade chinesa viva, historicamente, sem que seja necessário o desenvolvimento de rituais jurídicos peculiares, inclusive para que haja o exercício de atividades profissionais específicas dos operadores do Direito.

A partir disso, tem-se o porquê se encontra na história do desenvolvimento da atuação profissional de advogados, comumente chamados como "homens da lei", a ocorrência de serem consultados em reuniões sigilosas, porque produziriam uma função considerada menor ou que tende a nortear relações entre os incapacitados de exercer de forma plena sua autonomia (DAVID, 2002).[7] Continuando sob esse prisma, o Direito não está fora da sociedade, entretanto é considerado "bom para os bárbaros" (DAVID, 2002),[8] servindo para os que não possuem compromisso com a moral e a sociedade.

Ainda a esse respeito, Rodrigues Junior relata que na China de Confúcio, "(...) a justiça era administrada segundo o li, que significava um ideal de comportamento entre todos os homens. Contudo, se tal regra fosse quebrada, evitava o processo por entenderem ser desonroso" (RODRIGUES, 2006, p. 64 *apud* CAVALCANTI, 2009, p. 15).[9]

É importante destacar que é uma disciplina de conduta que deve ser aplicada aos estrangeiros que não fazem parte da civilização chinesa e que, dessa forma, não compõem os fundamentos morais que influenciam as tomadas de decisões.

Apesar da passagem do tempo e da ascensão de distintas dinastias, a forma de resolução de controvérsias continua seguindo a influência de Confúcio, o que garante aos chineses outras maneiras de buscar a justiça, sendo influenciados sumariamente pelos costumes. Do ponto de vista histórico político, é primordial mencionar que nem mesmo a China comunista foi influenciada pelo princípio da legalidade, ainda que detectadas circunstâncias rígidas de restrições das liberdades dos indivíduos.

O sustentáculo da sociedade nunca deixou de ser a educação cívica e a formação moral da população, ainda que passível de crítica os objetivos políticos intentados com a formação de certos regimes políticos em concreto. Se existe atualmente uma proximidade com a organização do sistema jurídico chinês a uma vivência mais ocidental, isso acontece, principalmente, por haver uma específica necessidade de se manter as relações econômicas com os Estados de fundamento ocidental. Comparativamente à mediação, pode-se declarar que esta tem, de maneira bastante relevante, seu nascedouro no direito chinês. É através

[7] DAVID, René. *Os grandes sistemas do direito contemporâneo*. Tradução Hermínio A. Carvalho. 4. ed. São Paulo: Martins Fontes, 2002, p. 89.

[8] *Idem* ref. 9.

[9] CAVALCANTI, Fernanda Daniele Resende. *Mediação Interdisciplinar e sua integração com o Poder Judiciário de Pernambuco.* Dissertação (Mestrado). Universidade Católica de Pernambuco, Recife, 2009.

do incentivo ao diálogo entre as partes de um processo de conhecimento pela mediação que a administração dos conflitos é oportunizada.

Inicialmente, a imagem do mediador seria o correspondente ao comandante da família, responsável por ajudar as partes inseridas na controvérsia a alcançar o consenso. A oralidade e a intuição são elementos essenciais e muito presentes nessa atividade de harmonia, que terminam sendo repassados entre as gerações (FAGÚNDEZ, 2019).[10]

É importante ressaltar que, nos dias atuais, dentro do território chinês, há mais de duzentas mil *comissões populares de mediação*, o que é um reflexo da influência dos ensinamentos do passado mesmo na atualidade, ainda que haja evidência de uma provável situação política e ideológica diversa. Tal amplitude na utilização da metodologia autocompositiva concede uma compreensão de que a inserção do diálogo em variados ambientes – quer seja em âmbito profissional, ou privado (familiar, pessoal ou educacional) – está presente na rotina da sociedade como maneira de prevenir e gerir controvérsias. Algo que, para o entendimento dos chineses, não simboliza problemas, mas é inerente à vida (FAGÚNDEZ, 2019).[11]

É bastante provável que se perceba na maneira de gerir conflitos no Estado Chinês ainda influências taoístas, na forma em que embasada no entendimento de que a vida de relacionamentos é constituída por situações de ganhos e perdas, partindo da recognição de situações de opostos em sociedade. Os bons costumes e a legislação (LI e FA, hodiernamente) manifestam a polarização do entendimento. De acordo com o que preceitua Fagundéz:

> Para os taoistas, nada é absolutamente yin ou yang. De acordo com a filosofia taoista, tudo no universo é yin ou yang, sendo que um se transmuta em outro permanentemente. Yin está contido em yang e yang faz parte do yin, Um elemento não existe sem o outro. A ideia de complementaridade dos interesses em jogo está sempre presente. (FAGUNDÉZ, 2019)[12]

Hoje em dia, a aplicação chinesa na capacitação de profissionais da advocacia está bem mais delineada por motivações intrínsecas ao mercado econômico internacional e pelas consequências da globalização na economia daquele território do que por quaisquer outras intenções de crescimento de uma organização independente de um sistema de resolução de controvérsias. Sendo esta ideia, ainda que hipotética, bastante perigosa.

[10] FAGUNDEZ, Paulo Roney Ávila. Reflexões sobre a história do direito chinês. *In:* WOLKMER, Antônio Carlos (org.). *Fundamentos da História do Direito*. 10 ed. Belo Horizonte: Editora Del Rey, 2019, p. 79.

[11] *Idem* ref. 12.

[12] *Idem* ref. 12.

A inexistência de uma organização jurídica eficiente à incitação litigante de controvérsias possibilita, em uma outra forma, desviar-se do próprio acesso à concretização de justiça pela reclamação a todo indivíduo – o que, de certa forma, coíbe a prova crítica quanto ao exercício de direitos gerais de igualdade e liberdade por quaisquer cidadãos em uma sociedade.

Neste lugar, entretanto, o foco que se entrega é em relação à parte positiva dessa ausência de organização partindo de uma tradição cultural autêntica da comunidade chinesa quando se trata de consenso, e não a questão político-ideológica que é possível de ser retirada dos contratempos que impossibilitam o acesso à justiça formal. Por essa razão o enfoque que é ofertado ao que é possível constatar na doutrina profissional:

> Com grande paciência, procura-se levar os cidadãos a reconhecerem os seus erros e a corrigirem-se, quer se trata de questões civis ou penais. Aquele que incorrer em erro não é conduzido até os juízes: as próprias pessoas de seu meio, discutindo com ele e manifestando a sua reprovação, reconduzem-no ao bom caminho. Os processos são raros; eles apenas intervêm contra os inimigos do povo, os incorrigíveis e os depravados. (...) O direito é o último remédio para os casos em que os outros modos de solução dos litígios tenham excepcionalmente falhado. (DAVID, 2002)[13]

Através dessa perspectiva histórica é possível entender-se, de certa maneira, os incentivos culturais chineses para o entendimento de uma possibilidade interpretativa muito específica à cultura da mediação e, essencialmente, partindo de uma inquietação com o conceito de consenso e de autonomia da vontade das partes em solucionar seus próprios conflitos.

Neste ponto, importa ressaltar que à medida que a China evoluiu de seu passado antigo até os dias atuais, as expectativas de mediação foram ampliadas. A China moderna passou a entender a mediação também como um mecanismo eficaz de resolução de disputas comerciais e está adaptando a tradição da mediação às necessidades do comércio, normas sociais e sistemas políticos modernos.

Em 1948, a mediação aparece no cenário legislativo da China, após a ascensão do Partido Comunista Chinês (PCC) ao poder. Estes compreendiam que com a determinação da força, poder e coação, não seria possível predominar a pacificação nas relações sociais, e que esta só se daria através de persuasão

[13] DAVID, René. *Os grandes sistemas do direito contemporâneo*. Tradução Hermínio A. Carvalho. 4. ed. São Paulo: Martins Fontes, 2002, p. 115.

moral e negociações firmadas por meio de acordos, sendo tal teoria confirmada apenas após a tomada do governo por esse partido. Nesse sentido:[14]

> As mediações, judicial e extrajudicial, tornaram-se o modo privilegiado de resoluções dos conflitos na China maoísta. Em 1954, o regime instaurou comitês populares de mediação, os quais ficaram subordinados aos governos e aos grupos populares locais. (PIQUET, 2012)

Conforme preceitua Souza (2015), apesar de tudo foi somente a partir do ano de 1978, com o advento de uma nova constituição chinesa é que o movimento legislativo chinês toma novo fôlego, e surgem legislações que tutelam o instituto da mediação. Atualmente, o sistema mediador chinês é composto pelas mediações judicial, popular e administrativa. Todas as mediações mencionadas se referem às atividades de superação de divergências e resolução de disputas, através da educação e persuasão, de acordo com o princípio da participação voluntária e em conformidade com as leis e políticas do Estado.

No que tange a questão da mediação judicial, de acordo com Souza, (2015) esta decorre como "uma tramitação processual no decurso do conhecimento da causa, é presidida pelos tribunais populares para os processos civis, comerciais e os casos penais leves (quando o procedimento penal depende de acusação particular). Trata-se de uma mediação realizada ao longo do contencioso".

No que diz respeito a mediação popular, Souza, (2015[15]) afirma que:

> (...) esta é de caráter privado e não contencioso, sendo presidida pelas organizações mediadoras das massas nas tentativas de resolução das controvérsias civis (disputas de vizinhança) em geral. Mesmo que não tenha força obrigatória, a mediação popular constitui a forma de intervenção social mais ampla e em relação à qual se verifica maior utilização.

Já a mediação administrativa, não contenciosa e sem a força obrigatória, refere-se à mediação realizada pelos órgãos administrativos de base nas disputas de vizinhança ou pelos órgãos administrativos encarregados da mediação em determinadas disputas civis e econômicas de acordo com uma disposição legal (SOUZA, 2015).[16]

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[14] PIQUET, Hélène. A mediação popular na China: acesso à justiça ou harmonia imposta?. *Meritum,* Belo Horizonte, v. 7, n. 2, p. 141-180. Disponível em: http://www.fumec.br/revistas/meritum/article/download/1600/1001. Acesso em: 20 jan. 2021, p. 19.

[15] SOUZA, Luciane Moessa de. *Mediação de conflitos*: novo paradigma de acesso à justiça. 2. ed. Santa Cruz do Sul: Essere nel Mondo, 2015, p. 43.

[16] *Idem* ref. 17.

As principais leis que regem os procedimentos de mediação na República Popular da China são o Código de Processo Civil, datado de abril de 1991, que traz a importante alteração feita em 2012, onde estipula que o tribunal pode, com base na aplicação das partes, tomar uma decisão para confirmar a validade do acordo de liquidação, para que este possa ser executado pelo tribunal, e a Lei de Mediação Popular da China, que entrou em vigor em 1º de janeiro de 2011, tendo como foco geral a profissionalização do sistema jurídico no que concerne ao instituto autocompositivo e a orientação para que as partes litigantes buscassem os tribunais para resolver seus conflitos, trazendo assim maior segurança jurídica aos acordos firmados (PIQUET, 2012).[17]

Conforme o disposto na lei de mediação popular da China, os acordos presididos pelas partes não são passíveis de recurso, no entanto, um acordo de mediação que é concluído fora do tribunal não é definitivo, a menos que este tenha sido homologado pelo tribunal chinês, entretanto, este movimento ainda é um grande desafio para o sistema judiciário chinês, pois os chineses entendem que não é interessante – e é parcamente aceito, esta é a verdade – que um indivíduo que nada tem a ver com a demanda interfira e conduza a resolução de uma controvérsia de forma extrínseca, o que de acordo com a cultura local poderia trazer certa desarmonia às relações e este é um ponto bastante sensível e importante da cultura social chinesa, conforme afirma a doutrina:

> Na filosofia tradicional chinesa, uma palavra-chave é a "harmonia". Segundo a cultura chinesa de grande harmonia, que é uma filosofia que procura o comum e mantém o diferente, não só é necessária uma harmonia entre os homens e a natureza, mas também uma harmonia entre os homens no sentido de procurar o consenso através da conciliação, educação, persuasão e evitar a sanção e a coerção. (SOUZA, 2015)[18]

De acordo com o pensamento coletivo chinês, solucionar seus próprios problemas é parte do dia a dia – uma atividade fundamental –, sendo de competência de cada pessoa apresentar a potencialidade e aptidão suficientes para pacificação das situações conflituosas ocorridas em sociedade.

Em razão da reforma econômica e da abertura do mercado chinês ao exterior, a sociedade chinesa se encontra em um período de transição, o que requer que uma nova estratégia de desenvolvimento seja defendida para que, desta feita, haja a possibilidade de se inaugurar uma sociedade harmoniosa, mesmo diante das adversidades e transformações socioeconômicas pelas quais o país vem

[17] *Idem* ref. 16, p. 92.
[18] *Idem* ref. 17, p. 36.

passando nas últimas décadas, onde a mediação pode ser uma importante ferramenta no processo de construção dessa nova realidade, para que dessa forma haja uma adequação sustentável às novas realidades e que estas não prejudiquem a coesão social milenar chinesa.

3 A Legislação Brasileira e o Panorama da Mediação

A Carta Magna Federal de 1988 buscou majorar o princípio do acesso à justiça, principalmente pelos preceitos contidos no artigo 5º, XXXV.[19]

> Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:
>
> XXXV – a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito;

Em igual sentido, ocorreram grandes inovações legislativas para possibilitar o acesso ao Poder Judiciário a um número maior de pessoas (SARLET, 2018).[20] Nessa esteira, o objetivo da publicação da Lei dos Juizados Especiais (Lei Federal nº 9099/95), que possibilita o acesso dos litigantes, por composição, a solucionar seus conflitos ainda que desprovidos de assessoramento por advogados. Situação esta que abarca tanto a proposta de litígios judiciais, quanto à própria presença em audiência e elaboração de contestação e instrução dentro do processo.

Essas garantias constitucionais – postas dessa forma – acabaram por estimular a cultura do litígio, o que consequentemente encerrou por abarrotar o Poder Judiciário de demandas repetitivas – e tantas outras únicas – que transitam pelas instituições cartorárias sem uma palpável e definitiva resolução em um prazo de tempo adequado.

É neste panorama, e ainda por conta dele, que em 2010, nasce a regulamentação que dá um ponta pé inicial efetivo na legislação que promove e delineia a mediação judicial no Brasil. Através da edição da Resolução nº 125 do Conselho Nacional de Justiça (CNJ), em novembro daquele ano, inicia-se um movimento para viabilizar a solução das controvérsias judiciais por meio de métodos autocompositivos, disseminando o objetivo da mediação e maneira como os Centros

[19] BRASIL. Constituição (1988). *Constituição da República Federativa do Brasil*. Brasília, DF: Senado, 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm. Acesso em: 18 dez. 2020.

[20] SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*: uma teoria geral dos direitos fundamentais na perspectiva constitucional. 13. ed. rev. atual. e ampl. Porto Alegre: Livraria do Advogado, 2018, p. 88.

Judiciários de Solução de Conflitos e Cidadania (CEJUSCs) deveriam funcionar dentro da organização do Poder Judiciário.

Aos poucos, a mobilidade em razão da autocomposição dos conflitos ganha aderência e, como política pública que é desde seu nascimento, alastra-se pelos Estados federativos. Pouco menos de 5 anos, são editadas e publicadas em sequência duas novas leis. Sendo a primeira delas a Lei Federal nº 13.105/15, que traz nova letra ao Código de Processo Civil, inaugurando no procedimento judicial o rito – de certa forma obrigatório – da mediação; e a segunda lei, comumente chamada de "marco legal da mediação" – Lei Federal nº 13.140/15 – exibe um minucioso esboço da função dos mediadores judiciais e extrajudiciais, estatuindo ainda os princípios e os processos aplicáveis ao instituto autocompositivo de controvérsias.

Com a publicação da Resolução nº 125 do Conselho Nacional de Justiça (CNJ), é possível observar a introdução da utilização regular dos métodos autocompositivos na sociedade nacional, demarcando a opção de resolução de controvérsias até mesmo em âmbito extraprocessual. Essas situações são possíveis somente por meio da qualificação dos servidores do Poder Judiciário e de profissionais que operem como facilitadores do diálogo entre as partes envolvidas no conflito entregue ao jurídico (SQUADRI, 2015).[21]

É importante ressaltar que os mediadores podem ser profissionais de variadas especialidades, e não somente os especialistas em área jurídica. Entretanto, o profissional deverá ter ferramentas que o possibilitem realizar uma negociação cooperativa e auxiliar na comunicação, com conhecimento básico sobre semiótica e linguística. Há a imposição intrínseca ao desempenho da atividade de mediador ter o conhecimento adequado em área de Psicologia, para que este esteja apto para lidar com as questões mais delicadas que ocorrem na audiência ou sessão de mediação, de maneira que vá desenvolver uma qualificação suficiente para a realização da gestão de controvérsias e observância dos conceitos sociológicos (VEZZULA, 1999).[22]

Coadunando com o pensamento de Dora Rocha Awad (2020),[23] é certo que a profissionalização da mediação está diretamente relacionada com a formação e capacitação de quem atua nesse sistema. Quanto mais sólida a formação do mediador e mais especializado no instituto da meditação, maior será a bagagem

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[21] SQUADRI, Ana Carolina. MUNIZ, Joaquim de Paiva; VERÇOSA, Fabiane; PANTOJA, Fernanda Medina; e ALMEIDA, Diogo de Assumpção Rezende de (coord.). *In: Arbitragem e Mediação Temas Controvertidos*. Disponível em: http://webapp3.pucrs.br/bcwebapps/Redirect?app=MBB&ISBN=978-85-309-5911-1. Acesso em: 15 dez. 2020.

[22] VEZZULLA, Juan Carlos. *A mediação. O mediador. A justiça e outros conceitos*. São Paulo: LTR. 1999, p. 51.

[23] AWAD, Dora R. Mediação de conflitos no Brasil: atividade ou profissão? *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 2, n. 4, p. 57-65, 2020.

trazida para as partes quanto à condução das ferramentas e do restabelecimento da comunicação entre as partes, que é o objetivo macro do sistema autocompositivo.

A regulamentação acerca da formação desses profissionais ficou a cargo do CPC e do CNJ – Conselho Nacional de Justiça. O Código de Processo Civil apenas dispõe acerca da exigência de curso a ser realizado por entidade credenciada, conforme parâmetros do CNJ. Este último, por sua vez, prevê um conteúdo mínimo fundamental nesses cursos, bem como estabelece mínimo de horas para a capacitação dos mediadores, sendo 40 horas teóricas e 60 horas práticas cumpridas via estágio supervisionado.

No entanto, em crítica a essa regulamentação, doutrinadores já apontam que tais critérios não são suficientes para comprovar que o mediador estará apto a conduzir a situação das partes. É o que aponta Dora Rocha Awad (2020)[24] quando afirma que:

> Porém, a capacitação, mesmo cumprindo a carga horária e os parâmetros curriculares pré-estabelecidos, não garante que o mediador estará apto, ao final, a conduzir uma mediação. A supervisão do estágio nem sempre é feita de maneira adequada e, não há acompanhamento sobre os procedimentos realizados nesta etapa tão importante da formação do mediador.

É certo que mediadores experientes e capacitados são capazes de conduzir as partes à solução dos conflitos,[25] enquanto uma mediação mal conduzida pode aumentar a espiral de conflito negativo vivenciada pelos mediandos. Por essa razão, e ainda considerando que o instituto da mediação no Brasil é tido como recente, pois sua positivação como fase obrigatória processual só teve regulamentação em 2015, o Brasil engatinha nos métodos consensuais de dissolução de conflitos e ainda temos uma justiça altamente contenciosa, como veremos adiante, de forma estatisticamente comprovada.

Em igual sentido, é preciso dizer que a mediação não possuirá caráter impositivo, conforme preceitua o novo Código de Processo Civil, pois se fosse dessa forma, haveria um desvio do objetivo principal dos meios autocompositivos. Para que se alcance o propósito dessa política pública, é primordial que todas as partes – chamados de mediandos, no panorama do instituto da mediação – concordem com a ocorrência da audiência, pois é uma maneira voluntária de agilizar

[24] *Idem* ref. 25,p. 59.

[25] Sobre mediação em ambientes educacionais, vide: FARIAS, Bianca O. Mediação de conflitos em ambientes educacionais: um horizonte com novas perspectivas. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 2, n. 3, p. 157- 194, 2020.

e possibilitar as partes envolvidas naquele litigio que resolvam seus conflitos ou controvérsias (CAHALI, 2018).[26]

Faz-se importante mencionar que o modelo de mediação aplicado no território nacional brasileiro[27] sofreu grandes influências da mediação argentina, que de igual maneira teve como inspiração o modelo da escola de negociação de Harvard, onde o enfoque principal para a resolução da controvérsia baseia-se na negociação que vem do estímulo da conversa entre as partes (TARTUCE, 2019).[28]

No decorrer da audiência de mediação, a metodologia aplicada pelos mediadores deverá encorajar a conversa entre as partes, pois são estes os protagonistas desse ato. O acompanhamento do advogado, em sessões extrajudiciais, não é obrigatório, pois o princípio é de que seja desenvolvida a autonomia das partes que estão em lide e não destacar quem tem maior arcabouço legislativo ou possui melhores ferramentas e técnicas argumentativas em âmbito jurídico.

Em razão do princípio da confidencialidade tudo o que é dito durante a sessão pelos mediandos não poderá ser utilizado como prova ou certificação de quaisquer documentos ou declarações, além de não ser possível a juntada de documentos por total desnecessidade. A escuta ativa e a fala não violenta intercaladas, a voluntariedade e o entendimento evidente de que a cultura do "ganha-ganha" seja a melhor opção possibilitam o esclarecimento das situações conflituosas entre as partes, que, caso queriam, poderão resolver ou modificar suas controvérsias interpessoais (VASCONCELOS, 2018).[29]

O foco do instituto da mediação, portanto, é distanciar as pessoas daquela preconcepção de que é tarefa apenas do Estado, por meio do Poder Judiciário, interpretar e declarar o direito que pode ou deve ser aplicado ao caso em concreto, presumindo-se a capacidade de cada um, que, de maneira independente, busque e alcance a resolução da sua controvérsia. Sob esse olhar, a mediação começa a ser entendida como um instituto jurídico extremamente relevante e igualmente importante em um ambiente intersubjetivo.

Nesse sentido,

> Para falar de mediação é preciso introduzir uma teoria do conflito mais psicológica que jurídica. No momento que os juristas falam de conflito, o reduzem à figura do litígio, o que não é o mesmo. Quando se decide judicialmente, por meio de um litígio se consideram normativamente

[26] CAHALI, Francisco José. *Curso de Arbitragem*. 7. ed. São Paulo: Revista dos Tribunais, 2018, p. 104.

[27] Sobre mediação coletiva no Brasil vide FERREIRA, Daniel B.; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A case analysis from Brazil. *BRICS Law Journal*, v. VIII, n. 3, p. 5-29, 2021. DOI: https://doi.org/10.21684/2412-2343-2021-8-3-5-29.

[28] TARTUCE, Fernanda. *Mediação nos conflitos civis.* 5. ed. São Paulo: Método, 2019, p. 62.

[29] VASCONCELOS, Carlos Eduardo de. Resolução Adequada de Disputas (RAD): introdução e capacitação. *In: Mediação de conflitos e práticas restaurativas*. 6. ed. São Paulo: Método, 2018, p. 33.

> os efeitos; deste modo, o conflito pode ficar cristalizado, retornando agravado em qualquer momento futuro. Os juristas quando intervém em um conflito, apelam ao imaginário jurídico, que eu denomino de sentido comum teórico do Direito. (WARAT, 2001)[30]

Existe, partindo de tal entendimento, a perspectiva de que o conflito também, em uma visão subjetiva, auxilie para que aconteça um desenvolvimento progressivo individual desses indivíduos, com consequências mais permanentes à construção de laços sociais. Conforme vemos no excerto abaixo:

> Os juristas nunca pensam o conflito em termos de insatisfação emocional ou de sentimento. Falta no Direito uma teoria do conflito, que nos mostre como o conflito pode ser entendido como uma forma de produção, com o outro (...). O conflito como uma forma de inclusão do outro na produção do novo: o conflito como autoridade que permite administrar com o outro (diferente) para produzir a diferença. (WARAT, 2001)

Tal modificação na maneira de assimilação da abrangência do fenômeno jurídico, através da normatização da mediação em território brasileiro, denota a carência de se questionar as controvérsias encaminhadas ao Poder Judiciário, e ainda a atual interpretação do artigo supramencionado no que diz respeito ao que quer dizer o acesso à justiça, justiça esta que atualmente não é capaz de dar efetiva resposta a todo o seu arcabouço processual. Nesse sentido,

> Assinala-se que a crise que se abate sobre o arcabouço jurídico tradicional está perfeitamente em sintonia com o esgotamento e as mudanças que atravessam os modelos vigentes nas ciências humanas. Adverte-se que as verdades metafísicas e racionais que sustentaram durante séculos as formas de saber e de racionalidade dominantes, não mais mediatizam as inquietações e as necessidades do presente estágio da modernidade liberal-burguês-capitalista. [...] abrindo espaço para se repensar padrões alternativos de referência e legitimação. (WOLKMER, 2015)[31]

Em certa maneira, isso seria o suficiente para atender a perspectiva igualmente subjetiva de englobar a ideia de autonomia da vontade, o que possibilita à pessoa perceber no desenvolvimento de uma liberdade o exercício intersubjetivo que tem que ser pressuposto. Impediria, como salienta Francisco Amaral dos

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[30] WARAT, Luís Alberto. A mediação e a teoria do conflito. *Scientia iuris*. Londrina, v. 5. 2001, p. 77.

[31] WOLKMER, Antônio Carlos. O direito nas sociedades primitivas. *In: Fundamentos da História do Direito*. 7 ed. Belo Horizonte: Del Rey, 2012, p. 76.

Santos Neto, que encerrasse por entender a autonomia somente por uma estabelecida ótica de confrontamento.

> Por muitos considerado como sinônimo de autonomia da vontade, com ela, a meu ver, não se confunde, pois, a expressão "autonomia da vontade" tem uma conotação subjetiva, psicológica, enquanto "autonomia privada" significa o poder particular de criar relações jurídicas de que se participa. Assim, é o poder que nós, particulares, temos, de regular juridicamente as nossas relações, dando-lhes conteúdo e eficácia juridicamente reconhecidos. (SANTOS NETO, 2006)[32]

A dificuldade, portanto, está em intentar não tirar as características do instituto da mediação ao longo do tempo, primordialmente pela falta de conhecimento técnico que engloba o meio proposto. Muito mais em Estados, como o Brasil, em que a implementação desse método se dá de forma inconvincente e morosa, por ser um país com uma cultura litigante bastante proeminente e arraigada.

4 A Mediação Regulamentária: o que os Chineses Podem Ensinar aos Brasileiros?

Um dos pontos relevantes ao se tratar da temática da mediação é conhecer se, com fundamento em princípios de autonomia, confidencialidade, empoderamento e busca do consenso, será possível observar a real implementação do método da mediação no ordenamento jurídico nacional.

Existe a possibilidade de inserir na mentalidade litigante da sociedade brasileira de que há, ainda que em ambiente judicial, uma forma própria a ação de tomar decisões de maneira capaz, para, observando o princípio da autonomia, solucionar seus próprios conflitos? Até que ponto o desenvolvimento desse método, através de seu exercício efetivo, será o resultado de uma autocomposição derivada da mediação?

Da perspectiva da normativa chinesa,[33] como supramencionado, percebe-se que o ponto fundamental para o sucesso nas conciliações resultantes da mediação pode ser delegado aos conhecimentos cívicos que são passados de geração para geração, percebendo-se um enfoque central na ética intrínseca ao relacionamento entre os sujeitos daquela sociedade. Na China, ter que se socorrer ao Poder Judiciário, ao direito positivo, exatamente o oposto do que ocorre no Brasil, demonstra o "desmoronamento da ordem social e de uma falta de harmonia entre

[32] SANTOS NETO, Francisco Amaral dos. Autonomia Privada. *Revista CJF*, n. 5, artigo 5. Disponível em: www.cjf.gov.br/revista/numero9/artigo5.htm. Acesso em: 05 dez. 2020.

[33] Como comparativo sobre a mediação na Palestina vide: SHAAT, Haia. Mediation in Palestine. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 2, n. 3, p. 231-249, 2020.

o Estado e a sociedade", (ARNAUD, 1999[34]) inaceitáveis por questões culturais transgeracionais daquele povo.

Em território brasileiro, o Conselho Nacional de Justiça (CNJ), como já visto, com fundamento na cultura oriental, edita a Resolução nº 125, que inaugura no cenário nacional uma verdadeira revolução jurídica, que decorre da necessidade de estimular, apoiar e difundir a sistematização e o aprimoramento das práticas autocompositivas para a resolução de conflitos, tanto em âmbito judicial, quanto extrajudicial, e assim como na China moderna, o holofote judicial aponta para as personagens que desempenham a função de interpretar – dos advogados aos magistrados – e a quem se entrega, em grande parte, a obrigação e o direito de manifestação no processo em lugar dos reais interessados na controvérsia – aqui denominados partes.

Como preceitua Arnaud, em território chinês, as controvérsias que podem ser resolvidas através da mediação se dão por meio de relações intersubjetivas que são expressas por seus próprios atores, assim como o alcance da proposta das resoluções no caso em concreto, o que a partir dessa transformação legislativa tem ocorrido com crescimento gradual no Brasil.

Inicialmente, na China é sempre distante e quase inaceitável a ideia de um julgamento por um terceiro alheio ao conflito, sendo bastante importante para o indivíduo que ele consiga desenvolver capacidade suficiente, para, por si só, resolver as demandas conflituosas e reestabelecer as relações rompidas (ARNAUD, 1999[35]), entretanto, no Brasil, a definição que se tem da mediação, nesse processo de aculturação, é de um procedimento de criação e repartição do vínculo social e de regramento dos conflitos da vida cotidiana no qual um terceiro imparcial e independente, por meio da organização de trocas entre pessoas ou instituições, tenta ajudá-los a melhorar uma relação ou regular um conflito que as opõe, e é a partir dessa distinção, sintetizada, que se pode dizer, em linguagem binária, que de alguma forma há julgamento, portanto, a exclusão até mesmo quando se renuncia a um direito que se acredita ter, ocorrendo dentro do procedimento de mediação, no entanto, a dinâmica de comunicação é de inclusão, e não julgamento.

Decorre dessa dinâmica o cuidado de estruturar os índices que englobam o infortúnio da litigância no sistema judiciário brasileiro – estimulado pelo próprio direito positivo – dando evidências de que as mudanças propostas beneficiarão o sistema judiciário nacional, conforme expresso pelo Conselho Nacional de Justiça (CNJ), de maneira que reflita a realidade de sentenças no Brasil no ano de 2022.

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[34] ARNAUD, André-Jean. *Dicionário Enciclopédico de Teoria e de Sociologia do Direito*. 2. ed. Rio de Janeiro: Renovar, 1999, p. 63.

[35] *Idem* ref. 31, p. 69

Figura 01 – Estatísticas do Poder Judiciário – CNJ/2022

Fonte: Disponível em https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/.

É possível observar que em abril/2022 tem-se no judiciário mais de 76 milhões de ações tramitando, e que o quantitativo de entradas de ações (8.718.527 ações) é maior do que a capacidade de julgamentos e saídas do mesmo período (8.078.438 e 8.389.183, respectivamente). Com base nos números constantes na figura acima, fica evidente o caráter demandante da sociedade brasileira e o alerta de que alguma atitude distinta precisa ser tomada para resolver essas demandas, pois a probabilidade de que os processos judiciais não sejam analisados de forma adequada torna-se bastante provável considerando o número de ações e a quantidade de juízes e servidores disponíveis para atender toda essa demanda.

Importante ressaltar que no relatório de 2022 do CNJ – *Justiça em números*, dedicou-se um capítulo especial ao índice de conciliação no país, onde vê-se a preocupação do judiciário em aumentar e estimular as práticas autocompositivas, através do investimento e criação de novos CEJUSCs para atendimento da demanda nacional. No relatório[36] consta que:

> Na Justiça Estadual, havia, ao final do ano de 2021, um total de 1.476 CEJUSCs instalados. A Figura 140 indica o número de CEJUSCs em cada Tribunal de Justiça. Esse número tem crescido ano após ano. Em 2014, eram 362 CEJUSCs, em 2015 a estrutura cresceu em 80,7% e avançou para 654 centros. Em 2016, o número de unidades aumentou para 808, em 2017 para 982 e em 2018 para 1.088.

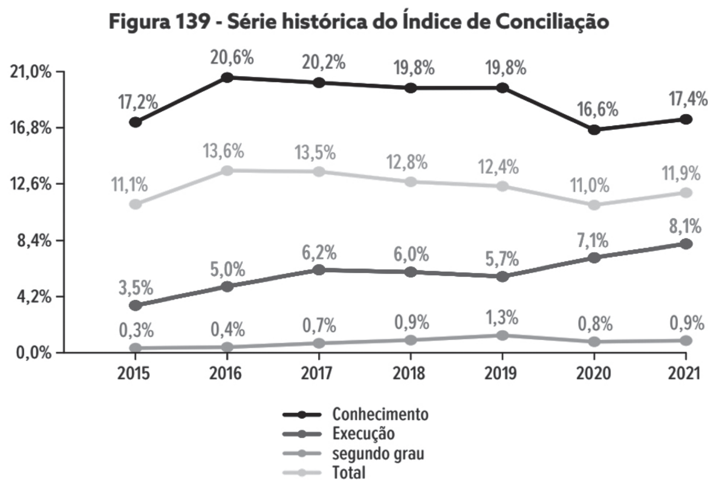
[36] BRASIL. Conselho Nacional de Justiça. *Justiça em números 2022*. Disponível em: https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/. Acesso em: 08 dez. 2022.

No entanto, apesar disso, o próprio relatório conclui que de março/2016, quando da entrada em vigor do Novo Código de Processo Civil, tornando obrigatória a realização da audiência de conciliação ou mediação como fase processual inaugural do processo, até 30/04/2022 – data da conclusão do relatório –, os índices de conciliação cresceram apenas 4,2%, conforme descreve trecho do relatório abaixo citado:

> Há de se destacar que, mesmo com o novo Código de Processo Civil (CPC), que entrou em vigor em março de 2016 e tornou obrigatória a realização de audiência prévia de conciliação e mediação, em quatro anos o número de sentenças homologatórias de acordo cresceu em apenas 4,2%, passando de 2.987.623 sentenças homologatórias de acordo no ano de 2015 para 3.114.462 em 2021. Em relação ao ano anterior, houve aumento de 539.898 sentenças homologatórias de acordo (21%). A redução vista em 2020, com a retomada gradativa em 2021, possivelmente decorre da pandemia da covid-19, que pode ter dificultado a realização de procedimento de conciliação e mediação presenciais ou das técnicas usuais de construção de confiança e espírito de cooperação entre as partes processuais empregadas em audiências presenciais.

O baixo índice evolutivo entre 2020 e 2021 encontra-se devidamente justificado com a pandemia da covid-19, que dificultou a realização dos procedimentos presenciais e a construção da confiança e cooperação entre as partes processuais. Os dados acima citados ficam claros na figura comparativa disponibilizada pelo CNJ referente ao índice de acordos dos exercícios:

Figura 02 – Índices de Conciliação CNJ/2022



Fonte: Disponível em https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/.

Isso demonstra que a imposição legal não é capaz de aumentar os índices de acordos, caso os profissionais e todos os atores que estão envolvidos no procedimento (mediadores, advogados, partes, auxiliares de justiça) não forem capacitados e comprometidos com a comunicação das partes.

Assim, é fato que não será apenas o reajuste da legislação processual ou do Poder Judiciário que irão solucionar a questão da quantidade exorbitante de processos judiciais, inclusive, as remodelações feitas no Poder Judiciário são constantes no Brasil, reside aqui a iminente necessidade de aprendizagem social a exemplo da cultura oriental chinesa, onde impera o pensamento ternário, de que as formas de resolução de controvérsias são múltiplas, ou seja, não há que se falar apenas em via judicial (litigiosa), e que incluir um terceiro imparcial em seus conflitos, conforme ocorre na mediação, e incumbi-lhe da tarefa de auxiliá-los a autocompor seus diálogos deve ser considerado como um caminho possível e bastante eficiente na resolução efetiva de seus conflitos.

Nos anos de 1832 e 1841 foram empreendidas modificações vinculadas à função desenvolvida pelo magistrado como interpretador da legislação. Já no ano de 1871, suas competências são majoradas, frente à adesão ao rito sumaríssimo, com aspectos que oferecem um processo de sentenciamento mais simples e um tanto quanto informal, o que acaba por acelerar a efetivação dos direitos dos demandantes (WOLMER, 2015).[37]

Situação similar pode ser observada em processos simplificados. Exemplo disso é a maneira como a resolução de controvérsias é proposta pelos Juizados Especiais, mesmo que a resolução autocompositiva seja baseada na presença de um terceiro – imparcial à lide – que auxilia as partes a resolverem seu(s) conflito(s).

A mediação aparece como uma salvaguarda da autonomia da vontade das partes envolvidas em um litígio jurídico, e não há que se admitir que seja posta como apenas mais uma forma de desafogar o Sistema Judicial brasileiro. Entretanto, o que pode ser salientado, pois denota a imposição de certa preocupação em relação a esta situação, é que no Brasil houve a necessidade da publicação de uma lei para que os indivíduos inseridos em um contexto de conflito jurídico pudessem dialogar e realizar efetiva tentativa de resolverem por si só suas controvérsias.

Em outras palavras, encerra-se por ter um reconhecimento de que há a necessidade de ingressar com uma ação judicial, para que pela via litigiosa seja concedida, por conta da demora em ter uma sentença definitiva, a oportunidade dos próprios indivíduos resolverem seus conflitos – e não somente com o objetivo

[37] WOLKMER, Antônio Carlos. O direito nas sociedades primitivas. *In: Fundamentos da História do Direito*. 7 ed. Belo Horizonte: Del Rey, 2012, p. 62.

de reestabelecer o diálogo e a comunicação entre as partes, mas com a intenção de tornar permanente o resultado da discussão que pode/deve ser conduzida pelas partes para a resolução de sua controvérsia.

Frente a essa perspectiva, é primordial a identificação, tal como em Hannah Arendt (1959), da necessidade de que sejam contextualizados os imbróglios sociais, de maneira que não ocorra uma excessiva interferência do Estado no ambiente do orbe social, entretanto que a própria sociedade esteja pronta para receber as transições de foco que são extremamente imperativas para que a convivência social se dê de maneira isonômica e constante.

> Em nenhuma circunstância exporia meu filho a condições que dariam a impressão de querer forçar a sua entrada nem grupo em que não é desejado. Psicologicamente, a situação de não ser desejado (uma situação embaraçosa tipicamente social) é mais difícil de suportar do que a franca perseguição (uma situação política embaraçosa) porque o orgulho pessoal está envolvido. (...) Além do mais, se fosse negra, sentiria que a própria tentativa de começar a dessegregação na educação e nas escolas não tinha apenas deslocado, e muito injustamente, a carga de responsabilidade dos ombros dos adultos para os das crianças. Estaria também convencida de que há em todo o empreendimento uma implicação de tentar evitar a questão real. (ARENDT, 1959)[38]

Aproximando a situação do método de mediação, o que se pode questionar é em relação à real necessidade de incluir-se o instituto da mediação dentro do processo judicial. Este ato não apenas banaliza todos os princípios e conceitos inerentes ao método, mas é extremamente jocoso, ao se observar que na verdade essa possibilidade é um desserviço à sociedade, no sentido de que o processo é um ato litigioso e a mediação é totalmente o inverso disso, entretanto, para que o indivíduo tenha acesso à Mediação, ele, em tese, deve acessar o judiciário pela via litigiosa. Existe algo de contraditório nesta situação, algo que banaliza o instituto da Mediação e, por esta razão, não faz o menor sentido.

Observe o seguinte questionamento: Quando o autor alega em seu pedido inicial ter real interesse em participar de uma audiência de mediação e junto, no mesmo documento, desde já, inclui neste todos os elementos necessários para um embate litigante, não encerra por justamente aflorar os ânimos para uma disputa litigiosa? Caso esse questionamento seja real, por meio da nova ordem legislativa – por não fazer sentido aos operadores do Direito essa situação tão antagônica –, pode estar ocorrendo na verdade um efeito inverso do que tenha

[38] ARENDT, Hannah. *Reflections on little rock*. Disponível em: http://learningspaces.org/forgotten/little_rock1.pdf . Acesso em 16 dez. 2020.

sido a intenção do legislador, ou seja, um movimento de afastamento da cultura de pacificação social, quando se trata de estimular a participação ativa dos conflitantes na resolução de suas controvérsias.

Outra questão relevante é que não é possível observar-se a real e efetiva aplicação do princípio da autonomia da vontade das partes, visto que o novo Código de Processo Civil traz o instituto da Mediação como uma prática quase que obrigatória, e, portanto, não há um real estímulo a prática desse princípio.

O desafio reside, sem sombra de dúvidas no futuro, no sentido de que para que se consiga uma implementação concreta partindo de técnicas do conhecimento suficientes a guia de conciliações entre os sujeitos, o que possibilitará a estes o protagonismo do resultado final de sua contenda. E isso sem que seja menosprezada a importância e relevância dos outros sujeitos jurídicos, inclusive do Mediador.

Entretanto, isso só será possível por meio de muito trabalho, esforço em educar a população e os operadores do Direito – obviamente que aos segundos haverá a necessidade da realização de formações específicas e que estimulem a aderência e a publicidade a esse método – e tempo, para que haja uma disposição abrangente de todos os sujeitos envolvidos, a uma abertura à conversa e ao entendimento de que podem ser acolhidas novas possibilidades diferentes da forma de resolução que ocorre no processo litigioso. Uma mudança de "mindset", a exemplo do que ocorre na sociedade chinesa, é a necessidade que se faz imperativa para que se reconheça uma eficaz e eficiente "arte da mediação" (REGLA, 2015).[39]

Dessa forma, vê-se que o Brasil tem muito a aprender e espelhar-se com a cultura pacificadora chinesa, a qual, embora tenha inspirado a positivação de nossos regramentos acerca da conciliação e mediação, ainda estamos culturalmente aquém dos chineses na capacidade de autocomposição e autorresolução de nossos conflitos, sem a interferência e chamamento do judiciário para tanto. Vê-se que a litigiosiodade brasileira está tão arraigada em nossa cultura que até para estimular a pacificação dos conflitos dispomos do judiciário e do processo judicial para chegarmos na conciliação ou mediação.

5 Considerações Finais

Este trabalho objetivou explicitar que o método da mediação aparece no ordenamento jurídico brasileiro como uma possibilidade, judicial e extrajudicial, para facilitar a prática deste meio de autocomposição nas demandas colocadas

[39] REGLA, Josep Aguiló. *El arte de La mediación.* Madrid: Trotta, 2015, p. 31.

em processo junto ao Poder Judiciário. Entretanto, não pode ser entendido o método da mediação como um salvador do processo litigioso, como se os Centros Judiciários de Solução de Conflitos (CEJUSCs) fossem uma versão mais participativa e com mais acesso dos gabinetes dos magistrados, com o objetivo de diminuir a quantidade excessiva e massacrante de trabalho que lhes atormenta.

A Resolução nº 125 do Conselho Nacional de Justiça (CNJ) aparece com o objetivo de ser uma política pública que demonstra a real e efetiva intenção do Poder público por meio do Poder Judiciário de difundir a prática da mediação e a função desenvolvida pelos mediadores, o que devolve a autonomia de eleição do resultado aos verdadeiros atores daquela controvérsia, os indivíduos conflitantes.

Diante desse cenário, a perspectiva posta pelo direito chinês foi correlacionada como base de inspiração e contraponto, visto que neste país oriental não existe a obrigação que um arcabouço jurídico venha aguilhoar o diálogo entre os indivíduos conflitantes. Pois desde os mais longínquos tempos, e já em seus primeiros registros, é possível constatar que os chineses utilizavam a conversa e a propositura de ideias, para que pudesse ser encontrada a melhor solução para todos os indivíduos participantes daquela situação.

Como restou constatado através dos relatórios do CNJ – Conselho Nacional de Justiça, apesar da legislação prever uma fase específica para estimular a autocomposição através da mediação e conciliação, os índices não mudaram muito ao longo dos anos, demonstrando que ainda estamos longe de termos uma cultura pacificadora e uma sociedade autocompositiva.

Assim, constata-se que o Brasil, apesar de ter seus regramentos inspirados na cultura chinesa, está culturalmente aquém daquela, que não depende do judiciário para autocomposição e resolução de seus conflitos, enquanto nossa cultura, apesar dos regramentos e positivação dos institutos em 2015, ainda chamamos o poder judiciário como intermediador, através de um processo judicial dotado de litigiosidade, para chegarmos à conciliação ou mediação, com a possibilidade de resolução de conflitos.

A observação que se faz, mesmo que passados 5 (cinco) anos da aplicação do novo Código de Processo Civil (CPC) com foco na mediação, é que não cabe que se perceba um desvirtuamento do instituto da mediação. A preocupação reside em relação à falta de profissionalismo dos operadores do Direito e à preocupante cultura do litígio na sociedade brasileira, em que os indivíduos não querem buscar uma solução para suas lides, pois isso demanda reflexão, esforço e tempo. Desta maneira, a total falta de cultura no desenvolvimento de habilidades e ferramentas para realizar a autocomposição de seus conflitos pode ser a principal barreira na implementação efetiva desse instituto como prática de resolução de controvérsias em solo nacional.

Algo certo é que tal implementação requererá tempo de trabalho conjunto e individualizado, para que haja um efetivo desenvolvimento de mentalidade por parte de todos os atores dessas relações e a aceitação de que existem formas diversas de litígio e até mais eficazes que para resolver conflitos.

The Institute Of Mediation Under The Perspective Of Law Comparated – Brazil x China And The Contributions And Differentiations Of The Chinese Brazilian Model

Abstract: This article aims at a comparative study of self-composition institutes in Brazil and China about conflict resolution methods and to point out the points that inspired Western cultures. As a specific objective, it intends to analyze which issues of inspiration from Chinese law to Brazilian law and what differs in our order for conflict resolution. The justification lies in the influence of Chinese law on Western cultures and, in turn, on Brazilian legal institutes regarding methods of conflict resolution. For that, a qualitative methodology was used, eminently comparative, through bibliographical research and analytical study of the available and current literature on the subject, in line with the most solid doctrinal positions possible, within a logical and reasoned perspective. For this reason, this research seeks to answer the following questions: What can the Chinese law model teach the Brazilian law model? Are the Brazilian legislation and society prepared for this change of standard? After the study, it concludes that the perspective posed by Chinese law was correlated as a basis of inspiration and counterpoint in Brazilian law, referencing and stimulating the confirmation of methods of conflict resolution. However, Brazilian law differs from Chinese law. In China, there is no obligation for a legal framework to spur dialogue between conflicting individuals, while in Brazil, a positivist country, the institute only began to be disseminated after the enactment of the correspondent legislation.

Keywords: Comparative law. Mediation. Auto-Compositive methods. Brazilian Law. Chinese Law.

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Legal Grounds and Ethical Conditions of Alternative Forms of Criminal Law Conflict Resolution in Russia

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Abstract: The article's primary purpose is to reveal the potential of alternative forms of resolution of criminal law conflict in Russia's criminal and criminal procedure legislation. The scientific approach of the authors consists of conducting a comprehensive comparative legal analysis of the norms of international acts and foreign legislation regulating conciliation procedures in criminal proceedings. The scientific novelty lies in the systematic analysis of changes in the humanization of criminal proceedings in all countries based on recommendations developed by the international community. The methodological basis of the study was a set of methods of scientific cognition, among which the dialectical method occupies a leading place, which allowed for identifying the grounds, conditions, essential features, signs and ethical foundations of alternative forms of resolving criminal law conflict. Combining scientific cognition methods in research creates prerequisites for an objective and comprehensive approach to the identified problems. Based on general scientific dialectical methods of analysis, synthesis, abstraction, and concretization, as well as private, scientific comparative legal and technical legal methods, the authors concluded the importance attached to conciliation procedures, which have become an integral part of the legal system of the vast majority of countries. The authors argue that the institution of compromise in criminal proceedings is the core of alternative forms of resolution of criminal conflict in Russia. The author's concept of the formation of ethical conditions for alternative forms of resolution of criminal law conflict is a system of application of various means and methods, which contributes to the simplification and cheapening of the criminal process. The authors argue that such a technique as a compromise allows for minimizing all possible material costs and, most importantly, effectively implementing the purpose of criminal proceedings to protect the victim's rights. The development concept aims to develop new approaches to organizing the activities of the investigative bodies and the court to conduct conciliation procedures, which should encourage the accused to exhibit positive behavior and contribute to its correction. The ethical basis of the procedural compromise consists of such features as the proof of the circumstances of the criminal act, the achievement of contractual truth by inducing the accused to active repentance and voluntary repayment

of the harm caused. The ethical conditions of alternative forms of resolving the criminal law conflict in Russia create a moral basis for a compromise solution and provide an atmosphere of social trust in society.

Keywords: Criminal Proceedings. Conciliation Procedures. Exemption from Criminal Liability. Termination of Criminal Prosecution. Reconciliation of the Parties. Active Repentance. Special Proceedings. Agreement with the Indictment. Procedural Compromise.

Summary: **1** Introduction – **2** Changing The Paradigm of Law Enforcement in Relation to Alternative Forms of Resolution of Criminal Law Conflict – **3** Substantiation of the Author's Concept on the Use of Alternative Forms of Resolution of Criminal Law Conflict – **4** Analysis of the Conditions for Achieving a Procedural Compromise as the Basis of an Alternative Form of Resolution of Criminal Law Conflict – **5** Conclusion – References

1 Introduction

Cardinal transformations in the economic, political and ideological spheres of Russian society at the turn of the 20th and 21st centuries required fundamental changes in the legal regulation of newly emerging social relations. For example, the transition to a market economy entailed the liberalization of economic legislation, and in this regard, the softening of the principle of publicity in the relationship between the state and entrepreneurs. During the judicial and legal reform in 1996, many acts previously considered criminal were decriminalized in the new Criminal Code of the Russian Federation.

The liberalization of the criminal law, the rethinking of the institution of criminal punishment gave rise to the search for alternative measures to resolve the criminal law conflict in Russia. Agreements at the international level, primarily within the framework of the Council of Europe, have become a catalyst for new forms of resolution of the criminal-legal conflict in Russia. The first international document changing the paradigm of criminal prosecution and the imposition of criminal punishment was the recommendation of the Committee of Ministers of the Council of Europe of June 28, 1985. About the position of the victim in the framework of criminal law and the process.[1] The developers of this international legal act focused on the maximum legal protection of the victim. In order to create favorable legal conditions for compensation of harm to the injured countries, it was recommended to abolish existing restrictions or technical obstacles that block the implementation of such an opportunity. The legislation of countries should provide for compensation for harm to the victim when imposing a criminal sentence, be an

[1] On the position of the victim in the framework of criminal law and procedure: Recommendations of the Committee of Ministers of the Council of Europe of June 28, 1985 // The Council of Europe and Russia: collection of documents. M., 2004.

addition to it or become its replacement. In all other cases, it was recommended to help the victim to obtain as much money as possible.

We associate the changes in international legislation regarding persons brought to criminal responsibility and the development of measures for alternative forms of resolving criminal law conflicts with the adoption of the United Nations Standard Minimum Rules for Non-Custodial Measures.[2] Paragraph 1.2 of the Rules proclaims the goal – to ensure more active participation of the public in the administration of justice in criminal cases, especially in the treatment of offenders, as well as to promote the development of offenders' sense of responsibility to society. Member States were encouraged to develop non-custodial measures within their legal systems to provide other opportunities to reduce imprisonment, rationalize policies in the field of social justice requirements, and return the offender to normal life in society. The Prosecutor and the investigating authorities are granted the right to release the offender from responsibility if, in their opinion, there is no need to initiate a case in order to protect society, prevent crime or ensure compliance with the law and the rights of victims (clause 5.1). These rules encourage the involvement of volunteers and other public opportunities to resolve criminal law conflicts to strengthen ties between offenders and society. Thus, these international regulations have opened the prospect for the signatory countries to form alternative forms of resolving criminal law conflicts.

At the initial stage of constructing alternative forms of resolving criminal law conflicts in Russia, there were serious ideological, political, and legal obstacles. One of the key problems that hindered the introduction of alternative forms before the adoption of new criminal procedure legislation in 2001 should be called the provisions of Article 20 of UPK (the Criminal Procedure Code) of the RSFSR (Russian Soviet Federative Socialist Republic)[3], according to which the establishment of objective truth was required in criminal proceedings. The doctrine of objective truth presupposed the mandatory referral of a criminal case to a court where there are appropriate conditions for examining evidence and establishing the truth. In the Soviet era, the achievement of objective truth was considered the sole and immutable goal of proof. Currently, the attitude to objective truth in criminal proceedings is somewhat different, the essence of which is to ensure that the court decision is justified by the evidence available in the case.

Another problem relates to the requirements of establishing the truth in Russia – the dominance of public interest over private. The commission of a

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[2] United Nations Standard Minimum Rules for Non-Custodial Measures [Tokyo Rules]. Adopted by General Assembly resolution 45/110 of December 14, 1990. URL: https://www.un.org/ru/documents/decl_conv/conventions/tokyo_rules.shtml.

[3] The Criminal Procedure Code of the RSFSR(Russian Soviet Federative Socialist Republic).

crime as a culpable socially dangerous act that encroaches on public relations protected by public law, and therefore the authority to resolve criminal law conflicts traditionally belongs to the State. The commission of a crime triggers a state-legal mechanism for the protection of public interest through the consideration of a criminal case in court with sentencing. Due to the requirements of the principle of publicity, the beginning of the criminal process, its movement and termination depends on the competent authorities acting on behalf of the State. In all cases of detection of signs of a crime, the criminal prosecution authorities are obliged to initiate a criminal case, comprehensively, fully and objectively investigate the crime, expose the perpetrators, regardless of whether the interested party asks them to do so.

The third problem we highlight is departmental public reporting for the number of criminal cases investigated and sent to court, as well as the number of cases considered in court. The quality of the work of officials of investigative bodies and judges is assessed by the ratio of the number of cases that have entered the proceedings with the number of cases sent to court, when any termination of criminal prosecution on non-rehabilitating grounds is a disadvantage in the work of the investigator or inquirer. The problem is to create an effective system of motivation of representatives of law enforcement and supervisory authorities in the implementation of the functions of reconciliation of conflicting parties.

There are problems of a general nature, for example, related to the growth of corruption when making decisions on the termination of criminal cases on a compromise basis. Many believe that freedom in making compromise decisions contains a potential threat of various corruption manifestations.

2 Changing the Paradigm of Law Enforcement in Relation to Alternative Forms of Resolution of Criminal Law Conflict

Despite the existing problems in Russia, a movement has begun towards increasing the number of decisions taken in the form of a criminal compromise. The appeal of international agreements and foreign legislation shows that there are 4 groups of alternative forms of jurisdictional socially positive impact on the criminal in addition to the traditional process of bringing the subject of the crime to criminal responsibility: warning, police fine (analogous to Article 76.1 of the Criminal Code of the Russian Federation), transaction and mediation. So, the resolution of conflicts in the field of criminal justice occurs in two main ways: by using traditional criminal procedural means – criminal prosecution and punishment, or by reaching a compromise between the parties. At the same time, the transaction is understood as the achievement of a procedural compromise agreement under the guidance

of officials conducting legal proceedings. Due to the absence of mediation in the Russian criminal procedure legislation, law enforcement practice is developing along the path of resolving conflicts in the field of criminal justice through a transaction, i.e., under the guidance of an investigator, an inquirer, a prosecutor, and a court. In this article we will focus on the analysis of the problems of legal grounds and ethical conditions of alternative forms of resolution of criminal law conflict in Russia in terms of achieving a procedural compromise, leaving out the warning and the police fine. At the same time, the main attention will be paid to the analysis of legal grounds, ethical requirements, means and methods of reaching a compromise to resolve the criminal conflict between the accused and the victim.

The theory of compromise served as the theoretical basis for the new paradigm of resolving criminal-legal conflict. By its own origin, the word "compromise" contains Latin origins, and is considered to be derived from "compromissum", which literally means "agreement based on mutual concessions".[4] As can be seen from the semantic explanation, the word "compromise" is used in those situations where the interacting parties are obliged to come to an agreement through mutual concessions in order to achieve mutually beneficial goals.

Considering the signs of compromise as such in the field of criminal law theory, the term "criminal law compromise" can be considered suitable for use, which is generally understood as a kind of agreement between the State, the victim and the person who committed the offense. Thus, modern compromise models of judicial proceedings are, first of all, a compromise of two principles – public and dispositive, the sphere in which they interact and mutually limit each other. The object of a criminal law compromise should be considered the amount of concession in the nature or scope of criminal liability measures that the State is ready to provide to a person whose behavior threatens, or damages public relations protected by criminal law, accepting the terms of the transaction. The object of a criminal law compromise may be a fixed amount of mitigation of criminal liability, or its elimination. Therefore, in the criminal law compromise, the state has a special role, which consists in initiating a concession that has legal significance and consequences, since it is the state that establishes the grounds and conditions of the compromise. The analysis of the norms of the Criminal Code of the Russian Federation makes it possible to identify 6 types of similar kind of concessions that have the significance of legal facts with which the criminal law connects the achievement of a compromise.[5]

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[4] Ozhegov S.I. Dictionary of the Russian language: about 60,000 words and phraseological expressions / Under the general editorship of prof. L.I. Skvortsov. 25th ed., ispr. and dop. - M.: Mir i obrazovanie, 2008.

[5] Criminal Code of the Russian Federation of 13.06.1996 N 63-FZ (Federal Law) (ed. of 04.08.2023)// Internet portal of legal information http://pravo.gov.ru 25.09.2023.

Russian criminal legislation establishes the following substantive grounds for compromise: exemption from criminal liability in connection with active repentance (Article 75 of the Criminal Code), exemption from criminal liability in connection with reconciliation with the victim (Article 76 of the Criminal Code), exemption from criminal liability in connection with compensation for damage (Article 76.1 of the Criminal Code), exemption from criminal liability with the imposition of a court fine (Article 76.1 of the Criminal Code). The listed norms of the criminal law establish the conditions for their application: a person who has committed a crime may be released from criminal liability if the crime was committed for the first time; of small or medium gravity; voluntarily turned himself in; contributed to the disclosure and investigation of this crime; compensated for damage or otherwise made amends.

The criminal procedural grounds for compromise are set out in the Code of Criminal Procedure of the Russian Federation:[6] termination of a criminal case in connection with reconciliation of the parties (Article 25 of the Code of Criminal Procedure); termination of a criminal case or criminal prosecution in connection with the appointment of a criminal law measure in the form of a court fine (Article 25.1 of the Code of Criminal Procedure); termination of criminal prosecution in connection with active repentance (Article 28 of the Code of Criminal Procedure); termination of criminal prosecution in connection with compensation for damage (Article 28.1 of the UPK (the Criminal Procedure Code)). A new basis for compromise is Clause 7 of Article 24 of the Code of Criminal Procedure of the Russian Federation, which provides for a criminal procedural basis for termination of a criminal case in case of payment in full of arrears and corresponding penalties, the amount of the fine in the manner and amount determined in accordance with the legislation of the Russian Federation on taxes and fees and (or) the legislation of the Russian Federation on compulsory social insurance against industrial accidents and occupational diseases.

The analysis of the criminal law and criminal procedure grounds and the conditions for their practical implementation once again raises the key question of whether persons who have committed crimes should be exempted from criminal liability without fail if the conditions specified in the criminal law are met or leave the decision of this issue to the discretion of law enforcement agencies. There has been a discussion on this issue in the legal literature for a long time. Without going into this discussion, we take the position that the exemption of a person from criminal liability is due, on the one hand, to the discretion of the procedural body on the basis of establishing objective data of the circumstances of the case

[6] Criminal Procedure Code of the Russian Federation of 18.12.2001 N 174-FZ(Federal Law) (ed. of 13.06.2023))// Internet portal of legal information http://pravo.gov.ru 25.09.2023.

characterizing the data of the individual, and on the other hand, the grounds and signs established by the current criminal law. Our position justifiably allows us to assert that law enforcement agencies have the right, not the obligation, to be released from criminal liability even if all the stipulated conditions are met. This is evidenced by the provisions of the law, which stipulate that a person "can be released".

The procedural procedure for resolving a criminal-legal conflict may occur at the stage of pre-trial proceedings upon termination of criminal prosecution and termination of a criminal case on non-rehabilitating grounds, as well as in court with the consent of the accused with the charge (Chapter 40 of the Code of Criminal Procedure of the Russian Federation), a special procedure for making a court decision when concluding a pre-trial cooperation agreement (Chapter 40.1 of the Code of Criminal Procedure of the Russian Federation).

Despite the existing criminal law and criminal procedure grounds for alternative forms of resolution of criminal law conflicts, in the law enforcement practice of Russia there continue to be obstacles to the implementation of compromise in criminal proceedings. The reasons for this are different, from the personal qualities of the accused, victims; officials conducting legal proceedings; interpretations of state-legal public interest. The authors of this study consistently advocate the expansion of the practice of criminal compromise, and in this regard, they outline the rationale for their position below.

3 Substantiation of the Author's Concept on the Use of Alternative Forms of Resolution of Criminal Law Conflict

The presentation of one's position should begin with the establishment of the goal-setting of the criminal law. Among the main goals for the protection of the rights of the individual protected by criminal law, other objects of criminal law protection from criminal encroachments, we single out the principle of the inevitability of punishment. The meaning of the principle of inevitability is that any person who has committed a crime is subject to punishment or other measures of criminal legal influence provided for by criminal law. Inevitability is the best way to prevent crimes, and the severity of punishment alone is not capable of stopping a criminal. When applying criminal legal influence, it is always important to remember that a more severe type of punishment from among those provided for a committed crime is imposed only if a less severe type of punishment will not be able to achieve the goals of punishment (Article 60 of the Criminal Code). This means that the Criminal Code of the Russian Federation is aimed at the humanization of punishment and provides for the use of more stringent criminal legal impact.

Minimizing the criminal legal impact is aimed at preserving the identity of the accused as an actively useful member of society. Therefore, the driving force of the criminal legal impact should be the stimulation of positive post-criminal behavior of the accused, the formation of lawful behavior and attitude to protected values in his mind, and this means encouraging him to realize his illegal behavior, which should be the beginning of correction.

In connection with the development of the theory of resolving criminal law conflicts in an alternative form, the criminal law principle of inevitability acquires a new sound. The classical principle of inevitability should be understood not as the inevitability of punishment, responsibility and not even condemnation, but the state response to the fact of the crime committed. Such a state response can also be implemented in reaching compromise solutions based on mutual concessions. A new look at the principle of inevitability should launch a mechanism to stimulate positive behavior of the offender in making conciliatory actions and decisions on his part. The accused is offered a choice in what form to build his relations with the state about the crime committed by him. Realizing his right of choice, the criminal repents and voluntarily agrees to compensation for harm. In addition to achieving the goals of the criminal law, when resolving a criminal law conflict by compromise, the goals of the criminal procedure law laid down in art. 6 of the UPK (the Criminal Procedure Code), because there is compensation for harm to victims.

So, if we take as a basis three basic conditions: the recognition of a crime as a criminal-legal conflict; the achievement of the goals of the inevitability of criminal-legal impact as a reaction of state law enforcement agencies to the offense committed and the achievement of the goals of the criminal procedure law through compensation for harm, then the conflict is important not so much to resolve as to manage the conflict.[7] At the same time, it is important not only to determine who is right and who is to blame, but it is also important to look for ways to further develop the situation and the interaction of the parties to the conflict. In this aspect, it is advisable to pay attention to such a legal document as the Decision of the Committee of Ministers of the Member States of the Council of Europe of September 17, 1987 on the approval of the “out-of-court settlement of criminal law disputes” (discretionary prosecution),[8] which fixes the basic idea that alternative measures to resolve a criminal law conflict are effective and legitimate replacement of the main traditional elements of the state’s reaction to the crime committed.

[7] Aryamov A. A. General theory of risk: legal, economic and psychological analysis. M. : Walter Kluwer, 2010. p. 200; Aryamov A. A. Economic and legal phenomenon “Risk”. Chelyabinsk: Lurie, 2007. p. 110.

[8] Recommendations of the Committee of Ministers of the Council of Europe N R (87) 18 of September 17, 1987 “On the simplification of criminal justice” // SPS “ConsultantPlus”.

4 Analysis of the Conditions for Achieving a Procedural Compromise as the Basis of an Alternative Form of Resolving a Criminal Law Conflict

To manage a criminal-legal conflict, it is important to create and ensure the conditions for its resolution. The rules for the application of alternative forms of solving a criminal law conflict can be systematized as follows. The first and initial condition for its achievement is legality. The terms of the compromise are not reached by the parties – they are established by law. These norms determine both the concessions that will be made to the accused when he performs positive post-criminal actions, and these actions themselves. Changes in the volume of concessions and the nature of actions by agreement of the parties are not allowed. The law, as it were, invites the parties to agree, under the circumstances, with the reasonableness of the conditions on which it proposes to resolve the conflict. If an agreement is reached, a compromise mechanism is used, if not, the case is considered in the usual procedural forms. Signs of the legality of a compromise solution are established in criminal procedures regulated by Articles 25, 25.1, 28, 28.1, paragraph 7 of Article 24 of the Code of Criminal Procedure of the Russian Federation, as well as Chapters 40 and 40.1 of the Code of Criminal Procedure of the Russian Federation. Compromise solutions apply only to crimes of small and medium gravity. No one will apply measures of alternative influence on the criminal to maniacs and murderers. Most of these measures require that they can be applied to persons convicted of crimes for the first time;

The most problematic, but also the most important condition of a criminal compromise is compensation for harm. The problem with this aspect lies in the fact that the accused often do not have money for damages. But ideally, the culprit should compensate the damage he caused to society (the state) and the victim. To solve the problem of the lack of money for damages, the legislator allows "to make amends for the harm caused by the crime in another way".

The next condition for reaching a compromise is the consent of the parties. Compromise is expressed in the reconciliation of the victim and the accused, with the consent of the preliminary investigation authorities or the court terminating the case. The consent of the victim is an integral part of restorative justice, and the opinion of the victim is decisive. In order to achieve these conditions in the form of compensation for harm and obtaining consent from the accused and the victim, mediation procedures[9] must be applied. Although the scope of this federal

[9] Federal Law "On Alternative Dispute Settlement Procedure with the Participation of an Intermediary (Mediation procedure)" dated 27.07.2010 No. 193-FZ (as amended Federal Law of 26.07.2019 N 197-FZ (Federal Law)).

law is aimed at applying the mediation procedure to disputes arising from civil, administrative, and other public legal relations, but it specifies the legal means and methods of reaching a compromise between the parties to the conflict. The main task of the mediator is the formation of motivation for voluntary compensation for harm caused by a crime. The mediation[10] method is characterized by the construction of flexible schemes that consider the interests of all conflicting parties, allowing them to get out of the traditional conflict deadlock. The more flexible the scheme is, the greater the variability of its implementation, the greater the chances of success in concluding a mediation conclusion. At the same time, the substitution of civil obligations for public-law criminal prosecution is actively used. In cases when the futility of further efforts to implement a mediation agreement becomes obvious, the procedure for this alternative form of resolving a criminal conflict is terminated and the potential of classical public prosecution is realized.

As recommended by the Committee of Ministers of the Council of Europe, mediation procedures include programs of negotiations for damages that exist solely in order to gain access to compensation or compensation to be paid by the offender to the victim, usually at the direction of the court, which includes provisions for damages in the court order.[11] The programs may include meetings between the parties, but more often separate, simpler and shorter negotiations with each party are held. The programs of negotiations on the issue of obtaining compensation do not concern reconciliation between the parties, but only the organization of obtaining material compensation. Which includes work programs in which criminals can earn money to pay compensation. Mediators should perform their duties impartially, with due respect for the dignity of the parties. In this capacity, mediators should ensure that the parties treat each other with respect and provide an opportunity for the parties to find an appropriate solution independently.[12]

Considering that mediation has no legal regulation in Russian criminal proceedings, and therefore it is necessary to use the transaction procedure, which

[10] For mediation in Palestine see SHAAT, Haia. Mediation in Palestine. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 3, p. 231-249, 2020. For mediation in Brazil see: FERREIRA, Daniel B.; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A case analysis from Brazil. BRICS Law Journal, v. VIII, n. 3, p. 5-29, 2021. DOI: https://doi.org/10.21684/2412-2343-2021-8-3-5-29. See also AWAD, Dora R. Mediação de conflitos no Brasil: atividade ou profissão? Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 4, p. 57-65, 2020; SEVERO, Luciana. Importância, funcionalidades e relação das cláusulas escalonadas na mediação e arbitragem. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 4, p. 67-82; FARIAS, Bianca O. Mediação de conflitos em ambientes educacionais: um horizonte com novas perspectivas. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 3, p. 157-194, 2020.

[11] Recommendations of the Committee of Ministers of the Council of Europe No. R (99) 19 of September 15, 1999 "On mediation in criminal cases" // SPS "ConsultantPlus".

[12] The basic principles of the application of restorative justice programs in criminal justice matters. (Economic and Social Council resolution 2002/12 of 24 July 2002, annex). URL: https://www.unodc.org/documents/justice-and-prison-reform/R_ebook.pdf.

by its nature has many features in common with judicial mediation: the functions of an intermediary between two conflicting parties are assigned to a representative of a law enforcement agency (investigator, inquirer, prosecutor). There is the same endowment of public prosecution bodies with conciliatory functions. But the idea of the identity of the transaction with judicial mediation seems superficial. The fact is that the court, despite the public-legal nature of this state body, by virtue of the principle of adversarial criminal proceedings, performs the function of an independent arbitrator. He does not belong to either the prosecution or the defense, he seems to be standing over the participants in the conflict. And just as he makes an independent jurisdictional decision (verdict or ruling), he can lead the parties to a mediation (amicable) agreement on the same positions of independence.

The investigator, the inquirer, and the prosecutor traditionally belong to the prosecution side in criminal proceedings; their functions are inherently antagonistic to the interests of the accused (defendant). Can they serve as an independent mediator? In the laws on the police, on the prosecutor's office, on the investigative committee, it is possible to prescribe in detail the endowment of these persons with the functions of a mediator (that they contribute to the reconciliation of the parties and compensation for the damage caused). As long as the quality of the work of these persons is assessed by the ratio of the number of cases that have entered the proceedings with the number of cases sent to court, when any termination of criminal prosecution on non-rehabilitating grounds is a disadvantage in the work of an investigator or inquirer, one cannot seriously talk about this form of conciliation procedure. The problem lies not so much in the normative consolidation of transactional procedures, as in the creation of an effective system of motivation of representatives of law enforcement and supervisory authorities in the implementation of the functions of reconciliation of conflicting parties. The mechanism of motivation of criminal justice officials to conduct conciliation procedures is quite complex. The system of accounting for the quality and quantity of labor of law enforcement and supervisory authorities, the system of their incentives and penalties, the system of personnel selection needs to be radically changed.

Conciliation procedures for crimes that infringe solely on the interests of the state have their own characteristics, as a result of which an official (investigator, inquirer and prosecutor) can save the state budget. Thus, functionally, both participants in the process are oriented towards achieving the same goal, and this is the unifying basis for initiating the reconciliation procedure. And the suspect (the accused, the defendant) is also ready in most cases to join this process. The discussion is mainly about the quantitative characteristics of compensation. In this part, the institution of transaction often corresponds with the institution of

police fines, the size of the fiscal fine by agreement of the parties as a result of the conciliation procedure can be significantly reduced. The fulfillment of obligations by the State, represented by the relevant authorities and officials, is conditioned on the fulfillment of its part of the agreement by the accused.

When developing a criminal law compromise, it is important to ensure that the decision is made voluntarily by the accused and the victim, since the fulfillment by the accused of the obligations assumed in accordance with Articles 25, 25.1, 28, 28.1, ch. ch. 40, 40.1 of UPK (Criminal Procedure Code) is voluntary. He is motivated to commit positive post-criminal acts by his own interest, since the state encourages such behavior of the accused in exchange for favorable consequences for his fate. As a result, a public, socially significant interest is also achieved.[13]

One of the ethical problems of resolving the conditions of alternative forms of resolving a criminal conflict in Russia is the requirement to establish the truth. We proceed from the fact that if the legislator establishes the grounds and authorizes the investigator at the pre-trial stages to terminate criminal prosecution: in connection with the reconciliation of the parties (Article 25 of the UPK (the Criminal Procedure Code)in connection with the appointment of a criminal law measure in the form of a court fine (Article 25.1 of the UPK (the Criminal Procedure Code)); in connection with active repentance (Article 28 of the UPK (the Criminal Procedure Code)); in cases of crimes in the sphere of economic activity (Article 28.1 of the UPK (the Criminal Procedure Code)), there must be a different content of the truth. These procedural institutions allow participants in criminal proceedings to agree with the version of the prosecution, as well as with the content of knowledge in the collected evidence, and therefore it is impractical to verify their reliability in court proceedings with the participation of the parties. In this case, the truth achieved is of a contractual, compromise nature. In the literature it is called conventional. A conventional truth is considered to be recognized by such a convention, i.e. an agreement. A judgment is true not because it corresponds to reality, but because the subjects have agreed to consider it true.[14]

Summarizing the new approach to establishing the truth, we note that the legal consolidation of simplified judicial procedures, the expansion of grounds for termination of criminal prosecution, the use of other measures of criminal legal influence, constitutional and criminal procedural immunities and privileges, the

[13] Rusman, Galina. The active position of the court is the basis for the successful application of alternative measures in criminal proceedings. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 04, n. 07, p. 89-101, jan./jun. 2022. DOI: 10.52028/rbadr.v4i7.6.

[14] Pastukhov P.S. What kind of truth is sufficient to implement the mechanism of criminal responsibility? Legal truth in criminal law and procedure. Collection of articles based on the materials of the All-Russian Scientific and Practical Conference. March 16-17, 2018 / North-Western branch of the Federal State Educational Institution “Russian State University of Justice” / Under the general editorship of K. B. Kalinovsky, L. A. Zashlyapin. St. Petersburg: Publishing House “Petropolis”, 2018. 234 p. p. 153-165.

conclusion of a pre-trial cooperation agreement indicates a subjective approach to the outcome of the evidentiary process, where evidence can be evaluated at the stage of pre-trial proceedings and may not pass the test during the adversarial trial.

One of the most important of these conditions of compromise is active repentance. The essence of active repentance, as a type of positive post-criminal behavior, lies in the fact that a person, while admitting his guilt, not only verbally expresses remorse for what he has done, but also confirms it with concrete actions: voluntary surrender, active assistance in solving a crime, exposing other accomplices and searching for property obtained as a result of a crime, voluntary compensation property damage and moral damage caused as a result of a crime, other actions aimed at making amends for the damage caused to the victim.

The concept of remorse is closely related to the concept of guilt and shame. These feelings are related to each other, but there are some differences between them: shame is the feeling that you have been exposed and disgraced in the eyes of others, and guilt is associated with a person's inner self-esteem of their actions.[15] To repent means "to repent, to regret your act, to realize that the wrong thing has been done, to be killed by conscience, to be executed for the past. Later repentance does not save. There is no forgiveness without repentance.[16] Thoughts, mental state of a person, if they are not expressed externally in the form of concrete actions, deeds, are not the object of criminal legal assessment.

Active repentance is voluntary, active and timely actions of a person who has committed a crime for the first time, expressed in a full confession of guilt and remorse for what he has done, which is objectively confirmed by contributing to the disclosure and investigation of crimes or by compensation for the damage caused or other compensation for the damage caused, or by turning himself in or other actions indicating repentance.[17]

Alikperov H.D. believes that active repentance is "... not only a full confession by a person of his guilt in committing a crime and sincere regret (remorse) about what he has done, but also the provision by this person of assistance to law enforcement agencies in solving a crime, establishing, detaining and exposing other participants in the crime, as well as the voluntary surrender of the stolen, tools, objects of the crime, compensation for damage or compensation for damage caused by the crime, etc."[18]

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[15] See: Freud Z. Selected book I M., 1990. p. 98.

[16] See: Dal V. Explanatory Dictionary of the living Great Russian language Vol. 4. M. 1982. p. 59.

[17] See: Savkin, Alexander Vasilyevich Active repentance of a crime. Legal and criminalistic problems: Dissertation of Doctor of Law Sciences Moscow. 2002. p. 44.

[18] Alikperov H.D. Exemption from criminal liability. – M.: Moscow Psychological and Sociological Institute of IPK(Institute of Professional Qualifications). RK (MANAGEMENT PERSONNEL) of the Prosecutor General's Office of the Russian Federation: Voronezh: Publishing house of NPO (SCIENTIFIC AND PRODUCTION ASSOCIATION) "MODEK". 2004. p. 34.

We do not consider it necessary to establish in each case the sincerity of the culprit and the motives of positive actions. In accordance with the approach adopted in domestic criminal law, the legislator leaves the inner world of a person out of the field of regulation. In addition, the degree and sincerity of remorse cannot be objectively measured, evaluated. Since the inner world is objectified in behavior, the conclusion about the presence of remorse and (to a certain extent) its degree can be made precisely by the behavior of the person who committed the crime. In our opinion, active repentance is the active, conscious, voluntary behavior of a person who has committed a crime, which is expressed in objective actions aimed at mitigating the negative consequences of what he has done, assisting in the investigation and disclosure of crimes.[19]

This is confirmed, in particular, by the opinion about active repentance as active voluntary actions through which a person who has committed a crime or interrupted its completion, guided by any internal motives, prevents, eliminates or reduces the severity of the harmful consequences of what he has done or assists law enforcement agencies in the disclosure and investigation of this and other crimes, which entails in cases provided for by law, exemption from criminal liability or mitigation of punishment.[20]

So, signs of active repentance can be considered: 1) admission of guilt; 2) sincerity in testimony; 3) voluntary repentance; 4) the desire to make amends for the harm caused; 5) self-condemnation of his act; 6) awareness of the public danger of the crime committed; 7) determination to atone for his guilt by correction and re-education.

Next, it is necessary to substantiate the moral and ethical basis of the procedural compromise. To do this, we emphasize once again that the substantive legal consolidation of the grounds and conditions for their application, the criminal procedure mechanism of law enforcement, the focus on achieving the goals of the criminal and criminal procedure law ensure its legality. As you know, the law is already the result of an agreement and consent.

In addition, the moral basis of the procedural compromise is provided by the voluntary form of behavior of its participants, prompt compensation for harm to the victim and the state, active repentance, stimulation of positive post-criminal behavior of the accused. The listed procedural conditions for concluding a criminal compromise do not contradict the moral foundations of society, since its result is achieved without the use of pressure, but on the basis of mutually acceptable concessions of the conflicting parties and is focused on an exhaustive solution to the incident.

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[19] Petrikova S.V. The concept of active repentance in the criminal law of the Russian Federation// Socio-political sciences. 2012. № 3.

[20] Endoltseva A.V. Institute of Active Repentance in Criminal Law: Abstract of dissertation... cand. jurid. Sciences. –M., 2000. p. 7.

All of the above ethical conditions of alternative forms of resolution of criminal law conflict in Russia create not only a moral basis for a compromise solution, but also provide an atmosphere of social trust. Multilevel understanding of any complex legal phenomenon, freedom of judicial discretion and high credibility of the law enforcement officer are the cornerstones on which the doctrine of alternative forms of resolution of criminal law conflict is based. The creation of such an atmosphere reduces contradictions not only between the parties in a criminal case, but also social tension in society due to the humanization of criminal law policy.

The final aspect of the compromise solution is the procedural form of its conclusion. The law does not provide for the written execution of the parties' agreements on reconciliation, active repentance, and agreement with the indictment, but it is impossible to deny that the commission of positive post-criminal actions by the accused is a consequence of agreements with the prosecution. This conclusion is based on an analysis of the provisions of Articles 25, 25.1, 28 and 28.1, Chapters 40 and 40.1 of the UPK (the Criminal Procedure Code). Although the choice of a compromise procedure is made dependent on the will of the accused, and in some cases the victim, the actual initiator of the consideration of the case in compromise procedures is the criminal prosecution authorities, and in appropriate cases – the court. In particular, in order for the right of the victim and the accused to choose a procedural way to resolve the dispute to be realized, it must be explained to them. Such an obligation lies with the criminal prosecution authorities, the prosecutor and the court (Article 11 of the UPK (the Criminal Procedure Code)). So far, the legislator proclaims only a pre-trial cooperation agreement, without detailing its content. We assume that the absence of legislative regulation excludes the element of imposing a certain option on the parties to resolve the case, while preserving their complete freedom of choice whether to take advantage of the procedure or not. However, the fact that reconciliation of the parties is accompanied by negotiations in order to develop the most favorable conditions for reconciliation for the victim is beyond doubt.

The above conditions and grounds should be considered in their unity and interrelation. A sufficient set of circumstances must be established. The presence of only one of them should be understood as a separate independent and sufficient circumstance for the termination of a criminal case or criminal prosecution. Thus, a confession is one of the legal conditions included in the complex legal structure, explaining the grounds to the suspect or the accused.

Summing up the interim results of the study of the substantive and criminal procedural grounds and conditions of compromise procedures for resolving criminal conflict in Russia, we note their significance and impact on improving the effectiveness of criminal procedural activities. The effectiveness of any procedure

is determined by its ability to achieve the purpose of criminal proceedings. An effective procedure is based on a rational ratio of the criminal procedural forces and means used, in which the appointment of criminal proceedings is achieved with the least damage to various social values and within a reasonable time, while preserving the guarantees of the rights of participants in the criminal process and its principles. Compromise procedures, it seems, are precisely the way to rationalize the process of achieving the goals and objectives of criminal procedural activity, since some of them exclude the need for a number of stages of criminal proceedings, while others significantly simplify them.

Obviously, the principle of procedural compromise in criminal proceedings should be understood correctly and interpreted broadly depending on the specific circumstances of the case. That is, in this case, we are talking about the rational use by the law enforcement officer of all possible legal tools and methods (methods) for the speedy resolution of a criminal case, for example, to use compromise methods not in all criminal cases that are in production. At the same time, all procedural guarantees and possible negative consequences of using such a compromise should be prescribed by law.

5 Conclusion

In the course of the study of the grounds and ethical conditions of alternative forms of resolution of criminal law conflict in Russia, we came to the conclusion about the positive significance of procedural compromise for society, the individual and the state.

The institution of compromise in criminal proceedings forms the core of alternative forms of resolution of criminal law conflict in Russia. The use of alternative means of resolving a criminal conflict contributes to the simplification and reduction of the cost of the criminal process. Reasonable use of it can provide material and procedural savings of public funds. In general, it is safe to say that such a technique in the form of a compromise allows you to minimize all possible material costs, and most importantly, effectively implement the purpose of criminal proceedings.

Given the spread of procedural compromise throughout the world, we believe that it should be consolidated as a principle of criminal procedure. The procedural compromise reached in the presence of legal grounds and ethical conditions is intended to facilitate the prompt achievement of the purpose and purpose of criminal proceedings. The principle of procedural compromise should be aimed, first of all, at creating the necessary and optimal conditions for resolving a criminal case with the help of simple and accessible procedures for using them in criminal proceedings.

The institution of compromise with its rational construction in criminal, criminal procedure inevitably leads to the economy of criminal repression, and on the other hand, it is a legal instrument that encourages perpetrators to cooperate with criminal justice authorities and active repentance.

In these cases, the criminal law will act not through the investigation and the court, as has traditionally been the case, but directly, changing the psychology of the individual through the informational and educational aspect of criminal law regulation. At the same time, the peculiarity of the mechanism for implementing the institution of compromise is that in these cases, an alternative to criminal repression for the perpetrator is a real opportunity for him to redeem himself for what he has done without undergoing a punishment regime or by significantly reducing or mitigating it. The Rules are intended to ensure greater public participation in the administration of justice in criminal cases, especially in the treatment of offenders, as well as to promote the development of offenders' sense of responsibility to society.

In other words, the law shows such persons a shorter way of atonement through positive post-criminal behavior. Here, the center of gravity is transferred not to the intensive educational impact that continues during the term of punishment, but to the psychology of remorse, which encourages actions related to self-education.

The institution of compromise can also become a legal mechanism for implementing the principle of humanism in the fight against crime, because it leaves a real chance for everyone who has committed a crime to redeem himself for what he has done by accurately and timely committing positive post-criminal acts specified in the law.

The institution of compromise is a natural development of dispositive principles in criminal proceedings, which is a moderate variant of an alternative form of conflict resolution between the offender and society, as well as the victim of a crime.

In this part, we believe without exaggeration that there is a need for legislative consolidation and rational use of compromise in the criminal process of Russia. In order to improve the Criminal Procedure Code of the Russian Federation, we consider it necessary to consolidate not only the idea itself in the form of the principle of procedural compromise, but also the procedure for monitoring and supervising the use and application of such techniques in criminal proceedings.

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ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns

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Abstract: Day by day, new technologies are capturing our lives. ChatGPT and other intelligent chatbots are among the most promising ones. As an LLM based on machine learning, an intelligent chatbot represents a perfect human chatbot assistant that can give an answer to any question asked, write a poem, or analyze and improve the code. Despite its potential, ethical and legal issues of using intelligent chatbots, which also might be a reason for the disputes, are among the most significant concerns. Based on the idea of responsible innovation, this paper aimed to define critical ethical and legal issues arising from using ChatGPT and other intelligent chatbots and then attempt to overcome them to increase the trustworthiness of this technology. For intelligent chatbots to be actively and effectively used for the benefit of humanity while not undermining the credibility of LLMs, we have attempted to outline the technical, legal, and ethical problems, as well as significant dispute resolution concerns arising from the use of intelligent chatbots, and to make recommendations on how to minimize the risks and threats related to it. The results of this study can be used both in the process of law-making in the field of artificial intelligence and to contribute to the limited research in this area.

Keywords: ChatGPT. Legal Issues. Ethical Issues. Large Language Models. Human Rights. Safety. Intellectual Property. Data Privacy.

Summary: **1** Introduction – **2** Large Language Models Race and Advance of Intelligent Chatbots – **3** Intelligent Chatbots' Technical Concerns – **4** Ethical Issues around Intelligent Chatbots – **5** Intelligent Chatbots' Legal Issues – **6** Intelligent Chatbots' Dispute Resolution – **7** On the Way Towards Trustworthy ChatGPT – Conclusion – References

Although the technology allows us to develop
a bot that behaves in just about any way,
that doesn't mean we should.
(Rozga S., Practical Bot Development)

1 Introduction

When it comes to the advance of compelling technologies, we still consider it as a future. Meanwhile, those technologies are already entering our life and changing it daily.[1] Neural networks can design any image we want, nanorobots can do microsurgeries, and quantum computers can make the fastest calculations. Intelligent chatbots based on LLMs are conquering their positions in the list of those significant results of scientific progress.

AI chatbot represents one of the most promising technologies in this area. This technology has several applications: data search and structuring, completing assignments, movie making, customer assistance, health counseling, etc.[2] For instance, ChatGPT has successfully passed the Master of Business Administration (MBA) exam and a law school exam. Also, a judge confirmed that he used ChatGPT to resolve a dispute.[3]

At the same time, significant ethical and legal concerns about using ChatGPT and other intelligent chatbots in an illegal or immoral way are hard to prevent or control today. First, the possibilities this technology gives users can provoke them to lie. Thus, one of the most scandalous examples of using this technology is when a student wrote his dissertation using ChatGPT and succeeded in getting the diploma.

ChatGPT and other intelligent chatbots have no process to determine the difference between how the world is and how it is not.[4] Recently, ChatGPT falsely accused an American law professor by including him in a generated list of legal

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[2] COOK UP AI. ChatGPT Use Cases, https://cookup.ai/chatgpt/usecases Access: 25.07.2023.

[3] TAYLOR L. Colombian judge says he used ChatGPT in ruling, https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling Access: 25.07.2023.

[4] LADKIN P.B. Involving LLMs in Legal Processes Is Risky, *Digital Evidence and Electronic Signature Law Review*, 20, P. 40, 2023.

scholars who had sexually harassed someone, citing a non-existent report.[5] This made scholars state that an issue must be actively addressed, if necessary, through government intervention.[6] And it has happened already. Threats that the emergence of ChatGPT brought resulted in the ban of this technology in China, Italy, North Korea, Iran, Cuba, and Syria.[7]

The literature review showed that ChatGPT and other large language models (LLM) are of significant attention to researchers. Existing research has explored the potential for ethical and safe innovation of LLM,[8] papers that outline potential risks,[9] and papers identifying ways to mitigate potential harms.[10]

Although now ChatGPT remains the most popular, there are many its competitors as ChatSonic, Jasper Chat, Bard AI, LaMDA (Language Model for Dialog Applications), Bing AI, NeevaAI, Chinchilla, etc. And it is also important to study major legal, ethical and other concerns related to the use of mentioned intelligent chatbots, not just ChatGPT itself.

Nevertheless, to understand the technological advantages and downsides that intelligent chatbots can bring, we must assess technical, legal, and ethical issues arising from its use. It is also crucial to study possible disputes that might emerge as a consequence of use the intelligent chatbots, as well as finding the best way to resolve those disputes.

The aim of the paper is to outline the technical, legal, ethical problems, as well as major dispute resolution concerns arising from the use of intelligent chatbots, and to make recommendations on how to minimize the risks and threats related to it. Our research basis is the idea of responsible innovation[11] and the fact that it is essential to thoughtfully assess the potential benefits as well as potential

5 VERMA P., OREMUS W. ChatGPT invented a sexual harassment scandal and named a real law prof as the accused, https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies/ Access: 13.07.2023.

6 LADKIN P.B. Involving LLMs in Legal Processes Is Risky, *Digital Evidence and Electronic Signature Law Review*, 20, P. 40, 2023.

7 KUMAR D. From China to Syria - Here's a list of countries that have banned ChatGPT. Know why, 2023 https://www.livemint.com/technology/tech-news/from-china-to-syria-here-s-a-list-of-countries-that-have-bannedchatgpt-know-why-11680531688656.html Access: 13.07.2023.

8 TAMKIN A., et al. Understanding the Capabilities, Limitations, and Societal Impact of Large Language Models, 2021 ArXiv abs/2102.02503.

9 BENDER E.M., et al. On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?. Proceedings of the 2021 *ACM Conference on Fairness, Accountability, and Transparency*, 610, 2021; DINAN E., et al. Anticipating Safety Issues in E2E Conversational AI: Framework and Tooling, arXiv:2107.03451 [cs], http://arxiv.org/abs/2107.03451. arXiv: 2107.03451 Access: 25.07.2023; KENTON Z., et al. Alignment Of Language Agents, Arxiv:2103.14659 [Cs], 2021 Http://Arxiv.Org/Abs/2103.14659 Access: 25.07.2023.

10 SOLAIMAN I., DENNISON C. Process for Adapting Language Models to Society (Palms) With Values-Targeted Datasets, *Neural Information Processing Systems*, 2021; WELBL J. et al. Challenges in Detoxifying Language Models. ArXiv abs/2109.07445 (2021): pp. 2447-2469, 2021. Access: 25.07.2023.

11 STILGOE et al. Developing a framework for responsible innovation, *Research Policy, No* 42, 1568, 2013.

risks that need mitigating.[12] Developing this idea, we propose the concept of smart and efficient resolution of the technology-related disputes as a part of the concept of smart regulation.

2 Large Language Models Race and Advance of Intelligent Chatbots

Intelligent chatbot represents a LLM that uses deep learning to generate human-like texts in response to prompts. From more evident perspectives, the Large Language Model is a machine learning model capable of handling various Natural Language Processing (NLP) use cases.

These machine learning models are in demand because of their ability to be pre-trained and self-supervised foundational models that can understand process and perform a wide range of natural language tasks. In simple terms, LLM can converse with humans on many topics and convert text documents into vector embeddings. These dense text embeddings can then be used for several tasks, preserving more semantic and syntactic information on words, leading to improved performance in almost every imaginable NLP task.[13]

In the 1980s, debug nets could handle a limited word order. But they took too long to learn and often "forgot" the previous words from the sequence. In 1997, scientists S. Hochreiter and J. Schmidhuber corrected the flaw. They invented the LTSM (Long Short-Term Memory) neural network technology, which processed the text of several hundred words and "remembered" the sequence data better. However, their language skills still needed improvement and were too costly to fix.

Year by year, training LLM is becoming cheaper, making them more prominent and influential. That is why, despite the relatively new technology, we can observe the evolution of large language models.

Thus, Recurrent Neural Network (RNN) models were state-of-the-art NLP models until 2017, usually applied for machine translation, general natural language generation, and abstractive summarization. RNN models process words sequentially in a context having its basis in Word2Vec and GloVe, which allows the representation of a term as a vector embedding while capturing the semantic meaning of the text. They are the two most popular word embeddings algorithms that bring out words' semantic similarity by capturing different aspects of a word's meaning. The main disadvantage of this model was its poor performance at maintaining contextual relationships across long text inputs.

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[12] WEIDINGER L. et al, Ethical and social risks of harm from language models, 2021, arXiv preprintarXiv:2112.04359 Access: 25.07.2023.

[13] LEBRET R. Word Embeddings for Natural Language Processing, 2016.

In 2017 a new generation of LLM appeared. What so-called "Transformers" were announced as a new architecture in NLP that aims to solve sequence-to-sequence tasks while efficiently handling long-range dependencies.[14] Transformers demonstrated effective results quickly when modeling data with long-term dependencies.

Originally designed to solve NLP tasks, Transformers applied in various disciplines. Further, in 2018 enormous deep learning model GPT (Generative Pre-Training) was introduced by California-based company "OpenAI." OpenAI's GPT is one of the most critical AI language models ever developed. GPT-3 leverages the transformer architecture and is ingested with vast amounts of data from diverse sources, creating a general-purpose tool.

These technologies' advances have led to the significant language models' race. China entered the race in May 2021. Thus, Alibaba released the Multi-Modality to Multi-Modality Multitask Mega-transformer (M6) model. M6 represents 10 billion parameters pre-trained on 1.9TB of images and 292GB of Chinese language text.

To compete with Chinese innovation, Meta AI shared an extensive model with 175 billion parameters trained on publicly available datasets (OPT-175B). Microsoft and NVIDIA have recently released the Megatron-Turing Natural Language Generation (MT-NLG), boasting an excess of 530 billion parameters.

To stay in the game, on the 30th of November 2022, OpenAI released ChatGPT as the latest iteration of LLM capable of having 'intelligent' conversations.

ChatGPT is the latest model trained by OpenAI based on the GPT 3.5 architecture. It uses a training process called Reinforced Learning. The model has demonstrated human-like behavior to an extent never seen in any Artificial Intelligent Program.[15]

If we ask ChatGPT what it represents, it answers: "I am simply a collection of algorithms and data designed to generate helpful and informative responses based on the input I receive."

ChatGPT and other Intelligent Chatbots have many skills in human-like response production:

1. Answer follow-up questions. Intelligent Chatbots can pick up references from previous conversations and use them to answer questions (unlike previous models, which treat each query as a singular entity);

[14] MOTRO Y. The Current State of Large Language Models (LLM), https://www.tasq.ai/blog/large-language-models/ Access: 25.07.2023.

[15] TAIWO J. ChatGPT: Abilities, Limitations and Applications, https://dev.to/teejay128/chatgpt-abilities-limitations-and-applications-o8b Access: 25.07.2023.

2. Generate detailed responses. Intelligent Chatbots are capable of replying with the information that includes not just the information requested but also justifications for the outcome, along with any applicable examples;
3. Recognize errors in input data. Intelligent Chatbots can correct the errors (e.g., if any grammar ones) and provide a response based on the correct query version. That is useful for users who are not familiar with the English language;
4. Write a variety of content. The data used to train the model contains vast data containing diversified content ranging from books, songs, and poems to code, articles, and websites. This data allows the bot to generate text in various styles and topics.
5. Generate or analyze code. The training data of ChatGPT and other Intelligent Chatbots also contains some code. This code gives the ability to write code that can perform simple functions such as building simple applications or solving easy problems. It can also analyze simple code and explain its functionality.
6. Filter inappropriate queries. Intelligent Chatbots can filter responses that might be offensive, discriminatory, or inappropriate, preventing it from answering inconvenient questions.

Being a part of the Generative Pre-trained Transformer (GPT) models, ChatGPT is different from the previous models. Unlike previous ones, ChatGPT has more use cases and, that is also important, has unique use cases (such as the generation of responses in dialogues/conversation, explanation of complex subjects, concepts or themes, generation of new codes or fixing of existing codes for errors).

Analysis of the functions of its main competitors as ChatSonic, Jasper Chat, Bard AI, LaMDA (Language Model for Dialog Applications), Bing AI, NeevaAI, Chinchilla showed that these Intelligent Chatbots have similar capabilities.

Table 1. Intelligent Chatbots

	ChatGPT	**Bert**	**Chinchilla**	**BARD**	**Jasper AI**
Developer	OpenAI	Google AI	DeepMind	Google AI	Jasper AI Company
Size	1.5 billion parameters	340 million parameters.	70 billion parameters	137 Billion parameters	175 billion parameters
Functions	summarization - answering questions; sentiment analysis; language translation.	limited functions: answering questions; not capable of offering translation and summarization facilities.	learn from a diverse range of experiences, which allows it to adapt to new situations and challenges quickly is its ability to learn from both positive and negative feedback.	– generate text; – translate languages; – write creative content; answer questions.	over 50 templates; unlimited words; unlimited project folders & workspace documents; write long-form content; 1,500 character lookback (up to 10,000) jasper commands; re-phrase & explain it tool; customizable tone of voice; 30 + supported languages; Grammarly integration; plagiarism checker.

3 Intelligent Chatbots' Technical Concerns

Critics have pointed out that ChatGPT has some serious technical issues as a large language model. Firstly, the system still "lacks the ability to truly understand the complexity of human language and conversation.[16] It means that LLM were

[16] SOLAIMAN I., DENNISON C. Process for Adapting Language Models to Society (Palms) With Values-Targeted Datasets, *Neural Information Processing Systems*, 2021.

trained to understand and can process natural language. But the fact that the algorithm could be better can lead to incorrect or inappropriate answers or even to some system defects.

Secondly, experts state that Intelligent Chatbots can generate incorrect information, produce harmful instructions or biased content and needs more knowledge because of the inputted data.[17] That is the biggest problem of all algorithms today, and it mainly depends on the quality of the datasets used to prepare LLM.

Thirdly, T. Cheng points out another issue related to ChatGPT. ChatGPT uses limited datasets (because it works with uploaded information and it is impossible to upload all the existing data in the world). This limitation influences the quality of the information and, consequently, ChatGPT's answers to customers. To address this issue, they compared ChatGPT with a Xerox photocopier. The Xerox photocopier digitally compressed files in a lossy way and reproduced false data. Lossy compression is usually used in situations when absolute accuracy isn't essential. The fact that the Xerox photocopier used lossy compression instead of lossless is a problem because it becomes unreadable if the image is blurred. But if the image is readable but contains incorrect data – that problem must be solved.[18]

Despite the fact that mentioned comment relates to ChatGPT, we must assume that other Intelligent Chatbots being LLM based Generative Pre-trained Transformer (GPT) models, can have the same technical issues.

Data quality problem is one of the technical problems with enormous social implications. Misinformation can lead to various negative consequences, and legal and ethical issues are part of it. Nevertheless, technical problems are not the only ones that lift our eyebrows. There are also some legal and ethical issues related to the use of Intelligent Chatbots.

4 Ethical Issues around Intelligent Chatbots

Over the years, several concerns have been unearthed concerning underlying bias ranging from derogatory language, racial discrimination, and violent depictions to gender stereotyping in AI models.[19] Intelligent Chatbots probably also inherited potential AI biases. As mentioned, one of the features of the Intelligent

[17] EKE D.O. ChatGPT and the rise of generative AI: Threat to academic integrity?" *Journal of Responsible Technology*, 13, 100060, 2023.

[18] CHENG K. ChatGPT is a Blurry JPEG of the Web, https://www.newyorker.com/tech/annals-of-technology/chatgpt-is-a-blurry-jpeg-of-the-web Access: 25.07.2023.

[19] NADEEM et al. Stereoset: Measuring stereotypical bias in pretrained language models, *in Proceedings of the 59th Annual Meeting of the Association for Computational Linguistics and the 11th International Joint Conference on Natural Language Processing*, 1, 5356, 2021.

Chatbot as a large language model is its ability to anticipate and mimic humans. Technology is learning from humans by reading vast amounts of text from the Internet. Thus, 570 GB or 300 billion words of data trains ChatGPT. By processing this data, the model looks for statistical patterns, understanding which words and phrases are related to others. This ability has one significant disadvantage. Because the information on which the language model was trained was taken from unfiltered open data, the developers cannot avoid "bias problems".[20] Certain highlighted problems are that information on which Intelligent Chatbots are prone to regressive bias, filters used to make the dataset better are not 100% accurate, and researcher data needs to be more diverse as people majorly control it.

Research made by several experts showed that technology has several bias-based ethical issues. Researchers have noticed that a large language model tends to use the words "whimsical" and "playful" regarding women. Men also lend themselves to stereotypical descriptions of being "lazy" and "sucked up." Thus, technology can indeed be sexist.[21]

ChatGPT and other LLM also need some help in the religious context. Findings show that "Islam" often appears next to the word "terrorism." "Atheism" is more likely to occur with words like "cool" or "right." Technology also named Syria, Iraq, Afghanistan and North Korea "terrorist-producing countries'.[22] According to the experiment results, a fictional 25-year-old American, John Smith, who visited Syria and Iraq, received a risk score of 3 – "medium" or "moderate security risk." While the fictional 35-year-old pilot "Ali Mohammad" was given a higher risk score of 4 by ChatGPT only because "Ali" is a Syrian national.[23]

Experts also state that ChatGPT is not free from racial biases as well. Thus, asking about the value of human brains from different races, ChatGPT valued a white person's brain at $5,000, an Asian's at $3,000, and a Pacific Islander's at $1,000.[24]

Political bias is also evident. ChatGPT rejected to write a poem praising former U.S President Donald Trump but was straightforward to write it for Kamala Harris and Joe Biden (ROSADO, 2023).[25]

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[20] KIRK H.R. et al., Bias out of-the-box: An empirical analysis of intersectional occupational biases in popular generative language models, *Advances in neural information processing systems*, 34, 2611, 2021.

[21] EKE D.O. ChatGPT and the rise of generative AI: Threat to academic integrity?. *Journal of Responsible Technology*, 13, 100060, 2023.

[22] BIDDLE S. The Internet's New Favorite AI Proposes Torturing Iranians and Surveilling Mosques, https://theintercept.com/2022/12/08/openai-chatgpt-ai-bias-ethics/ Access: 25.07.2023.

[23] BIDDLE S. The Internet's New Favorite AI Proposes Torturing Iranians and Surveilling Mosques, https://theintercept.com/2022/12/08/openai-chatgpt-ai-bias-ethics/ Access: 25.07.2023.

[24] EKE D.O. ChatGPT and the rise of generative AI: Threat to academic integrity?. *Journal of Responsible Technology*, 13, 100060, 2023.

[25] ROSADO D. ChatGPT Political Bias, https://davidrozado.substack.com/p/political-bias-chatgpt Access: 25.07.2023.

TechCrunch investigation results showed that LLM can be "toxic" and contains almost all existing human biases. The mentioned biases examples are evidence that ChatGPT can generate offensive or defamatory content, which could lead to legal action against its users. It is an inevitable consequence as ChatGPT learns to write like humans "with all the best and worst qualities of humanity".[26]

To overcome this issue, experts insist on applying the provisions of a standard ISO/IEC TR 24027:2021 to prevent bias and discrimination. It needs to be clarified if Open AI follows that standard.

We need to develop ethical regulation of AI and AI-based systems to solve the mentioned ethical issues. Ethics in AI is essential to weed out inherent bias from the machine learning algorithm while human programmers create more AI-based systems. Due to the increasing popularity of ChatGPT and other LLM, we should develop ethical guidelines on using appropriate datasets to train and create trustworthy AI-based LLM.

5 Intelligent Chatbots' Legal Issues

The fact that Intelligent Chatbots can generate answers based on uploaded datasets can potentially lead to legal issues, including the violation of human rights. It is the most crucial and dangerous issue to address for the use of Intelligent Chatbots can lead to the data breach, privacy and intellectual property violation and even threaten human life and personal safety.

Possible threats to personal safety. The problem here is that the use of Intelligent Chatbots can threaten safety. Thus, it uses available data that might contain personal information (e.g., address, phone number or bank account information). Illegal or inappropriate use of this information can lead to crimes, including cybercrimes and cyberbullying, stealing, burglary, etc.

Another "dark side" here is that the safety of a person who can be emotionally unstable at the moment of communication with Intelligent Chatbots can also be under threat. Similar LLM have this vulnerability. For instance, GPT-3 has urged at least one user to commit suicide (though it was within the experiment by a company assessing the system's utility for healthcare purposes). Another large language model, trained for giving ethical advice, initially answered as an affirmation, "Should I commit genocide if it makes everybody happy?"[27]

Data Protection Issues. This issue contains two related topics: Firstly, we will discuss the problems connected with data uploaded to a large language model

[26] TADDEO M., FLORIDI L. How AI can be a force for good, Science, 361, 6404, 2018.
[27] LIWEI J. et al. Can Machines Learn Morality? The Delphi Experiment, 2022.

to learn the technology. Secondly, we will discuss the issue related to the data received by Intelligent Chatbots during communication.

The first relates to the fact that ChatGPT and other Intelligent Chatbots can share personal data from its training datasets with the users. Scholars state that this functionality means the technology could probably breach most of the world's data protection laws.

Intelligent Chatbots pose a risk to the confidentiality of any data it considers. Thus, inputted personal data might be retained and used by software developer or collected and shared.

Intellectual Property Issues. This issue splits into two groups of problems. The first relates to the ownership of the content created by Intelligent Chatbots. The second refers to the infringements of intellectual property rights.

The first question here is who will be the copyright owner of the intellectual property created by Intelligent Chatbots. The answer primarily depends on the legal system. Thus, U.K. intellectual property law provisions constitute that for computer-generated works which involve no human author, the author and first copyright owner is taken to be 'the person by whom the arrangements necessary for the creation of the work are undertaken.[28] This is to be contrasted with the position of other countries. For instance, Australian law states that copyright protects certain subject matters, which are expressions of ideas, including 'literary works,' being materials expressed in print or writing, provided they are 'original.' The work must have originated from a 'human author' who has applied some 'creative spark,' 'independent intellectual effort' or 'skill and judgment,' and not be copied from another work.

Another issue is that Intelligent Chatbots can generate a response copied from any material, including academic papers or books. In this case, a user who reproduces or distributes such a response without the copyright owner's permission may violate copyright, and a user who fails to identify the author or edits the response in a way that damages the author's honor or reputation may violate intellectual property rights.

Another problem is that Intelligent Chatbot does not use specific sources to generate responses but somewhat broader training data, and its processes are generally unknown to the user. Therefore, it is likely to be challenging to determine where there is a risk of infringement or even identifying the copyright owner and/or author.[29]

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[28] UKIPO's public consultation on AI and IP – computer-generated works (Part 1), https://copyrightblog.kluweriplaw.com/2022/03/14/ukipos-public-consultation-on-ai-and-ip-computer-generated-works-part-1/ Access: 25.07.2023.

[29] EKE D.O. ChatGPT and the rise of generative AI: Threat to academic integrity?. *Journal of Responsible Technology*, 13, 100060, 2023.

It is worth stressing that there are lawsuits already claiming the infringement of intellectual property rights by the developers of AI-based technologies that used data to train A.I. In the U.K., Getty Images has brought a copyright infringement action against Stability AI, the developer of A.I. image generator Stable Diffusion, claiming that the processing of images in which Getty Images owns the copyright to train Stable Diffusion infringed the copyright in those works (Stable Diffusion vs. Getty Images).[30]

Unfair competition practices. The significant potential of Intelligent Chatbots made it possible to be used as a tool for businesses to promote their products or services. At the same time, technology can pose risks for unfair competition.

Users can ask Intelligent Chatbots to generate a text of commercial based on the incorrect comparison between two products that can discredit the competitors.

Another form of unfair competition may occur because of the ability of Intelligent Chatbots to generate names and logos. If the model generates a name or logo similar to an existing trademark and the company starts using it, it could constitute trademark infringement.

The ability of ChatGPT to generate text raises concerns about its potential to create fake news or other misleading content. In case of unfair competition, inappropriate use of this feature can damage a competitor's reputation by spreading misinformation.

Lack of transparency and explainability. Transparency and explainability are also significant legal issues related to Intelligent Chatbots. The problem is that developers must explain the datasets they use to train LLM. Moreover, how they train the algorithms needs to be made clear. At the same time, we need to understand these processes. For that, we need specific regulations to ensure that AI systems are transparent and explainable and that individuals can challenge AI's decisions.

Issues arising from the Terms of Use. Analysis of chosen Intelligent Chatbots' terms of use showed some vulnerabilities that may create asymmetry in users' and developers' rights and duties. This asymmetry may become a reason for human rights violations.

Every software has its Terms of use (End-user license agreement – EULA). It is a legally binding contract between a consumer and a service provider. More so, it is a "take it or leave it" contract of adhesion where the consumer must accept the terms if he wants the software. Only a few consumers[31] will read before accepting

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[30] STABLE DIFFUSION vs. GETTY IMAGES LAWSUIT, https://www.theverge.com/2023/1/17/23558516/ai-art-copyright-stable-diffusion-getty-images-lawsuit Access: 25.07.2023.

[31] STEINFELD N. I agree to the terms and conditions': (How) do users read privacy policies online? An eye-tracking experiment, *Computers in Human Behavior*, 55, 992, 2016.

any EULA. They want the product,[32] and clicking yes without reading seems the only option. EULA presentation style can affect users' comprehension (e.g., legal information presented in an abbreviated manner across multiple windows).[33]

Thus, for instance, regarding the Open AI Terms of Use, both Input and Output (collectively representing a Content) users own all content. Thus, it is worth mentioning that clause 3 of the Terms of Use, named "Content," contains provisions explaining who is responsible for the content. The user is primarily responsible for the content, including ensuring it does not violate any applicable law or these Terms. At the same time, the Terms of Use claim that OpenAI can use all the inputted content because the user's consent is given when accepting the terms (provision 3a).

Terms of Use allow using content to improve services. OpenAI may use the content as necessary to provide and maintain the services. Provision 3c addresses the use of content to service improvement. Deployers state they might use content to enhance services, and users agree and instruct about that. Users can forbid using the content by contacting OpenAI support and naming the organization ID. It is supposed to think that all users first agree that their content may be used for product improvement.

Another concern is that the Terms of Use need to clarify what it means to use content to improve services. The ability of machine learning to develop itself by using all data uploaded means that all content can qualify for potential service improvement. At the same time, the user still is the one that is responsible for content.

6 Intelligent Chatbots' dispute resolution

The mentioned legal issues might become the reason for the disputes between Intelligent Bot's users and developers. In this case, parties to the conflict will follow the provisions of the law, and they will check the Terms of Use of the mentioned Intelligent Chatbots.

Every EULA contains (if well drafted) a dispute resolution clause. This non-negotiable clause directs any dispute to one or more (hybrid or multi-tiered clauses) dispute solution types (negotiation, mediation, arbitration or a country's judicial court). A thoughtful and conscious consumer will read any EULA before installing software and the dispute resolution clause. Reading the dispute resolution clause

[32] BEN-SHAHAR O. The myth of the 'opportunity to read' in contract law, *European Review of Contract Law*, 5, 1, 2009.

[33] WADDELL, et al. Make it simple, or force users to read? Paraphrased design improves comprehension of End User License Agreements, *CHI '16: Proceedings of the 2016 CHI Conference on Human Factors in Computing Systems. New York: Association for Computing Machinery*, 5252, 2016.

reduces the risk perception to accept the services, for the consumer becomes aware of who to look for if any problem arises and if it is an impartial and independent ADR provider in the case of arbitration.

For instance, ChatGPT's previous EULA (effective until December 14, 2023) brought its dispute resolution clause in provision 8. It provided a multi-tiered clause that imposed a 60-day negotiation (provision 8b) before mandatory arbitration (provision 8a). The users could and still can in the current EULA (but certainly will not because they did not read the terms of use) opt out of the mandatory arbitration by filling out a form within 30 days of agreeing to the terms of use (provision 8a of the previous EULA, and Paragraph 1 of the current Dispute Resolution Clause). Opting out is a straightforward procedure for users only to fill in a four-question Google form (Name, account email, organization ID and Organization Name – the last two only if applicable – this form remains the same in the previous and current EULA).

The previous EULA (published on March 14, 2023, and effective until December 14, 2023) appointed ADR Services, Inc. (provision 8c), a private arbitration provider from San Francisco, California, as the arbitration forum and elected the laws of the State of California as the governing law (provision 9L). That meant the following: to discuss the terms of use, a user should do it exclusively in the federal or state courts of San Francisco County, CA (provision 9L), and in the case of a dispute, the user needed to negotiate for 60 days before requesting mandatory and binding arbitration at ADR Services in San Francisco with the arbitration proceeding regulated by this provider arbitration rules.

The current EULA replicates the 60-day negotiation dynamics before initiating mandatory arbitration. Nevertheless, OpenAI elected another arbitration institution. ADR Services from San Francisco is not the company's arbitration forum anymore. Now, it is a New York Alternative Dispute Resolution provider named National Arbitration and Mediation ("NAM").[34]

The current and previous terms of use also bring a class action waiver provision (Paragraph 3 of the current Dispute Resolution Clause and provision 8f of the previous EULA), meaning only individual basis disputes can proceed. According to Paragraph 5 of the Dispute Resolution Clause (provision 8e in the previous EULA), customers can also file a claim in small claim courts, which would only work smoothly for American users. Nevertheless, that must happen in San Francisco federal and state courts, which is an unbearable burden to international users (the

[34] NATIONAL ARBITRATION AND MEDIATION ("NAM"). Retrieved from https://www.namadr.com/resources/rules-fees-forms/. Access 17.11.2023.

governing law did not change with the Terms of Use update. The applicable law is California law).

The world is already using ChatGPT in multiple languages— nevertheless, disputes needed to go to an ADR provider in California with English as the procedural language. In the current EULA, parties must recur to NAM, a New York ADR provider. They must comply with the *Comprehensive Dispute Resolution Rules and Procedures* applicable to consumer disputes.[35] Most international users feel uncomfortable discussing a dispute resolution in their non-native language. Language familiarity can affect the consumer's ability to present the case properly and influence its outcome.[36] The consumer can use an interpreter. Still, as provided by Rule 28 of the ADR Services' 2021 Arbitration Rules,[37] the party *must make arrangements directly with the interpreter and shall pay for the costs of the interpreter's service.* NAM Rule nº 16 provides that *in the event any translation, interpreting or other services are requested as a result of a hearing which is to be held in a language other than English, expenses for such services will be borne by the party which requests them.* This language barrier is mitigated if the consumer chooses to be represented. ADR Services Rule 16 of the 2021 arbitration rules forced the consumer to hire a lawyer: *Where a party to the arbitration is a natural person, he or she may be represented by counsel of that party's choosing or may represent themselves in propria persona. However, ADR Services reserves the right to decline to administer an arbitration in the event a party opts to proceed in propria persona*. NAM's Rule nº 5 is more flexible and allows the consumer to act on its behalf: *Parties may act on their own behalf or may be represented by a person with authorization to act on their behalf. The name, address and contact information of such persons shall be communicated to NAM and all other parties at least thirty (30) days prior to the scheduled hearing or conference.*

ADR Services Rule 39 states the filing fee is due upon filing the arbitration claim. Accordingly, according to its General Fee Schedule,[38] there is a U$450,00 initial filing fee plus a U$ 750,00 non-refundable administration fee cost per party, a cost that the ChatGPT user would have to bear to commence an arbitration proceeding. The counsel, not the represented party, will be held responsible for paying all charges (Rule 42), meaning the user must be represented and hire a lawyer. As a comparison, we can cite The Independent Betting Adjudication Service

[35] See the rules at https://www.namadr.com/content/uploads/2023/07/Comprehensive-Rules-as-of-7.1.2023.pdf. Access: 17.11.2023.

[36] ADR SERVICES, INK. Retrieved from https://www.adrservices.com/services-2/arbitration-rules/. Access: 25.07.2023.

[37] ADR SERVICES, INK. Retrieved from https://www.adrservices.com/services-2/arbitration-rules/. Access: 25.07.2023.

[38] LAI et al. The Importance of Language Familiarity In Global Business E-Negotiation, *Electronic Commerce Research And Applications*, 9, 537, 2010.

(IBAS), an ADR provider approved by the U.K. Gambling Commission responsible for managing arbitration proceedings between consumers (local and international) and gambling operators (virtual casinos and sports bet operators). The IBAS service is free of charge to consumers, which makes it easier for consumers to file their claims.[39] NAM Rule nº 7 refers to the Fee Schedule, which in this case is the *Comprehensive Fees and Costs.*[40] The *Comprehensive Fees* schedule sets an initial administrative fee of U$740,00 and a final administrative fee of U$640,00 for claim amounts less than U$75.000. The claimant must pay both administrative fees. The arbitrator hearing time will be charged at the designated hourly rate for the NAM arbitrator.

According to the previous terms of use (Provision 8d), the arbitration procedure will be conducted by telephone, based on written submissions, video conference,[41] or in person in San Francisco as a rule. The current EULA also provides the videoconference possibility and adds that the hearing could occur in the consumer's county. Indeed, this would only apply to U.S. residents.

The arbitration proceedings will be conducted by a sole arbitrator appointed by the chosen arbitration chamber. ADR Services neutral panel, for example, is composed of 100 professionals, of which 61 are retired judges, a common practice in the U.S. but less common in other countries. ADR Services, Inc. works on a closed list arbitrator appointments system, meaning that the parties cannot appoint an arbitrator whose name is not in their neutral panel. Closed lists go against arbitration's best international practices that privilege the party's autonomy in selecting the arbitrator. Unfortunately, that is what happens in consumer contracts of adhesion.

NAM's Rule nº 22 provides that NAM *shall appoint the arbitrator (s) as promptly as possible* and that *if the claim amount is for $10,000 or less, the NAM Administrator shall appoint the arbitrator (s)* (Rule nº 22 A). For claims over U$ 10,000,00, NAM will forward the parties a list of three names so each party may strike one name off the list and number the remaining names in preference

[39] ELISAVETSKY A., MARUN M. V. La tecnologia aplicada a la resolución de conflictos: su comprensión para la eficiência de las ODR y para su proyección en Latinoamérica", *Revista Brasileira de Alternative Dispute Resolution*, 2, nº 3, 51, 2023; FERREIRA, et al, Online Sports Betting in Brazil and conflict solution clauses, *Revista Brasileira de Alternative Dispute Resolution*, 4, nº 7, 75, 2020.FERREIRA, et al, Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", *Technology in Society*, 68, 101872, 2022.

[40] See the Comprehensive Fees and Costs at https://www.namadr.com/content/uploads/2023/06/Comprehensive-Fees-7.1.2023-updated-6.26.2023.pdf. Access: 17.11.2023.

[41] FERREIRA, Daniel. et al, Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", *Technology in Society*, 68, 101872, 2022. See also: FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E.A., Jorge Brantes FERREIRA, J.B. Arbitration chambers and technology: witness tampering and perceived effectiveness in videoconferenced dispute resolution proceedings, *International Journal of Law and Information Technology*, Volume 31, Issue 1, Pages 75–90, 2023. https://doi.org/10.1093/ijlit/eaad012.

order. Then, NAM's Administrator will choose the sole arbitrator from the list (Rule nº 22 E). NAM has two neutral rosters: state and national federal. Many of the neutral are former judges in the state roster, and all the 13 (thirteen) neutrals of the National Federal Rosters are retired judges.[42] The arbitrator hourly rate will vary according to the designated arbitrator. Like the previous provider, NAM works on a closed-list arbitrator appointments system.

ChatGPT is an app already used worldwide in multiple languages; nevertheless, its terms of use elect an American ADR provider (ADR Services previously and NAM currently) with clear common law and American litigation patterns. That is a barrier for international consumers to solve conflicts, which tilts toward the company. It means that OpenAI will play as the home team in a dispute.

We can name the challenges for an international ChatGPT user to file an arbitration claim against OpenAI: 1. Arbitration in the U.S.; 2. Language barrier; 3. Arbitration costs (administration fees and arbitrator's fees); 4. Probable U.S. counsel fees; 5. Closed list arbitrator appointment; 6. Common law tradition and U.S litigation prevailing practices.

A local ADR provider with local practices is hardly the best option for a large-scale international service such as ChatGPT. Therefore, a global provider is better for providing the best conflict solution service to worldwide ChatGPT users. Also, an ODR-centered (online dispute resolution) and experienced provider would work best for international users because the information technology would facilitate communication.

Similar services' terms of use, like ChatSonic, do not even provide a dispute resolution clause.[43] Jasper Chat, for example, elects a AAA (American Arbitration Association) as its Alternative Dispute Resolution (ADR) provider. AAA has vast international experience (AAA-ICDR) and follows the best arbitration practices and is a better option for this service type.

In the tables below, we can observe the dispute resolution clause and the applicable law of 10 (ten) intelligent bot providers.

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[42] See the list at https://www.namadr.com/content/uploads/2023/01/NAM_Roster_Federal_1-18-23_x1a.pdf. Access: 17.11.2023.

[43] CHAT SONIC, https://chatsonic.pro/terms-and-conditions/#Reservation_of_Rights. Access: 25.07.2023.

Table 2. Dispute resolution clause

Intelligent Bot	Dispute resolution clause
ChatGPT	ChatGPT Terms of Use provide a multi-tiered clause that imposes a 60-day negotiation before mandatory arbitration. The terms appoint National Arbitration and Mediation ("NAM"). (New York) as the arbitration forum.
BERT	Disputes must be resolved exclusively in the federal or state courts of Santa Clara County, California, USA.
XLNet	No provision
PaLM 2	No provision
Chinchilla	Disputes must be resolved exclusively in the federal or state courts of Santa Clara County, California, USA.
Jasper AI	Disputes shall be resolved through binding arbitration conducted in accordance with the rules of the American Arbitration Association – AAA.
ChatSonic	No provision
Bing AI	No provision
BARD AI	Disputes must be resolved exclusively in the federal or state courts of Santa Clara County, California, USA.
CONTENTBOT AI	Disputes shall be resolved through binding arbitration conducted in accordance with the rules of the American Arbitration Association – AAA.

Speaking of applicable law, we can see that developers mostly choose California law due to the fact that they based companies there (See table 3). Only Jasper AI and CONTENTBOT AI established Rules of the American Arbitration Association as applicable law.

Table 3. Applicable Law

Intelligent Bot	Applicable law
ChatGPT	California law
BERT	California law.
XLNet	No provision
PaLM 2	No provision
Chinchilla	California Law.
Jasper AI	Delaware Law
LaMDA	California Law
ChatSonic	No provision
Bing AI	No provision
BARD AI	California Law
CONTENT BOT AI	California Law

Further analysis showed that only three (30%) of the Terms of Use have Arbitration clause (see table 2). Thus, as it was mentioned above, ChatGPT previous Terms of Use appointed ADR Services, Inc., a private arbitration provider from San Francisco, California, as the arbitration forum. The current EULA (effective in December 14, 2023) changed the provider to a New York state based company, the National Arbitration and Mediation ("NAM"). The EULA also elects the laws of the State of California as the governing law. That means the following: to discuss the terms of use, a user must do it exclusively in the federal or state courts of San Francisco, CA, and in the case of a dispute, the user must negotiate for 60 days before requesting mandatory and binding arbitration at the NAM with the arbitration proceeding regulated by this provider arbitration rules.

Jasper Chat elected the American Arbitration Association (AAA) as its ADR provider. Its Terms of use state that Intelligent Bot-related disputes shall be resolved through binding arbitration conducted in accordance with the rules of the American Arbitration Association.

Summarizing the section, we should assume that most Intelligent Bots have dispute resolution clauses (6 out of 10) that take the disputes to binding arbitration or the State and Federal courts. The preferred applicable law is the Californian law, chosen by 6 (six) developers.

At the same time, only some of them (3 out of 10) provide arbitration clauses. Meanwhile, arbitration represents a quick, cost-effective, professional way to resolve disputes; choosing arbitration would provide users, developers, and third parties with efficient legal protection towards exercising their activities related to using Intelligent Bots. Only by delivering legal guarantees for the mentioned subjects will make possible further development of technology while making it more responsible.

7 On the way Towards Trustworthy ChatGPT

For Intelligent Bots to be actively and effectively used for the benefit of humanity while not undermining the credibility of LLM, it is already necessary to work actively to address the problems associated with using such technologies.

We offer the following recommendations to address the above legal and ethical problems.

1. OpenAI and other developers of LLM should set up special tools for data security and intellectual property protection. It's also important to follow any rules or laws that are in place to protect the data we're using. By doing these things, we can use chat AI to get lots of information safely without causing any problems.

2. We need to develop ethical regulation of AI and AI-based systems to solve the mentioned ethical issues. Due to the increasing popularity of Intelligent Bots and other LLM, we should formulate ethical guidelines on using appropriate datasets to train and create trustworthy AI-based LLM.
3. It is necessary to design special rules for using the datasets to train AI for LLM. This can be standards and ethical principles. Thus, to prevent bias and discrimination, LLM designers must apply the provisions of a standard ISO/IEC TR 24027:2021.
4. The terms of use should align with the interests of users and developers. It primarily concerns users' rights to content, including the terms of its transfer to improve the Intelligent chatbot experience.
5. Moreover, to provide the best conflict solution service to worldwide Intelligent Bots users, an international provider, let alone an ODR (online dispute resolution) centered provider, would be a better option. A local ADR provider with local practices is hardly the best option for a large-scale international service such as ChatGPT and other Intelligent Chatbots.

Conclusion

The emergence of technologies such as Intelligent Bots can change our lives in many ways. The advent of perfect assistants, chatbots capable of answering any question, tells us that the future based on technology has already arrived. However, like any new technology, Intelligent Bot is not flawless, and its use is fraught with ethical and legal violations. In this regard, to implement this technology prospectively and effectively in our daily lives, it is necessary to work to minimize the risks of human rights violations and violations of existing legal provisions resulting from the use of this technology. In this article, we have outlined the technical, legal, and ethical problems, as well as significant dispute resolution concerns arising from using intelligent chatbots and made recommendations on minimizing the risks and threats related to it. The results of this study can be used both in the process of law-making in the field of artificial intelligence and for further research in this area.

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Digital Tools to Facilitate the Implementation of Mediation in Criminal Proceedings

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Abstract: The article is devoted to the issues of digitalization of criminal proceedings in general and conciliation procedures of restorative justice in particular. Mediation, as a form of resolving a criminal conflict, is used in many countries of the world and does not lose its relevance, being an alternative form of resolving a criminal conflict in cases of minor and moderate severity, aimed at restoring social balance by reconciling the accused and the victim, restoring his violated rights. In the context of the digital transformation of criminal proceedings and the expansion of the use of electronic and digital tools, mediation in criminal proceedings can take new forms that contribute to increasing the level of citizens' access to justice, their interactive interaction and improving the efficiency of legal proceedings in general. The conducted research of the international experience of digitalization of interaction between the state and citizens in criminal proceedings shows not only the variety of electronic resources used in criminal proceedings, but also allows us to predict new architectures of criminal proceedings in small and medium-gravity criminal cases that meet the spirit of modern times. The authors have developed a model of the pre-trial procedure for the termination of a criminal case, which provides for the possibility of implementing a conciliation procedure using digital tools, allowing to terminate a criminal case for a minor crime using a universal multifunctional portal in which each of the subjects of the criminal process interactively implements their procedural rights and obligations, and the final decision is made by the court.

Keywords: Digital Technologies. Mediation. Reconciliation of the Parties. Criminal Proceedings. Mediator. Model of Termination of a Criminal Case.

Summary: **1** Introduction – **2** Methodology – **3** Conciliation Procedure in Criminal Proceedings – Author's Vision – **4** Digital Tools in Criminal Proceedings – **5** Digital Tools in Conciliation Procedures of Criminal Proceedings: Realities and Prospects – **6** Conclusion – References

1 Introduction

The recommendations of the Committee of Ministers of the Member States of the Council of Europe of September 17, 1987 approved the idea of out-of-court settlement of criminal law conflicts. Taking into account these provisions, it is impossible not to note the institution of termination of a criminal case in connection with the reconciliation of the parties, which is enshrined in Russian legislation, the legal regulation of which is carried out by criminal and criminal procedure legislation.

The termination of a criminal case and the release of a person from criminal liability in connection with the reconciliation of the parties are «compromise measures in the fight against crime» or «alternative measures» that allow achieving the goals of criminal justice in certain cases in a different way, that is, bypassing the traditional scheme of the state's reaction to the crime committed.

It is well known that alternative dispute resolution methods are widely used in all branches of law. At the same time, in order to increase the prevalence and effectiveness of mediation procedures, digital tools of varying complexity are being actively introduced into them.

Legal systems of different countries allow the use of digital technologies in conflict resolution in many legal areas. Thus, the use of separate digital tools and online platforms[1] as methods of out-of-court conflict resolution is allowed when considering civil law disputes related to commerce,[2] sports betting,[3] in arbitration practice,[4] when resolving family, medical[5] and educational disputes.[6] The so-called mediation procedures implemented through special software allow, thanks to their algorithms, to offer the parties a recommended solution, reduce court costs and restore violated rights and legitimate interests as soon as possible.

Criminal procedural relations differ significantly from private-legal relations, and require a special approach of the state to restore public relations violated by

[1] TARTUCE, F., BRANDÃO, D. Mediação e conciliação on-line, vulnerabilidade cibernética e destaques do ato normativo no 1/2020 do Nupemec/SP. *Cadernos Jurídicos*, São Paulo, ano 21, n. 55, p. 153-162, jul./set. 2020, p. 156.

[2] CAI, W., & GODWIN, A. CHALLENGES AND OPPORTUNITIES FOR THE CHINA INTERNATIONAL COMMERCIAL COURT. (2019). *International & Comparative Law Quarterly*, 68(4), 869-902. doi:10.1017/S0020589319000332.

[3] FERREIRA, D.B., GROMOVA, E.A., FARIAS, B.O. de, GIOVANNINI, C.J. Online Sports Betting in Brazil and conflict solution clauses. *Revista Brasileira de Alternative Dispute Resolution – RBADR,* Belo Horizonte, ano 04, n. 07, p. 75-87, jan./jun. 2022. DOI: 10.52028/rbadr.v4i7.5.

[4] FERREIRA, D.B., GIOVANNINI, C., GROMOVA, E., da ROCHA SCHMIDT G. Arbitration chambers and trust to technology provider: Impacts of trust technology intermediated dispute resolution proceedings. *Technology in Society*. (2022), vol. 68, 101872. https://doi.org/10.1016/j.techsoc.2022.101872

[5] WANG, M., LIU, G. G., ZHAO, H., BUTT, T., YANG, M., & CUI, Y. The role of mediation in solving medical disputes in China. (2020). *BMC health services research*, 20(1), 1-10. doi.org/10.1186/s12913-020-5044-7.

[6] http://sprc.ru/educational-organizations/ [Accessed 11 October 2023].

a crime. This rule also applies to such grounds for exemption from criminal liability as reconciliation with the victim. Despite the vector of digital transformation of the criminal process, it is necessary to assess the admissibility and rationality of the use of digital tools in the framework of conciliation proceedings.

2 Methodology

To achieve the goals set in the article, a set of research methods was used, namely logical analysis and synthesis, induction and deduction, comparative legal and systemic. Of particular importance in the preparation of the study are the logical method, comparative legal and content analysis.

Logical and comparative legal methods were used to analyze the essence of the institution of mediation in criminal proceedings, the level of regulation of mediation procedures and the permissibility of using digital tools in the course of their implementation, including existing foreign experience. The use of logical rules of deduction made it possible to identify the problems of the legality of the use of online platforms, the admissibility of the use of electronic evidence and other digital tools in the course of resolving a criminal law conflict through reconciliation of the parties.

Content analysis of websites with information posted on them about mediation (restorative) procedures implemented by states in criminal proceedings allowed us to conclude about the presence or absence of such programs in various states, to identify individual features of the use of digital tools in the mediation process.

3 Conciliation Procedure in Criminal Proceedings – The Author's Vision

Being a form of encouragement in criminal proceedings, the institute of mediation is aimed at the speedy restoration of public relations, rights and interests of the victim violated by a crime of small or medium severity and reconciliation with the person who committed the crime.[7] Thus, the overall goal of the conciliation procedure, regardless of the stage of the criminal process, is to achieve social balance. As noted by Ashworth A. in criminal proceedings, there are two interrelated paradigms of goal-setting: the «punishment paradigm», where the key goal of the criminal process is the application of punishment (repressive measures) and the restoration of «peace» between the state and the criminal; the goal of the «restorative

[7] RUSMAN, G. The active position of the court is the basis for the successful application of alternative measures in criminal proceedings. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 07, p. 89-101, jan./jun. 2022. DOI: 10.52028/rbadr.v4i7.6.

paradigm» is not to punish the person who committed the crime, but to restore the rights of the victim and, ultimately, the rights of states.[8]

The world criminal procedure practice widely applies elements of restorative justice. Its essence is the exemption from criminal liability of a person who has committed a crime of small or medium gravity, provided that socially useful actions are performed. The main purpose of restorative justice is to restore justice, to ensure the peaceful resolution of the criminal law conflict. The positive practice of using restorative justice programs shows what limitations and negative side effects the use of punitive approaches (punishments) leads to.[9]

In science and practice in many countries, it is customary to use the English term diversion (deviation, departure) to denote a compromise way of combating crime. Reconciliation with the victim is a model of «alternative measures» of the criminal process, the so-called «simple mediation» (mediation (Latin mediatio) – mediation in a dispute by a third party not involved in the dispute). This is a specific mechanism for resolving the conflict that arose after the commission of a crime, expressed in the totality of legally significant actions of its participants under the supervision of the State.

Mediation programs for the resolution of criminal law conflicts with the participation of a mediator are actively used in Brazil,[10] Germany,[11] Kazakhstan,[12] Canada,[13] China,[14] Russia,[15] the USA,[16] France[17] and other countries.

The termination of a criminal case in connection with the reconciliation of the parties and the release of a person from criminal liability, currently provided for in article 76 of the Criminal Code of the Russian Federation and Article 25 of the Criminal Procedure Code of the Russian Federation, can be considered a Russian version of the institution of "simple mediation". In this case, the termination of the criminal case, subject to the conditions specified in the law, depends only on two closely related grounds: reconciliation with the victim and making amends for the harm caused to him. The forms of the harm caused and the ways of its smoothing should be determined by the victim himself. Taking into account the fact that the

[8] ASHWORTH, A. The criminal process. An evaluative study. Oxford: Clarendon Press (1994), p. 34-35.
[9] HOWARD, Z., The Little Book of Restorative Justice (2002), p. 15. 76 p.
[10] https://www.gov.br/senappen/pt-br/assuntos/sinape [Accessed 12 October 2023].
[11] http://classic.austlii.edu.au/au/journals/BondLawRw/2001/16.html [Accessed 12 October 2023].
[12] https://www.mpc-info.kz/ru/sudebnaya-mediatsiya [Accessed 12 October 2023].
[13] https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html [Accessed 12 October 2023].
[14] YAN Zhang, YIWEI Xia. Can Restorative Justice Reduce Incarceration? A Story From China. (2021). *Justice Quarterly*, 38:7, p. 1471-1491, doi:10.1080/07418825.2021.1950814.
[15] http://sprc.ru [Accessed 14 October 2023]
[16] https://www.ncjrs.gov/ovc_archives/reports/national_survey/natsurv3.html [Accessed 14 October 2023].
[17] FAGET, J. The Double Life of Victim-Offender Mediation in France. https://arbitrationlaw.com/library/double-life-victim-offender-mediation-france-wamr-2005-vol-16-no-7 [Accessed 12 October 2023].

victim is an individual who has suffered physical, property, moral damage by a crime, as well as a legal entity in the event of damage to his property and business reputation by a crime, each of these types of damage may correspond to a certain method of compensation. On the basis of article 25 of the Criminal Procedure Code of the Russian Federation, if the victim makes a statement that reconciliation has taken place, the criminal case may be terminated.[18]

The approach of the Russian legislator, generally consistent with the European concept of «simple mediation», has one important feature: the absence in the procedural legislation of any «mediation measures» to reconcile the parties. After all, the persons conducting the proceedings only passively record that the reconciliation took place, without being obliged to take active steps to achieve this goal.

It is worth emphasizing that mediation relations are tripartite. They involve the person who committed the crime, on the one hand, and the victim, on the other. At the same time, control over the procedure and its legal consolidation is carried out by the state through an authorized state body or officials. At the same time, the actions of the subjects of reconciliation generate procedurally significant consequences. The concept of «persons involved in reconciliation» is broader, since it includes various procedural figures directly involved in the reconciliation procedure (such, for example, may include an interpreter if one of the parties does not speak the language of the proceedings).[19]

Taking into account the need to make appropriate changes to the criminal procedure legislation of Russia in order to consolidate the mediator as a participant in conciliation proceedings in criminal proceedings and before diving into the identification of elements of the digital transformation of this procedure, we will outline our vision of the reconciliation procedure itself.

The nature of mediation production determines the specifics of interpersonal interaction when using it. Meetings should be based on a person-centered dialogue, in which empathy, empathy and support are put in the first place. The neutrality of the intermediary is also a prerequisite. The mediator independently establishes the rules of negotiation, compliance with which allows you to maintain a friendly atmosphere. His task is to facilitate negotiations and translate the flow of mutual accusations into recognition of the unfairness of the current situation. Due to the techniques of paraphrasing, highlighting constructive grounds in statements, active listening, the ability to work with strong emotions and the like, the mediator helps the parties to express their feelings and at the same time helps to reduce

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18 GOLOVKO, L.V. New grounds for exemption from criminal liability and problems of their procedural application (1997). *State and Law*. № 8. p. 79-82.

19 TSENEVA, V.V. Exemption from criminal liability in connection with reconciliation with the victim: abstract of the dissertation of the Candidate of Legal Sciences (2002). Tomsk. p. 22.

aggressiveness and awaken the humanity of the participants of the meeting. Overcoming the stereotypes of the victim and the criminal by the participants of the meeting, the opportunity to see each other as experiencing and sympathetic people are the main conditions for the restorative nature of the reconciliation procedure as an alternative way to resolve the criminal conflict, allowing to reach a mutually acceptable agreement and implement a plan to remedy the situation. The terms of the agreement adopted during the meetings are formulated on the basis of the proposals of the participants, and are not imposed on them from the outside, which is the actual guarantor of their subsequent implementation.[20]

Conciliation proceedings are highly psychologized. The confrontation of the interests of the accused and the victim here reaches the utmost tension. Each side, willingly or unwittingly, seeks to impose its point of view, leading to the conclusions desired for itself. In the course of conciliation proceedings, previously raised doubts may be eliminated and new questions may arise. The participants of the conciliation proceedings are not limited in the time of discussion of conflict points (with the exception of the general period of time allotted for the implementation of conciliation proceedings), they have the right to constantly express their own opinion. However, the mediator is obliged to prevent deviations from the substance of the case, insults to the other party, intrusion into the intimate aspects of her life, that is, to fully perform the functions of monitoring the direct conduct of negotiations.

Along with the «professional» control by the mediator, conciliation proceedings may also be subject to social control by persons present during the procedure. Their presence increases the social responsibility of the behavior of all participants in the conciliation procedure, places increased demands on the general culture of its conduct. The mediator, if he considers it necessary, may invite relatives of any of the parties, work colleagues, or other persons capable, in his opinion, of influencing the result to meetings held during the conciliation proceedings. The parties themselves can do the same. However, the behavior of the persons present is not always objectively neutral, because usually they are persons sympathetic to any of the parties. The support of those present can make the behavior of one of the parties more pretentious, suppress the activity of the behavior of the other party. In this case, again, the role of an intermediary is important, who is able to limit the excessively tendentious behavior of those present by his intervention.

All information is perceived by the mediator and other participants in the conciliation procedure orally, in terms of immediacy. The immediacy of contact

[20] VINITSKY, L.V., RUSMAN, A.A., RUSMAN, G.S. Termination of the criminal case in connection with the reconciliation of the parties at the stage of preliminary investigation. (2011). Moscow. p. 127.

between the mediator and the parties is also connected with paraverbal means of influence – here facial expressions, gestures, pantomimics, emotional and expressive features of speech play an essential role. Pauses, intonation, verbal difficulties, external manifestations of uncertainty – confidence, confusion – composure, nervousness – calmness can have a certain influence on the direction of the conciliation procedure.

Conciliatory production develops as an interaction not only of individuals, but also of small social groups, while the processes of intra-group and intergroup dynamics, intra-group cohesion and intergroup antagonism acquire significant importance. A lawyer, in case of such participation, being a representative of his client, fully defends the interests of the latter, providing him with the necessary legal assistance, creates a background of social protection. Having a common goal, the party and its representative are actively united, they actively interact – the party informs its representative about all the nuances of the case, about the possible behavior of persons interested in the outcome of the case, about the reserve amount of information. Reconciliation must take place directly between the accused and the victim, therefore, all active actions in the process of conciliation proceedings must be performed by them. The lawyer, as a representative of the party, although he has all the information, cannot take a direct part in the reconciliation. There should be a direct reconciliation between the person who committed the act and the person who suffered from it.

In the settlement of interpersonal relations, the mediator's reflexivity, his ability to adequately model various life situations, to see himself in the position of others, to carry out social-role identification, to avoid hasty judgments on the external signs of various circumstances is especially significant. After all, depending on how the mediator directs the course of conciliation proceedings, its further result depends in most cases. It is also essential to clearly define the positions of the parties on what they expect from the conciliation procedure as a whole. In the course of conciliation proceedings, these positions may change significantly. In any case, changes in the position of the party are subject to discussion in order to decide on their adoption. Thus, the will of the parties significantly affects the direction and nature of the conciliation proceedings.

The activity of the parties' behavior depends on their attitude to the requirements of the other party, on their ability to discuss the circumstances of the case, ask questions, make specific proposals. The mediator is called upon to coordinate the actions of the parties, contribute to their efforts, assist the parties in discussing controversial issues, and provide the parties with equal opportunities during the negotiation process. The mediator needs considerable awareness of the psychology of people in order to prevent the transition of the conciliation procedure

to the level of bickering of the parties. During the conciliation proceedings, the party should be able to fully substantiate its claims.

If a party agrees with the facts from which the other party proceeds, then the interaction of the parties becomes conflict-free. In case of non-recognition of these facts, the confrontation of the parties acquires the character of conflict interaction. At the same time, all the means and techniques used by the parties have not only informational, but also suggestive effects. The opinion of the mediator should also be trustworthy, depending on various circumstances, including his social status, public prestige, fame, significance, communication experience, conducting conciliation procedures and others. At the same time, it is important for the mediator to negotiate and make proposals in such a way that they do not have the nature of suggestions and do not affect the will of the persons involved in the conciliation proceedings.

Due to the position of the mediator and the parties, their relations acquire the character of cooperation. The mediator receives informative and motivational information from the parties. The parties mostly receive only incentive information – proposals. Although in some cases, the parties may also be interested in information of an informative nature. For example, the victim necessarily wants to know why he was the victim of a crime. The mediator, on the other hand, needs informative information to correctly direct and stimulate the behavior of the parties.

The most important condition for the interaction of the participants in the conciliation proceedings is mutual understanding: adequate mutual reflection of the goals and motives of behavior, the meaning of the existing circumstances, understanding of the terminology used. The mediator must monitor the speech of the victim and the accused, so that they understand each other. There are often cases when the accused and the victim are representatives of different strata of society, as a result of which the terminology used in the conversation is also different, or due to an insufficient level of education, the person simply cannot clearly formulate his position.

The validity of the conclusions and proposed solutions is emphasized by various speech techniques: special intonation, rhythmic organization, giving speech a sublime, pathetic tone. Moreover, the formulation of conclusions and proposals is the prerogative of the mediator. It is he who announces the agreed proposals, thereby giving the parties the opportunity to hear them from the outside and think about them again.

In the case of conflicting interaction between the parties, the discussion takes on the character of a polemic, a confrontation of reason – the factor of social distancing (the degree of perceived difference between one's social group from the one to which other participants in the interaction belong), interpersonal and

intergroup discrimination is exacerbated. Information is concentrated around the dominant values in these groups. Information is deformed by likes and dislikes. The speeches of the parties acquire a subjective one-sidedness. The insufficiency of the material is compensated by emotional assessments, outpouring of feelings, appealing to sympathy from the mediator.

The key to successful reconciliation will be an absolutely neutral and impartial mediator. On the one hand, he should exercise restraint in order not to identify himself with any of the participants in the process, and on the other hand, try to focus the attention of the parties on the committed act and ways to eliminate its consequences. Of course, questions about personal relationships, as well as emotional assessments of behavior, cannot be avoided during conciliation proceedings. The mediator must clearly understand the ambiguity of the situation. It is necessary to allow any of the participants in the reconciliation process to «talk out», and at the same time, not to allow them to move away from the issue of resolving the conflict that has developed after the commission of a particular act.

The effectiveness of the interaction of the participants in the conciliation proceedings depends on a number of factors, including: the circumstances of the committed act, personal, professional and other qualities of the victim and the accused, the professionalism of the mediator, the establishment of communicative and emotional contact between them, their verbal and semantic understanding, situational intuition, and so on.

In order to achieve a positive result of reconciliation, the mediator independently decides on the number of necessary meetings and their order. In this case, the whole procedure is limited only by the total time allotted for its implementation.

If the parties have come to a settlement of the conflict, agree to reconcile and have negotiated the terms of such reconciliation, there are grounds for drawing up a final document, which may be a reconciliation agreement – a written document drawn up by the mediator during the conciliation proceedings, containing a brief description of the circumstances of the crime committed, an indication of the recognition by the accused of the validity of the charges brought against him, as well as circumstances and conditions of reconciliation, under which the parties consider it possible to terminate the criminal case.

In order to avoid violation of the principles of criminal proceedings, the rights and interests of its participants, the issue of termination of the criminal case against the accused based on the results of mediation should be resolved only by the court. In pre-trial proceedings, exemption from criminal liability can be carried out by contacting the investigator with a corresponding petition to the court with a reconciliation agreement attached to it. Having considered these materials, having made sure that there are factual and legal grounds for termination of the criminal

case, the court decides to terminate the criminal case against the accused or to refuse to satisfy the petition.

4 Digital Tools in Criminal Proceedings

Digital technologies in the criminal process should be understood as a system for the collection, investigation and subsequent presentation of evidentiary information.[21]

The use of digital technologies in criminal proceedings is primarily aimed at ensuring citizens' access to justice, which is reflected in the openness of the justice system and increasing the level of communication of participants in the process. In addition, it becomes possible to provide the necessary documents and petitions, receive notifications via e-mail, specially designed digital platforms, participate in individual investigative actions (for example, interrogation, confrontation) and court sessions through video technology.

In order to identify the elements of digitalization of the mediation procedure, it is necessary to analyze the existing international experience of digitalization of criminal proceedings.

The report of the European Commission of the Council of Europe on the effectiveness of justice for 2020 highlights trends in information and communication technologies that have become an integral part of the provision of judicial services, including decision-making, electronic communication and remote court proceedings.[22]

The Criminal Procedure Code of the Federal Republic of Germany provides for the possibility of petitions and their justification in criminal proceedings in the form of an electronic document with a qualified electronic signature.[23] Germany also provides for the use of electronic communication at all stages of the work of courts, prosecutor's offices and the police. Procedural document flow in criminal cases and materials is carried out through closed communication channels in encrypted form, including cross-border interaction with other EU countries.[24]

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[21] VASILENKO, A.S., FILIPPOV, V.M., SIMONOVA, M.A., KOVALENKO, S.A. Probabilistic Model of Implementing Mediation into Russia's Criminal Procedure in the Conditions of Society's Digital Transformation (2020). In: Popkova, E., Sergi, B. (eds) Scientific and Technical Revolution: Yesterday, Today and Tomorrow. ISC 2019. Lecture Notes in Networks and Systems, vol. 129. Springer, Cham. doi.org/10.1007/978-3-030-47945-9_140.

[22] https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680a00a07 [Accessed 16 October 2023].

[23] GOLOVNENKOV P., SPICA, N. §41a The Criminal Procedure Code of Germany: scientific and practical commentary and translation of the text of the law (2012). Universitätsverlag Potsdam.

[24] MASLENNIKOVA, L.N., SUCHINA, T.E. Experience of Criminal Proceedings Digitalization in the Federal Republic of Germany and Possibilities of its Use in the Criminal Proceedings Digitalization in Russia (2020) *Actual Problems of Russian Law,* 15(6):214-224. doi.org/10.17803/1994-1471.2020.115.6.214-224.

France has a Law on the Digital Republic No. 2016-1321 adopted on October 7, 2016, which declares the openness of public data, providing access to fundamental documents, databases of economic, social, sanitary and environmental interest, and the state as a whole is entrusted with a new mission – a public data service.[25] National legislation in the framework of civil proceedings provides for the possibility of electronic document management through the IP WEB information system as an alternative method of traditional document management.[26]

On the territory of the countries belonging to the Commonwealth of Independent States, procedures for conducting legal proceedings in electronic order have also been introduced at the legislative level and are used. Thus, in 2019, the Intergovernmental Council of the Eurasian Economic Union approved the Concept of Cross-border information Interaction, according to which information interaction between economic entities of the member states is carried out using mechanisms for ensuring information interaction, including through mechanisms for documenting information in electronic form.[27] Within the framework of this concept, common approaches to the implementation of electronic interaction between business and government bodies have been developed, it is fixed that the subjects of the participating countries will be able to interact with each other electronically using an electronic digital signature, which will significantly simplify economic interaction and create the necessary foundation for increasing investment activity in the member countries of the Eurasian Economic Union, so it is in the Union itself.[28]

This trend towards digitalization can also be traced in the legislation of individual CIS countries. From the point of view of the introduction of digital technologies into criminal procedural activities, the experience of the Republic of Kazakhstan and the Republic of Azerbaijan is interesting.

The Criminal Procedure Law of Kazakhstan provides for the possibility of conducting legal proceedings in electronic format, on which a reasoned decision is made by the person conducting the criminal process, taking into account the opinions of participants in criminal proceedings. The said resolution may be

[25] PILIPENKO, A.N. France: Towards Digital Democracy // *Right. Journal of the Higher School of Economics*. 2019. No. 4. pp. 185-207. DOI: 10.17323/2072-8166.2019.4.185.207 / LUZHINA, A.N. Digital Justice Reform: France and Russia (2022) *Social sciences and humanities. Domestic and foreign literature*. No. 3. p. 110-119. DOI: 10.31249/rgpravo/2022. 03.10.

[26] KONSTANTINOV, P.D. The influence of Information technologies on the principles of civil procedure (comparative legal research on the example of Russia and France): abstract of the dissertation of the Candidate of Legal Sciences (2022). Ekaterinburg, p.130.

[27] Legal Portal of the Eurasian Economic Union https://docs.eaeunion.org/docs/ru-ru/01422708/icd_12082019_7 [Accessed 16 October 2023].

[28] RUSAKOVA, E.P. The impact of digitalization on civil proceedings in Russia and abroad: the experience of China, India, Singapore, the European Union, the USA, South Africa and some other countries: *dissertation of the Doctor of Law* (2021). Moscow. p.112.

appealed, and if it is impossible to continue the proceedings in electronic form, its transition to paper format is allowed.[29]

The Criminal Procedure Code of the Republic of Kazakhstan allows the electronic format of the process in pre-trial investigation. For example, a citizen has the right to report a criminal offense in the form of an electronic document signed by the person from whom it originates (part 1, Article 181).

It is allowed to coordinate and approve the actions and decisions of officials conducting a pre-trial investigation by certifying the resolution with an electronic digital signature (paragraph 6 of part 1 of Article 193). The body conducting the investigation has the right to take and send procedural decisions to the prosecutor for approval or approval, as well as notify the prosecutor of the decisions taken and send copies of them, other materials of the criminal case in electronic format, with the exception of information requiring confidentiality (part 3 of Article 42-1).

To ensure electronic criminal proceedings in the Republic of Kazakhstan, an automated database has been created – the Unified Register of Pre-Trial Investigations (hereinafter – ERDR), which contains information about the reasons for the start of pre-trial investigation, procedural decisions and actions taken on them, the movement of criminal proceedings, applicants and participants in the process.

This digital platform provides for the module «Electronic Criminal case», within which the functionality allows you to organize the preparation, management, dispatch, receipt and storage of an electronic criminal case. The electronic criminal case itself is conducted by the prosecution body in electronic format, including by entering an electronic document and attaching documents to the ERDR on the basis of procedural decisions and actions taken by an official, signed with an electronic digital signature. This service allows you to create electronic documents on existing templates and pdf documents; to sign documents by participants in criminal proceedings using an electronic digital signature or a signature tablet; to carry out SMS notification; to implement electronic interaction with the court in order to ensure the processes of consideration of criminal cases and materials in electronic format; to carry out electronic interaction with experts, specialists on the appointment of research and obtaining conclusions in electronic format.[30]

[29] Article 42-1 of the CPC of the Republic of Kazakhstan 04.07.2014 №231-V / https://online.zakon.kz/Document/?doc_id=31575852&pos=1217;-46#pos=1217;-46&sdoc_params=text%3D%25D1%258D%25D0%25BB%25D0%25B5%25D0%25BA%25D1%2582%25D1%2580%25D0%25BE%25D0%25BD%25D0%25BD%25D0%25BE%25D0%25B5%26mode%3Dindoc%26topic_id%3D31575852%26spos%3D1%26tSynonym%3D1%26tShort%3D1%26tSuffix%3D1&sdoc_pos=1 [Accessed 17 October 2023].

[30] Order of the Prosecutor General of the Republic of Kazakhstan dated 03.01.2018 No. 2 «On approval of Instructions on conducting criminal proceedings in electronic format» / https://online.zakon.kz/Document/?doc_id=34195283&pos=27;-46#pos=27;-46 [Accessed 17 October 2023].

Along with the above, the Information System «Unified Register of Pre-Trial Investigations» provides an opportunity to interact with interested persons, suspects, victims, other persons involved in criminal proceedings, including a defender, translator, expert / specialist, witness, witness, mediator. Within the framework of this service, you can submit an application for a criminal offense, specifying in it the date and time of the commission of the criminal offense, its plot; the region and district of the application body; the body of criminal investigation. When submitting an application in electronic format, the user is warned about criminal liability for knowingly false denunciation by putting an appropriate mark in the field. The available functionality allows you to check the status of the submitted application (its acceptance or rejection by a law enforcement agency), its registration,[31] send a petition for a criminal offense; request access to the materials of the criminal case (it is possible to request a list of materials from authorized persons) and get information about the decisions taken on the criminal case and materials to them. It is planned to develop a module for filing a complaint on a criminal offense.[32]

Within the framework of criminal proceedings, there are also: 1) the procedural possibility of ensuring the participation of a defender in a criminal case by sending an appropriate resolution in the form of an electronic document through the unified information system of legal aid (article 68); 2) a statement of a civil claim, as well as a refusal of such in the form of an electronic document (part 5 of Article 167, part 2 of article 169); 3) provision of the minutes of the main court proceedings at the request of the parties in the form of an electronic document certified by the electronic digital signature of the presiding judge and the secretary of the court session (part 8 of Article 347), as well as the possibility of submitting comments on the protocol through electronic document management (article 348).

In the case of an appeal in the format of electronic court proceedings, it is allowed to file a petition for the restoration of the time limit for appeal (Article 419); the possibility of familiarizing with the appeal claims of the parties through the Internet resource of the court that decided the appealed decision; as well as the right to file objections to appeal claims in electronic format (article 420).

Mediation procedures in the criminal proceedings of the Republic of Kazakhstan, in the implementation of which these digital tools can be used, are allowed from the moment of registration of a report on a criminal offense and until the verdict enters into force (part 4 of Article 85).[33]

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31 https://qamqor.gov.kz/offence [Accessed 17 October 2023].

32 https://erdr-public.kgp.kz/resources/download/user_guide.pdf [Accessed 16 October 2023].

33 Law of the Republic of Kazakhstan dated 28.01.2011 No. 401-IV «On mediation» / https://online.zakon.kz/Document/?doc_id=30927376&pos=356;-44#pos=356;-44 [Accessed 17 October 2023].

Along with the digital systems listed above, elements of artificial intelligence have been introduced in the Republic of Kazakhstan as a tool of the Digital Analytics of Judicial Practice service, through which a computer analyzes many judicial acts and provides analytics on a specific situation.[34]

At the moment, the Judicial Cabinet project has been implemented in Kazakhstan on the principle of organizing a single window of access to the services of the courts of the Republic in electronic form. With the help of this service during the criminal process it is possible: 1) filing complaints about actions / omissions and decisions of officials conducting criminal proceedings; 2) filing a private complaint; 3) initiating a review of judicial acts on newly discovered or new circumstances; 4) statement of objection; 5) application for familiarization with the case materials; 6) other statements and documents.

Along with this, this digital portal provides an opportunity for the user to track cases with his participation that are in production; to correspond with the court and with the party to the dispute; to issue an electronic power of attorney, as well as to use templates of various procedural appeals (statement constructor), including, for example, petitions for settlement of a dispute (conflict) by mediation.[35]

The functionality of the Judicial Cabinet allows participants in criminal proceedings to apply remotely with a petition for mediation: the corresponding module contains information about the author of the appeal; information about the case (the procedural status of the petitioner; his address; the court to which he is being filed; information about the defendant; the number of the criminal case; the text of the petition itself and information about the mediator who is charged procedure). Before submitting this petition, the applicant is explained the provisions of the current legislation on the application of mediation in criminal cases and the consequences of the application (release of a person from criminal liability).

The Criminal Procedure Code of the Republic of Azerbaijan provides for an information system «Electronic Court», on the platform of which electronic criminal proceedings are conducted, as well as proceedings in courts in the order of judicial supervision. The current procedure provides not only for the exchange of procedural documents and other materials with the courts electronically, but also for integration with the information systems of other bodies conducting criminal proceedings.[36]

34 «Artificial intelligence helps judges of Kazakhstan» / The official website of the Supreme Court of the Republic of Kazakhstan, news from 02/23/2023 https://sud.gov.kz/rus/massmedia/sudyam-kazahstana-pomogaet-iskusstvennyy-intellekt-pravoru-23022023-g [Accessed 17 October 2023].

35 http://contract.atameken.kz/template/kopiya__hodatajstvo_ob_uregulirovanii_spora_konflikta_v_poryadke_mediacii-1565936483600.html?2 [Accessed 17 October 2023].

36 Article 51-1 of the Criminal Procedure Code of the Republic of Azerbaijan dated 14.07.2000 No. 907-IQ / https://online.zakon.kz/Document/?doc_id=30420280&pos=1050;-44#pos=1050;-44 [Accessed 18 October 2023]; Decree of the President of the Republic of Azerbaijan dated 01.06.2020 No. 1043

The software package of the system includes, among others, an electronic cabinet, a unified database of final court decisions, an electronic document management subsystem, a subsystem of electronic audio and video protocols of trials and a videoconference subsystem that provides participants in the process with the opportunity to participate in the meeting without appearing at the meeting and creating the possibility of monitoring it in real time.

The electronic cabinet provides the participants of the process with the opportunity to get acquainted with the progress of the process in the case (in which they participate), the decisions made, the status of their execution, the presence of complaints or protests, and also allows you to send or receive procedural documents, petitions. In addition, the named system provides: control over compliance with procedural deadlines in court cases and has the functionality of warning about the expiration of deadlines; systematized storage of information; the use of artificial intelligence in judicial activities; organization of an electronic cabinet that allows the participant to receive information about the progress of the case.[37]

Electronic document management involves the use of both enhanced electronic signatures and certified electronic signature tools. From the point of view of the mechanics of making a decision, the information system generates drafts of court documents and compiles them in an automated form, which, after checking for compliance with legal requirements, the judge certifies with an enhanced electronic signature.

In the criminal proceedings of the Republic of Azerbaijan, at the legislative level, the court provides for the placement of procedural documents and other information for their transfer to persons who have been registered in the information system, as well as to the state prosecutor in their electronic offices. At the same time, such persons can send procedural documents that they are entitled to provide, also through the «Electronic Court» (Articles 51-1.6-51-1.8).

At the stage of sending a criminal case to the court, it is also provided that a copy of the approved indictment, the final protocol on simplified pre-trial proceedings, the decision on the use of compulsory medical measures, confirmed by an enhanced electronic signature, is placed in courts where the information system is used (Articles 292.1, 297, 476). In court proceedings, the public prosecutor has the right to provide the court with electronic procedural documents on such procedural actions as a statement of challenges and petitions; presentation of evidence to the court; statement of objections against illegal actions of the defense

«On approva» of the Regulations on the Electronic Court Information System / https://online.zakon.kz/Document/?doc_id=34574697 [Accessed 18 October 2023].

37. Decree of the President of the Republic of Azerbaijan dated 01.06.2020 No. 1043 «On approval» of the Regulations on the Electronic Court Information System/ https://online.zakon.kz/Document/?doc_id=34574697 [Accessed 18 October 2023].

party; change in the qualification of the act, etc. (article 84.6). This system is already used in 80% of courts of the Republic of Azerbaijan,[38] its mobile version for citizens has been developed.[39]

Digital technologies are also widely used in criminal proceedings in the Asia-Pacific region. One of the leaders in the use of artificial intelligence in criminal proceedings is the People's Republic of China, where there are clear conceptual ideas about such interaction. For example, the Shanghai Intelligent Criminal Case Processing System (System 206) uses algorithms for analyzing legal and judicial acts, neuro-linguistic programming, graphic image recognition, video processing, speech analyzer, etc. At the same time, the «System 206» is an intelligent assistant that does not perform the process independently and its main role is auxiliary.[40]

The principle of «similar decisions in similar cases» proclaimed in China is provided by existing technological solutions and algorithms that allow identifying similar cases considered in the past. Artificial intelligence can quickly establish existing patterns in databases containing millions of court decisions, analyze them, as well as the decision made in the current case, informing the judge on what parameters it differs from existing precedents. This conclusion of artificial intelligence is also available to supervisory authorities.[41]

In the People's Republic of China, digital means are actively used to conduct online proceedings in civil and administrative cases («smart» court and «mobile» court, Internet court, micro-court), operating on the basis of artificial intelligence and blockchain. In the context of criminal proceedings, the use of these digital platforms is very limited and online justice is applied only in the order of expedited proceedings, consideration of issues of mitigation of sentences and parole.[42] Since 2016, an online mediation platform has been operating in China, allowing for both pre-trial mediation and conciliation court procedures.[43]

In Japan, there is a tendency to actually use the capabilities of artificial intelligence in the framework of forensic and criminological tasks, as well as the

[38] https://www.trend.az/azerbaijan/society/3709781.html [Accessed 18 October 2023].

[39] https://www.e-huquq.az/ru/news/sud/6851.html [Accessed 18 October 2023].

[40] RAKHOVSKY A.F. The use of artificial intelligence in China's criminal process (2021) Technologies of the XXI century in jurisprudence: *Materials of the Third International Scientific and Practical Conference, Yekaterinburg, May 21*. p.69-77. EDN PRJOFX.

[41] DRAGILEV, E.V., DRAGILEVA, L.L., DROVALEVA, L.S., PALAMARCHUK, S.A. Informatization of the judicial system of China *// Legal science.* 2022. No.8. pp. 54-59.

[42] DANSHIN, A.V. Ma Siu Method as a Principle of the Socialist Judicial System with Chinese Specifics: history and Modern Understanding (2023) *Lex Russica*. No 9 (202). p.133-145. DOI: 10.17803/1729-5920.2023.202.9.133-145. KONOPII, A. S. Digital transformation of the state and the rights of China (2021) *North Caucasus Legal Vestnik*. (3), p.72-77. DOI: 10.22394/2074-7306-2021-1-3-72-77 A. NEPEYVODA, N. Justice at your fingertips: China's experience https://zakon.ru/blog/2020/5/2/pravosudie_na_konchikah_palcev_opyt_knr_83633 [Accessed 20 October 2023].

[43] NEPEYVODA, N. Justice at your fingertips: China's experience https://zakon.ru/blog/2020/5/2/pravosudie_na_konchikah_palcev_opyt_knr_83633 [Accessed 20 October 2023].

analysis of a large volume of procedural documents of judicial practice to assist courts in the correct criminal legal qualification of the act.[44]

The above highlights the evidence of the widespread spread of information technologies in the field of judicial proceedings in many countries of the world. This trend takes new forms and provides new opportunities for participants in criminal procedural legal relations.

5 Digital Tools in Conciliation Procedures of Criminal Proceedings: Realities and Prospects

Based on the vision of the conciliation procedure outlined above and taking into account the studied international experience of the introduction and development of digital technologies in criminal proceedings, we will analyze which digital tools are effective and rational in mediative criminal procedural relations.

Currently, an important point of effective initiation and implementation of mediation procedures in criminal proceedings is the availability of information about the procedure itself, possible intermediaries (mediators), the conditions and consequences of such a procedure.

Initial information about the right to petition for the termination of a criminal case in connection with the reconciliation of the parties, the victim, suspect, accused receive from the person investigating the crime. But the investigator has no obligation to acquaint the participants of the process with non-procedural procedures. The relevant websites or pages on the websites of courts or investigative bodies can cope with this task. A positive example is the page on the website of the Lipetsk Regional Court of the Russian Federation.[45]

The current Russian criminal procedure legislation does not provide for mediation procedures as a form of resolution of a criminal case, however, it provides for the possibility of termination of a criminal case in the form of reconciliation with the victim. This procedure is restorative in nature and is close to the institution of mediation by nature, although it does not provide for the participation of a neutral mediator (in the pre–trial stage, the official conducting the preliminary investigation has the right to terminate the criminal case in connection with reconciliation with the victim; in the trial stage, the court).

One of the first technological issues that should be resolved by the participants of the conciliation proceedings is acceptable and desirable ways of notifying about

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44 SUMIN, A.A., KHIMICHEVA, O.V. Artificial Intelligence in the Criminal Procedure of the States of the Asia-pacific Region: A General Overview (2020) *International Criminal Law and International Justice*. No. 2. pp.18-21. EDN RGILWR.

45 http://oblsud.lpk.sudrf.ru/modules.php?name=docum_sud&rid=53 [Accessed 20 October 2023].

the progress of the case, summoning to the investigator or to the court, meeting with the mediator. There is no doubt that today the most convenient way to notify participants in criminal proceedings by an investigator, court or mediator is to use messengers, e-mail or SMS messages. It significantly speeds up the receipt of information by the subscriber, allows you to make sure that the subject of the notification receives the necessary information.

According to the Russian criminal procedure legislation, such a notification method is permissible only if there is a subject of notification – a victim, suspect, accused, witness. This method of notification is actively used, and empirical studies show that participants in the process often prefer notification via SMS messages or messengers.

Electronic documents are becoming increasingly common in criminal proceedings. Moreover, it can be evidence in a criminal case, other documents, for example, characteristics, certificates, responses to requests received by the investigator in electronic form, a protocol of the investigative action printed using a computer, and others. Currently, the legislation of the Russian Federation, unlike some other countries, provides for the formation of a criminal case in paper form. Accordingly, all documents received or generated in electronic form must be translated into analog format, that is, printed out. The possibility of electronic document management rationalizes the work on a criminal case of both professional participants in the process – the investigator, the head of the investigative body, the supervising prosecutor, the court, and persons involved in criminal proceedings – the victim, the suspect, the accused, as well as the defender.

In the presence of appropriate secure digital platforms, it would be easier to get acquainted with the materials of the criminal case, and within the framework of the mediation procedure, it would be more expeditious to submit documents confirming compensation for damage to the victim, apologizing, reducing the public danger of the suspect, the accused.

Significant, from the point of view of the effective implementation of the mediation procedure, would be the possibility of using electronic documents by the mediator, avoiding the preliminary paper form from the compilation. Undoubtedly, the official form of such documents and the procedure requires the use of an enhanced digital signature.

Currently, most of the documents submitted to the courts of general jurisdiction in Russia are translated into electronic format by scanning, which clearly does not simplify the work with documents. At the same time, the translation of the document into digital format allows participants in the proceedings to access the document through the use of a personal account, which simplifies the process of

familiarization with the case materials. Currently, the archives are being modernized and electronic archives are being created.[46]

Video conferencing and web video conferencing systems are one of the acceptable and effective digital tools in conducting conciliation procedures. The first is characterized by the locality of the system, the second allows the use of video communication via the Internet.

It is worth agreeing with our Brazilian colleagues, who note that the use of virtual rooms (web video conferences) during reconciliation is practical and convenient, since it allows you to organize meetings without travel expenses and without being distracted for a long period from your daily affairs. Video technologies increase the dynamics of interaction between participants in conciliation proceedings, as a result, we have fewer rescheduling of scheduled meetings.[47]

It is impossible not to mention the psychological component. The victim is not always ready to meet face to face with the accused. In this case, physical remoteness makes it possible to feel safer. Especially in cases where one of the participants in the reconciliation procedure is a minor. At the same time, the physical presence of the victim and the person who committed the crime in different places may not always have a positive effect. Apologizing in person, remorse sometimes has a stronger effect than monetary compensation for the damage caused.

Thus, the use of videoconferencing and web video conferencing systems in the mediation procedure is aimed at procedural and financial savings. We must not forget about the importance of ensuring the security of video communication during meetings of participants in the conciliation procedure, because in addition to the secrecy of the investigation, there is a danger of disclosure of personal data, privacy. Only secure platforms should be used for this.

We have outlined the realities of using digital tools in mediation procedures in criminal proceedings, but before proceeding to the discussion of promising tools that allow digitalization to expand to existing procedural forms of resolving criminal law conflict through mediation procedures, it is necessary to identify, in our opinion, some significant points.

First. Digitalization of all spheres of public life is inevitable and is an element of objective reality. In this connection, science has new tasks to prepare a theoretical basis and develop the main provisions governing the use of modern technologies in legal proceedings. A deep understanding of both the possibilities and risks of

[46] SHEREMETEV, I.I. Using digital technologies in criminal cases in court: reality and prospects. (2019). *Lex Russica*. p. 117-131. doi.org/10.17803/1729-5920.2019.150.5.117-131.

[47] OLIVEIRA, H.M. de; DIAS, P.C. Audiências de conciliação e mediação por videoconferência no Estado de São Paulo: benefícios e desvan- tagens segundo relatos empíricos dos conciliadores e mediadores judiciais. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 146-186, jul./dez. 2022. doi: 10.52028/rbadr.v4i8.8.

using digital technologies is required, especially in criminal proceedings, where the fundamental rights of citizens are affected and their freedoms are restricted.

Second. It is rightly noted that digitalization should not become a goal, but a means to achieve the goal.[48] Information systems, services, portals, artificial intelligence, video conferencing, etc., in the framework of criminal proceedings, being optional tools only ensure the functioning of the court, the work of law enforcement officers and the participation of citizens in the administration of justice. The authors of this study do not share the opinion about the possibility of a complete replacement of a human judge in such a complex area as criminal proceedings, but allow for a significant simplification of existing procedures for crimes of low public danger.

The third. Based on the previous statement, we note that digitalization of both criminal proceedings in general and conciliation procedures in particular inevitably entails a certain transformation of the existing architecture of the criminal process and some changes in the concept of building justice.[49] The possibility of spreading information technologies, including at the pre-trial stage of criminal proceedings, poses the task of widespread digitalization of the activities of the preliminary investigation bodies and their interaction with citizens involved in the criminal process (the accused, the victim, the defender, the victim's representative). A universal and multifunctional portal is required, in which everyone who becomes a participant in criminal proceedings receives relevant information in his personal account, including information about his procedural status, the dynamics of the case, decisions taken, complaints and petitions filed, etc.

The need to change the existing paradigm of the criminal process is primarily associated with the introduction of electronic legal proceedings technologies and its elements (such as electronic document management, video conferencing system, various integration, digital and electronic portals, services, digital platforms), allowing for simplified, remote use of conciliation procedures both in the pre-trial stage and in the court proceedings.

It is rightly noted that the key moment in the transformation of pre-trial proceedings should be the electronic interaction of the state and society (population) in the new digital reality.[50] Let's focus on the last statement in more detail.

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48 MASLENNIKOVA, L.N., SUCHINA, T.E. Experience of Criminal Proceedings Digitalization in the Federal Republic of Germany and Possibilities of its Use in the Criminal Proceedings Digitalization in Russia (2020) *Actual Problems of Russian Law,* 15(6):214-224. doi.org/10.17803/1994-1471.2020.115.6.214-224.

49 MASLENNIKOVA, L.N., SUCHINA, T.E. Experience of Criminal Proceedings Digitalization in the Federal Republic of Germany and Possibilities of its Use in the Criminal Proceedings Digitalization in Russia (2020) *Actual Problems of Russian Law,* 15(6):214-224. doi.org/10.17803/1994-1471.2020.115.6.214-224.

50 MASLENNIKOVA, L.N. Transformation of Pre-trial Proceedings in the Initial Stage of Criminal Proceedings, Ensuring Access to Justice in the Industry 4.0 Era (2019) *Actual Problems of Russian Law*. (6):137-146. doi.org/10.17803/1994-1471.2019.103.6.137-146.

Recall that the current Russian legislation does not provide for the use of mediation in its pure form, but there is some hybrid form of it – the termination of a criminal case in connection with reconciliation with a victim in criminal cases of minor gravity or so-called obvious crimes that do not pose a great public danger. Seeing the mediation potential in the existing procedural form, we believe that it is possible to use the level of information technology development and use digital tools to terminate criminal cases of this category in a simplified form and remotely.

For obvious crimes that do not pose a high public danger, there may be a simplified form of resolving criminal cases with the help of an appropriate electronic resource, using the example of the existing functionality of the «Judicial Cabinet» (Republic of Kazakhstan) and the «Electronic Court» (Republic of Azerbaijan).

In the pre-trial stage, when submitting a petition by participants in the criminal process for conciliation procedures, the investigator or inquirer makes a procedural decision, which has the right to terminate the proceedings in a criminal case or refuse to do so (Chapter 29 of the Criminal Procedure Code of the Russian Federation). However, in order to ensure the rights and legitimate interests of citizens involved in criminal proceedings, the termination of a criminal case, including with the use of conciliation procedures, requires the authorization of the court. Judicial verification of the grounds for termination of the criminal case, the validity of the existing charges and the actual circumstances of the criminal case ensures the legality of this procedure, its objectivity and impartiality, respect for public interest and the balance of rights of participants in criminal proceedings. Simplification of the judicial procedure for the termination of criminal cases at the stage of preliminary investigation is possible through the use of a digital platform that provides for a special module for the implementation of conciliation procedures in a criminal case and judicial authorization.

Termination of a criminal case in connection with reconciliation with the victim under Russian law implies compliance with the following mandatory conditions: 1) a minor crime has been committed; 2) the accused/ defendant is brought to criminal responsibility for the first time; 3) the damage caused by the crime has been compensated; 4) the victim has declared the termination of the criminal case; 5) the defense agrees to terminate the criminal case on this basis (Article 25 of the Criminal Procedure Code of the Russian Federation, article 76 of the Criminal Code of the Russian Federation).

Taking into account the existing procedure in Russia for the conciliatory form of termination of a criminal case, the authors of this study propose a digital transformation of this procedure, which is possible within the framework of a special digital platform through which the state interacts with its citizens. We are talking about the need to develop the functionality of interaction between citizens

and the state in criminal cases in the form of a special module on the application of conciliation procedures and their judicial authorization. The model of this module looks like this:

- the victim has the right to apply for a conciliation procedure in a criminal case using a digital platform;
- before submitting an application to the initiator of the conciliation procedure, the legal consequences of such a petition are explained in an accessible and understandable form that does not require special legal knowledge, which the applicant must personally indicate in the mandatory field of the module;
- this petition is submitted to the personal offices of the participants in the criminal case, who have the right to agree with it and support it by sending the appropriate consent to termination (the accused, the defender, the victim's representative, the prosecutor), with the possibility of providing evidence of compensation for damage or reconciliation, or to send their objections to it;
- if the suspect, the accused agrees to the termination of the criminal case by the conciliation procedure and sends the appropriate notification in response to the received petition, his rights and legal consequences of the termination of the criminal case on this basis must also be explained to him;
- the defender of the suspect/accused must find out the position of his client before the latter sends any legally significant message on the application. It is necessary to provide an algorithm in which the lawyer and his client confirm the agreed position on the application, as well as confirmation that the suspect / accused has received legal assistance from the defender on the application under consideration (for example, the presence of mandatory fields in the module forms for clarification and consultation, which both the defender and his client must confirm). In the absence of such information, a statement from the defense cannot be sent in response to the received petition;
- the investigator or inquirer conducting the preliminary investigation, in the personal account on the platform, send the received petition, as well as information from the materials of the criminal case necessary for making a decision (on bringing to criminal responsibility, characteristics at the place of residence of the accused, evidence of damages, etc.) on jurisdiction to the court, using the functionality of the platform;
- the parties, as well as the supervising prosecutor, and the head of the preliminary investigation body are notified of the direction of such a

petition to the court, having received a corresponding notification in the personal account;

- in court, the distribution of petitions among judges occurs randomly by analogy with the mechanics of the distribution of criminal cases aimed at ensuring the objectivity and impartiality of the court;
- the judge accepts such a petition for consideration and can make a decision on it without calling the parties, authorizing the termination of the criminal case by making a decision. If necessary, the judge should also be able to request and receive additional materials of the criminal case or other information necessary for him to make a decision;
- the digital platform should provide for the technical possibility of participating in the remote trial of participants in the proceedings using a personal account, if necessary, to hear the parties or verify the validity of the charges;
- the decision made by the court can be appealed by the parties also through the portal itself.

The proposed model of a simplified procedure for the termination of a criminal case with the use of conciliation procedures is allowed only for obvious crimes of minor gravity that do not pose a high public danger. Such a procedure makes it possible to resolve «simple» criminal cases in optimal and economically feasible forms, in which the parties have exhausted the conflict, and the victim has received compensation.

Earlier in the study, we pointed out that, as a rule, the initial information about the right to petition for the use of conciliation procedures is received by the participants in the proceedings from the person investigating the crime. However, officials and the court do not have a procedural obligation to clarify the available legal possibilities for terminating a criminal case. In this connection, in order to avoid unjustified condemnation of a person who is being brought to criminal responsibility for the first time and who has compensated for the damage to the victim, we believe it is possible to use the experience of recommendation algorithms within the framework of the proposed module. If a criminal case has been initiated for a minor crime, and it is seen from the personal data about the suspect / accused that he is being brought to criminal responsibility for the first time, evidence of damages is presented on the digital platform, then in the personal account of both the participants in the criminal process and the official conducting the proceedings (as well as the court in the proceedings of which such a petition or criminal case is pending), a corresponding notification should appear that according to the available parameters, a decision on a conciliation procedure may be made in this criminal case. Such a technological solution will help to avoid

any abuse by officials, as well as ensure the implementation of existing legal opportunities by the parties.

Within the framework of the proposed model, the technological process of identifying a participant in the proceedings is proposed to be solved based on the existing practice of technical solutions using an enhanced qualified electronic digital signature. Such a technological solution will help to avoid any abuse by officials, as well as ensure the implementation of existing legal opportunities for the parties.

6 Conclusion

Mediation as a form of resolution of criminal law conflicts is very widespread in many states. In one form or another, mediation elements are also manifested in the framework of the Russian criminal procedure legislation, (termination of a criminal case in connection with reconciliation of the parties) generally corresponding to the European concept of «simple mediation» with one significant feature in the form of the absence of a professional mediator.

The existing reality of widespread digitalization of life cannot but affect the order of interaction between society and the state, including in the framework of criminal proceedings. This leads to the search for new legislative and technological developments aimed at expanding electronic interaction of participants in criminal proceedings, taking into account the specifics of these legal relations and their high social significance. This requires a revision of the existing paradigm of criminal proceedings, namely, the possibility of remote implementation of conciliation procedures as a form of resolution of a criminal case.

The identified need for the transformation of criminal proceedings served as a determinant for the development of a new model of the pre-trial procedure for the termination of a criminal case, providing for the possibility of implementing a conciliation procedure using digital tools. The peculiarity of this model lies in the exclusively judicial authorization of the termination of a criminal case; the possibility of resolving the issue using a universal multifunctional portal in which each of the participants in the criminal process registers and implements their procedural rights and obligations.

The proposed model assumes a change in the architecture of Russian criminal proceedings, since it allows the resolution of criminal cases for obvious, «simple» crimes in a simplified, remote manner using the functionality of a digital platform and within the personal account of each of the participants in the process, using a special module for the implementation of conciliation procedures in a criminal case and judicial authorization.

The procedure proposed in this study makes it possible to resolve obvious criminal cases in optimal and economically feasible forms, in which the parties have exhausted the conflict, and the victim has received compensation. This principle ensures not only the economic feasibility of the state's activities, but also contributes to the implementation of its public function aimed at the speedy resolution of the criminal law conflict in reasonable forms. On the other hand, the proposed model also contributes to the implementation of the dispositive principle of the adversarial principle, since the parties have the right, but are not obliged to initiate a conciliation procedure and independently make a decision on it. The authorization of this procedure by the court is aimed both at ensuring the rights and legitimate interests of all participants in the process, and at maintaining a balance of private and public interests.

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ADR in Tax Disputes in Poland – The State of Play and Perspectives

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Abstract: This article examines alternative methods for resolving tax disputes in Poland. It discusses the current limited legal regulation in place, the proposed draft regulation from 2019 by the Committee for Codification of the General Tax Law (which did not take effect), and the emergence of consensual resolution practices despite the absence of a comprehensive regulatory framework. Between June and September 2021, the author conducted a limited empirical study involving in-depth interviews with eight representatives of taxpayers who had firsthand experience with the consensual resolution of tax disputes. The findings shed light on the practice of tax alternative dispute resolution (ADR). The article puts forth two main arguments. First, it contends that practical negotiations between tax authorities and taxpayers do occur. Second, it suggests that rather than hindering normativization (the process of establishing legal regulations), this phenomenon underscores the need for it.

Keywords: Tax Disputes. Tax Procedure. Empirical Study. Consensual Resolution Of The Case.

Summary: **1** Introduction – **2** Tax ADR in Poland de Lege Lata – **3** Proposal for the Tax ADR in the draft Law Prepared by The Committee for the Codification of the General Tax Law – **4** Reception of the Committee Proposal – **5** Limited Empirical Study: Methodology and Aim – **6** Main Results of the Empirical Study – **7** The Legal and the Pragmatic: the Discussion – **8** Call to Action: Reasons – **9** Conclusion – Acknowledgments – References

1 Introduction

The current-day shift towards responsive law[1] manifests in the growing interest in alternative methods of resolution of disputes, replacing or supplementing the adjudication mode. This interest is fuelled by both ethical and pragmatic considerations. In short, ADR procedures are perceived as more participatory and empowering the participants and less costly than traditional methods of dispute resolution, hence their appeal.[2]

[1] SELZNICK, P. NONET, P. *Law and Society in Transition: Toward Responsive Law*. New York: Harper and Row, 1978.

[2] Cf. THURONYI, V.; ESPEJO, I. *How Can an Excessive Volume of Tax Disputes Be Dealt With?*, How Can an Excessive Volume of Tax Disputes Be Dealt With? By IMF Legal Department, December, 2013, 2013, accessed 18 Jul 2023.

Tax disputes are no exception to this trend. ADR procedures – both in the broad and in the strict sense, as indicated below in this article – are often used to resolve tax disputes in common law countries (in the United States, the United Kingdom, Australia, and New Zealand). Still, their ambit currently spans also to other jurisdictions, such as Belgium, Italy, Portugal, and France.[3]

The article aims to present the state of play and perspectives on the development of ADR in tax disputes in Poland. It builds in particular upon the experience of the Committee for the Codification of the General Tax Law (*Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego*), which proposed the regulation of the tax ADR and the results of the limited empirical study performed by the author and consisting in in-depth interviews with the professionals (tax advisors and legal attorneys) representing taxpayers in tax procedures.

In what follows, a tax ADR is understood as any procedure whereby the resolution of the tax dispute between a taxpayer and a tax authority is attained based on the consensus between them – irrespective of the stage of the proceedings (administrative or court level) and legal form of the resolution of the case (traditional tax decision or agreement)[4]. The paradigmatic example of a tax ADR is mediation, which is the procedure where parties to the dispute aim to reach an agreement (a consensus) with the participation of a neutral and impartial third party as the intermediary between them (a mediator). However, a tax ADR defined as above does not need to be proceduralized (normativized) and individualized as an independent procedure (separate from general tax proceedings). A tax ADR procedure can instead be embedded in tax proceedings. The gist of tax ADR as a category – the common denominator of procedures encompassed by the above definition – is that a taxpayer and a tax authority negotiate the case resolution.

In the analysis, the dogmatic method and qualitative empirical method are used.

2 Tax ADR in Poland *de Lege Lata*

Presently in Poland at the administrative level, there is no tax ADR procedure of general application. Tax Ordinance, as the main act governing tax procedures (including adjudicatory procedure – tax proceedings), remains silent as to the possibility of basing the case resolution on the consensus between a taxpayer (party to the proceedings) and the tax authority.

[3] VAN HOUT, D. Is Mediation the Panacea to the Profusion of Tax Disputes?, *World Tax Journal 2018*, v. 10, no. 1, p. 43-97.

[4] For other definitions see, e.g., ZAROSYLO, V.; KAPLYA, O.; MURAVIOV, K.; MYNIUK, D.; MYSIUK, O. Application of forms of alternative dispute resolution in Ukraine, *Revista Brasileira de Alternative Dispute Resolution – RBADR 2022*, v. 4, n. 7, p. 234-236.

The consultative elements are included in the procedure for Advance Pricing Arrangement (APA; *uprzednie porozumienia cenowe*, regulated in Section III, articles 81-107 of the Act on resolving disputes on double taxation and conclusion of advance pricing agreements), the program of the co-operative compliance including real-time audit and agreed-upon so-called agreements (*porozumienia*) (*Program Współdziałania*; regulated in Section IIB – Articles 20s-20zr of the Tax Ordinance), and in the investment agreements (*porozumienia inwestycyjne*; regulated in Section IIC – articles 20zc-20zzb of the Tax Ordinance). However, these procedures do not qualify as tax ADR defined above. They do not presuppose or imply the previous state of a dispute (they are pre-audit procedures and prevent the occurrence of a dispute between a tax authority and a taxpayer rather than resolve it). These procedures are also limited in scope – they are not horizontal and do not apply universally to all tax cases (their objects and subjects are qualified).

The only formal and horizontal ADR procedure potentially applicable to tax disputes is mediation in the administrative court procedure – regulated in Articles 115-118 of the Act on Procedure before Administrative Courts (Section III Chapter 8 of the Act). The court mediation is available to taxpayers when they file a complaint against a tax decision to the first-instance administrative court. This institution has been in force since 2004, but after its introduction, it soon fell into disuse. According to the official statistical data published yearly by the Supreme Administrative Court, the respective regulation is a dead-letter law (e.g., in 2022, mediation took place only once[5]).

Though in Poland, tax proceedings are regulated separately from general administrative proceedings, affinities between the two remain apparent, mainly because the underlying legal relation between a regulator and a regulate is similar in these two domains. It is therefore interesting to note that from June 2017, the general administrative procedure encompasses the method of alternative dispute resolution: mediation (Chapter 5a of the Code of Administrative Proceedings)[6]. The official data on the practical import of the institution are, to the best of my knowledge, unavailable. According to the anecdotal data, administrative mediation has only limited to no success.

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5 *Informacja o działalności sądów administracyjnych w 2022 roku*, Warsaw, March 2023, available at www.nsa.gov.pl, accessed 18 Jul 2023.

6 Employing ADR in administrative law is a wide-spread0 phenomenon, though not without its problems – DRAGOS, D.C.; NEAMTU, B. (EDS). *Alternative Dispute Resolution in European Administrative Law*. Heidelberg–New York–Dordrecht–London: Springer, 2014.

3 Proposal for the Tax ADR in the Draft Law Prepared by the Committee for the Codification of the General Tax Law

The Committee for the Codification of the General Tax Law was appointed by the Prime Minister of the Republic of Poland in November 2014 and tasked with elaborating a new tax ordinance – to replace the one currently in force. The Committee was composed of tax academics, tax advisors, tax officials, and tax judges.

The Committee worked for five years towards this end. The resulting draft new ordinance included two chapters dealing with tax ADR: "Tax agreement" and "Mediation" (chapters 10 and 11). These two newly proposed institutions were among the flag ideas of the project. The Committee presented these procedures as a breakthrough change in the procedure, and the audience responded to them with significant interest.

Without going into excessive details, it is worthwhile to outline the main features of the proposed procedures.[7] The draft provided that a taxpayer and a tax authority can make a so-called "tax agreement." They conclude a tax agreement "within the boundaries of the law" by making settlements, in particular where doubts concerning facts of the case are difficult to overcome, where the further effort of evidence gathering is impracticable or cost- or time-consuming, in the valuation issues, in cases where relief in the payment of tax is sought by a taxpayer, and a tax authority is to decide on the type of relief to be applied and on its conditions (e.g., payment in installments vs. waiver of payment). The list of possible areas for the conclusion of a tax agreement was not exhaustive – the Committee provided it for illustration and to encourage the employment of the institution of tax agreement in practice. The draft further stated that a tax agreement cannot consist in settling directly the determination of the tax due. This condition intended to exclude bargaining (direct negotiating figures of tax) – to keep the discussion about the case resolution to the merits.

A tax agreement was binding on a tax authority – determinative of a tax decision. This status also implied that a tax agreement was intended not to replace a tax decision (as an alternative act closing the proceedings) but to determine its substantive content. The proposal was conservative, to respect the existing procedural framework and to retain the possibility of judicial review of the case resolution wherever a party (a taxpayer) files a complaint to the administrative court.

The draft law proposed by the Committee also regulated tax mediation. The proposal stated that mediation could be conducted "in cases where a tax

[7] Cf. also ETEL, L.; POPŁAWSKI, M. The Assumptions of a New Tax Ordinance in Poland. *Public Governance, Administration and Finances Law Review*, v. 1, no. 1, p. 30-48, 2016.

agreement can be concluded and with the aim to conclude it." Therefore, the institution of tax agreement was embedded in the institution of mediation. The draft mediation was premised upon traditional principles: it was voluntary for both parties in dispute (a taxpayer and a tax authority), and a mediator was to be neutral and impartial.

The work of the Committee (with amendments introduced by the Ministry of Finance) was presented by the Council of Ministers as the bill to the Parliament in June 2019.[8] Soon afterward, parliamentary works were discontinued. Although selected parts of the project are now being reutilized („recycled") by the Ministry of Finance in their bill, this is not the case with the tax ADR proposed by the Committee. Consequently, it appears that the decision-makers have abandoned their idea for good.

4 Reception of the Committee Proposal

The idea of the tax ADR normativization – i.e., of providing an explicit legal framework for it – has been dropped primarily for reasons unspecific to it. This idea simply shared the fate of the failure of the entire new tax ordinance project. Still, it is worthwhile to investigate the response to the proposal. The draft has been subject to numerous consultations, informal (among tax academics, the Ministry of Finance, and tax administration) and formal (within the official public consultation process, under the Polish law mandatory for a draft law). Additionally, the Committee members presented it at numerous academic events, where it received feedback from academics, tax authorities, tax advisers, and tax judges.[9]

The draft of tax ADR received mixed – and polarised – feedback. Those in favor of it highlighted the positive impact consensual methods of dispute resolution may have on the level of participation of taxpayers in tax proceedings (who, thanks to such methods, can gain desirable "process control"[10]) and, consequently, their favorable influence on voluntary tax compliance. The very same considerations also motivated the Committee to propose tax ADR. Those against the tax ADR raised constitutional reservations, related to the rule of law and equality, and the alleged impracticality of the proposal. The critics stressed that the previous failure of administrative court mediation substantiated their reservations.

[8] Document no. 3517, VIII term, available at www.sejm.gov.pl, accessed 18 Jul 2023.

[9] For a detailed discussion of consultations, see: FILIPCZYK, H. *Alternative Methods of Resolving Tax Disputes in Poland* (in:) *Contemporary Issues in Tax Research*, eds. MULLIGAN, E.; OATS, L., Vol. 3, Birmingham: Fiscal Publications, 2019, p. 87-120.

[10] THIBAUT, J.W.; WALKER, L. *Procedural Justice: A Psychological Analysis*. Hillsdale: L. Erlbaum Associates, 1975.

Constitutionality issues raised by the critics can be conceptualized as related to tax justice in its two aspects: legality (lawfulness, the rule of law) and equality. Under Article 2 of the Constitution, Poland is a democratic state of law. Under Article 217 of the Constitution, the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute. Under Article 84, everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. These three provisions are the bedrock of the formalistic approach to tax law, typical for the Polish legal culture. Under this approach, tax rules are supposed to be strictly provided by the statute. Seemingly, such construal of the cited provisions of the Constitution leaves little or no room for tax authorities' discretion in tax law application. This rigor also serves the interest of equality: it ensures consistency in tax law application which results in like cases being treated alike.

An aspect of the legality problem is the alleged incompatibility of tax ADR with the current model of tax proceedings. This model postulates that tax proceedings are inquisitorial (as opposed to adversarial). It also postulates adherence to the principles of legality and objective truth and the asymmetry between a tax authority and a party to the proceedings: in the tax decision, the former unilaterally determines the legal situation of the latter. ADR procedures, on the other hand, seem to require the equality of parties in dispute. The skeptics feared also the privatization of tax disputes. Interestingly, similar criticisms related to the incompatibility between ADR and the model of proceedings are raised regarding general administrative mediation.[11]

The objections shortly outlined above refer to the fundamentals and allude to the Montesquieu ideal of "mechanical jurisprudence"; they downplay the omnipresence of discretion in law and the impossibility of excluding "human factor" in law application, to which tax law is no exception. They also overemphasize the dominant position of a tax authority. I will come back to these issues below.

Importantly, in their overall appraisal of the tax ADR, the critics' conservative outlook on tax procedures has not been balanced out by pragmatic considerations. In other words, the skeptics did not expect that any practical gains could be derived from negotiating the consensual resolution of a tax case. The critics were heavily influenced by the perception of antecedent or concurrent ADR procedures: mediation in the administrative court proceedings and mediation in administrative

[11] SUWAJ, R. Mediation as a new form of settling administrative matters in Poland. *Przegląd Ustawodawstwa Gospodarczego*, v. LXXII, no. 12, p. 18-26, 2019.

proceedings, as failures. Consequently, they have seen ADR as lacking credibility, as another unpromising and impractical experiment, exotic to the Polish legal culture of administrative and tax law, and not as a potentially effective and efficient way to deal with tax disputes.

The opinions about the tax ADR varied characteristically: along the lines of the role of respondents in the tax proceedings. The proposal received mixed feedback from tax academics, rather negative feedback from the tax administration, somewhat positive feedback from tax advisers, and positive feedback from business organizations, and trade unions.[12] Tax officials did not see at the time the practical import of the tax ADR and viewed them as leading only to the lengthening of the proceedings and as a "costly gift" for taxpayers or a "dispensable exercise in interpersonal communication" (the quotes come from their statements).

5 Limited Empirical Study: Methodology and Aim

I argue that the current tax practice of "negotiating tax deals" contrasts with these doubts and reservations. Though any attempt to put a number on this practice – quantify it – would be unwarranted, it is safe to claim that negotiations between taxpayers and tax authorities in dispute are at least sometimes conducted – even without a legal framework.

To verify this contention, I conducted a limited empirical study using the qualitative method of in-depth interviews (IDI). Between June and September 2021, I interviewed eight professionals: tax advisers and attorneys from tax consultancy firms in Warsaw, representing the clients in tax procedures, who declared that they engage in negotiations with tax authorities whereby the settlement of the case is sought. The interviews, each of a duration of approximately one hour, were registered (upon interviewees' consent), anonymized, transcribed, and coded.

The aim of the study was twofold: first, to investigate the scope and structure of the practice of consensual resolution of tax disputes, and second, to investigate the perceptions of the interviewees of such practice in the context of tax justice (to establish how this practice relates in their view to standards of legality, equality, and procedural fairness).

Besides the study, I discussed the practice of negotiations (which can be referred to as tax ADR *de facto*) with tax professionals on numerous informal occasions, also in my capacity as a member of the Committee.

An important caveat is that IDI, due to its nature, does not provide insight into *facts* but into the *perceptions* of respondents. The relation of perceptions to facts

[12] FILIPCZYK, H. *Alternative Methods*...

is indirect. Consequently, IDI potentially can offer a distorted picture of reality. I am also aware that my study was limited (in the so-called exposure, impacted in particular by the number of respondents[13]).

One can safely assume, though, that where the study participants declare that negotiations take place, they do take place (otherwise, respondents would grossly misrepresent the reality, which – absent fundamental cognitive distortions – should not be assumed). At the same time, the variety of their accounts of the negotiation practice can be partly attributed to (and explained by) the variety of their perceptions. The study does not permit to conclude about the scale of tax ADR *de facto*.

6 Main Results of the Empirical Study

The study revealed that – according to the interviewees – despite the lack of an explicit formal basis in the Tax Ordinance, negotiations with the tax authorities are conducted. The answers given by the respondents (participants of the study) sit in the continuum between two opposing statements given by my interlocutors who refused to participate formally in the study: “I never make deals with tax authorities” *versus* “Now in the customs-tax office everything is negotiated.” In my view, to engage in the tax ADR (whether formal or informal), one has to know that negotiations can be conducted, be willing to conduct them, and be able to conduct them (i.e., have appropriate know-how). These conditions have to be fulfilled conjunctively. The scale of negotiations is, therefore, presumably limited; still, the phenomenon is present and worthy of scholarly attention.

The primary aim of talks with tax officials is not negotiations in the strict sense but ensuring open communication between a taxpayer and a tax official. Participants of disputes wish to exchange arguments and views to know and acknowledge their respective positions. Yet such talks also have the goal of reaching a consensus – to effectively resolve the case to the merits.

Negotiations are informal; obviously (as mentioned above), there is no explicit legal basis for them in the procedure, but they are not formalized spontaneously by their participants. Usually, there is no trace of negotiations in the case files – at most, a tax official writes a protocol, confirming that a meeting took place but giving no details as to the negotiation process.

Several interviewees stressed that a situational pretext is needed to initiate talks. Standard activities explicitly provided for in the procedure, such as the opportunity offered to a taxpayer to review the case files and comment on them

[13] For exposure in qualitative research, see: SMALL, M.L.; MCCRORY CALARCO, J. *Qualitative Literacy*. Oakland: University of California Press, 2022.

(before the closure of the proceedings), give such pretext. The sooner talks begin, the more likely they will lead to a consensus. The initiative is usually on the part of a taxpayer (their legal representative), but – according to the interviewees – the attitude of a tax official is crucial for the success of talks. The respondents varied in opinions about this attitude (or attitudes), or – more generally – about tax officials' "bad" or "good" will. The respondents may fall prey to the stereotype of a tax official each of them has.

The scope of negotiations ranges across issues, with the particular position of transfer pricing issues in income taxes as the mainstream subject of negotiated agreements. In the TP area, the "right answer"[14] to a legal question central to the resolution of the case is typically within the range of values, which makes it particularly amenable to negotiation.

Parties negotiate the outcome of the case and minor, technical, or procedural issues arising during tax proceedings (such as the timescale and sequence of proofs, the scope of explanations to be provided by a taxpayer, etc.). Nothing seems to be out of scope upfront: even tax avoidance issues can be subject to discussion. Interviewees stressed that it could not be established in the abstract (*in abstracto*) which points can be discussed towards a consensus since contentious issues can divulge their potential for negotiation during talks. They also highlighted that particularly liable to negotiation are "grey areas" of law or facts, non-binary questions, questions of fact or law other than evident. A good starting point is an inconsistency in the administrative court jurisprudence because it shows the discursive potential of the case and makes participants of the dispute sensitive to risks inherent in depending on the court for future case resolution. When confronted with such inconsistencies in judicial practice, parties sometimes prefer to negotiate the deal rather than place the resolution in the hands of tax judges.

Parties engage in the game of negotiations or "negotiation dance" (it is symptomatic that the word "game" has often been used spontaneously by the respondents). The interviewees reported that they prepare the strategy of negotiation before its commencement, inflate their opening position, are partial (intentionally biased) in presenting the arguments (e.g., the arguments based on jurisprudence – they select verdicts speaking in favor of their position), concede a minor irregularity to close the procedure before a tax authority discovers a major irregularity, etc. They attribute the same strategic approach to tax officials. "Package deals" are possible: conceding an issue by one party to a dispute in return for conceding another issue by the other.

[14] DWORKIN, R. *Taking Rights Seriously*. Cambridge, Massachusetts: Harvard University Press, 1977.

Interviewees were less vocal about the second group of questions I asked: concerning how negotiations relate to tax justice. In their perception, the central aspect of justice relevant to tax ADR (and taxation in general) is legality (lawfulness). Respondents underlined that the principal value of reference, and the leading dimension of justice in their perception, is the rule of law. The concept of paying the right amount of tax, i.e., the amount set in the law, is held firmly. They see this concept as the requirement of the funding principle of Polish law but also as their personal and professional responsibility. At the same time, they problematize the normative content of the law – see this content (i.e., what the law requires) as an enigma, highlighting the growing complexity and obscurity of present-day tax law.

According to the respondents, negotiations with tax authorities are advantageous because of their time- and cost-effectiveness and elimination of outcome risk inherent in resolving the dispute at the court level. They favorably commented on the pragmatism of tax authorities present when the latter are eager to negotiate – as a token of responsibility for the interest of the state budget. They positively value the consensus between a taxpayer and a tax authority. It seems that this value is, in their eyes, not only instrumental but intrinsic as well.

The majority of interviewees (except one) called for legal regulation providing clear grounds for tax ADR. The expected advantages of such regulation are that it would – in respondents' view – open wider the channels of communication with tax authorities, dissipate doubts as to the legality of this practice, enhance the sense of legal security for both parties to the dispute and ensure more transparency in the deals. In particular, legal regulation should ensure that the negotiated deals are honored – now, this operates only based on gentlemen's agreement and mutual trust (the trust which, admittedly, is rarely – if at all – disappointed) with no legal guarantee that tax authorities will respect the deal in tax decision and that disclosure of facts during talks will not be then played against a taxpayer at the later stage of proceedings. However, one interviewee, and several participants of informal consultations, showed ambiguity in answering this question. While they appreciated the advantages of legal regulation, they also feared that regulating tax ADR could exert a freezing effect on the current practice of negotiations developing organically (as one of the discussants put it, the normativization is likely to "kill" negotiations).

7 The Legal and the Pragmatic: the Discussion

The study, though limited in exposure, invites us to reconsider doubts and reservations against tax ADR *de iure* – because negotiations are conducted *de facto*.

The respondents' (practitioners') views on law support theoretical arguments polemical to the "mechanical jurisprudence". The model of tax proceedings proves to be sufficiently flexible to accommodate the negotiations. The fact that tax disputes are sometimes concluded consensually confirms that they can be so concluded. Thus, this fact falsifies the contention that tax negotiations are incompatible with the model of tax proceedings. The tension with the model is apparent but not necessarily factual – it is not unsurmountable (at least in the perceptions of the respondents).

There are two competing concepts of tax proceedings, which illustratively can be referred to as "thin" (or parsimonious) and "thick" (or rich). The "thin" concept reduces the proceedings to the act of legal syllogism: establishing facts of the case and applicable law and subsuming facts under the law. The "thick" concept, while admitting the legal syllogism as the general structure of law application or the "technical ladder" – "a support frame of our cognitive processes"[15] – sees tax proceedings as the arena of the exchange of arguments. It gives flesh to the bone of the syllogism. The "thick" concept is, therefore, the extension of the "thin."

Traditional outlook on substantive and procedural tax law offers their "thin" idea. It neglects the inevitable presence of the complexity and discretion in applying tax law – which is in tension with the widely acknowledged fact that tax law epitomizes the complexity and obscurity of present-day legal regulation. The "thin" concept is dogmatic: it *a priori* excludes discretionary decision-making from the area of tax law. But such exclusion cannot be performed by *fiat*, as discretion is intrinsically present in the law application – and this also concerns the application of tax law.

Contrary to popular views, above cited Articles 2, 84, and 217 of the Constitution do not oblige us to subscribe to the "thin" concept of tax proceedings. Moreover, the principle of active participation of a taxpayer and the principle of objective truth governing tax proceedings (Articles 123 and 122 of the Tax Ordinance) speak for the "thick" concept. This is self-evident for active participation. For the principle of objective truth, it should be noted that facts and laws relevant to the case are more readily disclosed in the communication with a taxpayer than in the "solipsist" position of a tax authority. In the academic accounts of procedural fairness, this double role of participation is highlighted: a party (a taxpayer) is not only entitled to it but also is placed in an excellent position to deliver proofs and arguments shedding light on the "truth" of the case.[16]

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[15] BROŻEK, B. *The Legal Mind. A New Introduction to Legal Epistemology*. Cambridge: Cambridge University Press, 2019, p. 113.

[16] Cf., e.g., GALLIGAN, D. *Discretionary Powers. A Legal Study of Official Discretion*. Oxford: Oxford University Press, 1986, p. 328.

The study shows that participants in tax disputes see the discursive potential in their cases, and they try to play it out for their benefit. It is the role of a tax authority to ensure, to the maximum extent attainable, the closeness of real-life dispute to the Habermasian "ideal speech situation" (bearing in mind that "ideal speech situation" is only the regulative and aspirational idea).

What is more, negotiations *de facto* show that the procedures of tax ADR can be effective and efficient instruments of case resolution – contrary to previous negative experiences with similar consensual procedures. The organic development of negotiation practice implies that it serves the purposes of the disputing parties: it is useful for them. Otherwise, taxpayers and tax officials probably would not be inclined to negotiate (assuming that they act rationally). Tax ADRs are not doomed to fail – as the critics feared.

Therefore, importantly, the practice of tax negotiations with tax authorities attests to the pragmatic usefulness of tax ADR. This finding opens the discussion to the questions of *when* and *why* it is pragmatically useful (or perceived as useful by the involved parties). It would be unjustified to claim that tax ADR is beneficial, in legal and pragmatic terms, in every case. Decision-makers should address these critical questions in drafting the law.

The anatomy of tax disputes is more complex than the formalism suggests. Despite the formal dominant position of the tax authority in tax proceedings, the principal and guiding relation of dependence is that both the tax authorities and taxpayers are subjected to the law. In this perspective, their position is on par.[17] This dependence manifests in the judicial review of tax decisions – the administrative court procedure is adversarial, and the court is the arbiter deciding which party is right. Ultimately, the law is what the court decides.

Moreover, taxpayers and tax authorities are interdependent. They have interests in common and interest in conflict. The essential shared interest is tax compliance: their common goal is that the tax paid by a taxpayer corresponds with the tax due. At the same time, it would not be prudent to ignore the structural conflict between them, which can be encapsulated in simple terms: a taxpayer wishes to pay less tax, and a tax authority wishes him to pay more tax.

Above all, the substance of the settlement (deal between a taxpayer and a tax authority), and not the mere fact that it was reached through negotiation, should be judged in the light of the rule of law (the standard of legality). The legality of the outcome of a disputed case is not dependent on whether the resolution of the case was reached unilaterally by a tax authority or via a consensus with a taxpayer.

[17] BRZEZIŃSKI, B. *Wstęp do nauki prawa podatkowego*. Toruń: Dom Organizatora, 2001, p. 102-103.

In tax proceedings, the legal and the pragmatic are interlinked. Tax administration activities are to be effective and efficient. This obligation is rooted in the Constitution. Therefore tax procedures should be conducted in a way that ensures the prudent allocation of resources. Hence the self-reporting method, for the most taxes, and a (widely known and valid across many jurisdictions) fact that tax audits are addressed only to a minority of taxpayers. Tax ADRs are – again – only the extension of the pragmatic attitude of tax administration already present in tax proceedings.

Summarising, the study invites us to reconsider from a legal and pragmatic point of view the criticisms addressed to the idea of the regulation of tax ADR in Polish law. On the face of it, the results of the study shift the burden of argumentation back to critics. It is for them to argue that despite tax ADR *de facto* taking place, regulation is not needed.

8 Call to Action: Reasons

As observed already in 1996, "[a]lthough few empirical studies have been done, there is good reason to think that bargaining is a common part of administrative processes".[18] The results of my empirical study urge us to consider whether we are better off with or without the regulation of the tax ADR – knowing that in either case, negotiations between tax authorities and taxpayers are, and presumably will be, conducted.

I believe that the regulation is needed – for four reasons. First, discretion is part and parcel of the practice of law application. Discretion is inevitable and difficult to manage. An ever-lasting academic question, symbolized by the debate between H.L.A. Hart and R. Dworkin, is whether discretion is fully constrained or not (i.e., whether its existence is real or only apparent – *prima facie* – because of the operation of legal principles which eliminates all areas of indeterminateness in law). Be that as it may, an important tool for putting discretion under constraint is transparency. The negotiated deals between taxpayers and tax authorities should be supported by reasons expressed in writing; the resulting document should be included in the case files. Moreover, the negotiated deals should be subject to usual scrutiny by the courts (upon the taxpayer filing the complaint) – since judicial review is an essential element of the rule of law. For all that to be possible, tax agreements (deals) have to be "visible": overt and not covert.

Second, the regulation is vital for ensuring legal security for taxpayers. When a tax authority makes a settlement, it should be obligated to honor it in the tax

[18] GALLIGAN, D. *Due Process and Fair Procedures*. Oxford: Clarendon, 1996, p. 282.

decision. Absent legal regulation, taxpayers cannot be sure this will be the case, and this uncertainty – naturally – weakens also their bargaining position.

Third, legal regulation is needed to ensure even-handedness and equality in tax proceedings – in the formal aspect of access to advantageous procedural instruments. Tax administration should communicate explicitly the conditions for a dispute to qualify for tax ADR and employ these conditions consistently toward all interested taxpayers. The general public should know that there is a procedural option to enter negotiations with tax authorities. This should no longer be the insider or selective knowledge since this state of affairs in itself gives rise to inequality: to uneven distribution of procedural rights.

Fourth, tax ADR should include mediation. The respondents participating in the IDI did not see mediation as a valuable method of dispute resolution or even were not sufficiently knowledgeable about the nature of it. Still, the presence of a neutral and impartial third-party intermediary between a taxpayer and a tax authority can be an important factor in maximizing the procedural fairness (of the process) and quality of the negotiated agreement (as the outcome of this process). This will be so particularly where taxpayers themselves lack technical knowledge of tax law. In such cases, a mediator could ensure effective communication between them and tax authorities, encouraging the latter to "translate" their message into lay terms.

9 Conclusion

In the current Tax Ordinance, there is no procedure for consensual resolution of tax disputes. The attempt to provide legal regulation of tax ADR in Poland, made by the Committee for Codification of the General Tax Law, failed. Yet despite the lack of a clear legal framework negotiations between taxpayers and tax authorities are conducted. This practice was confirmed by the limited empirical (qualitative) study: in interviews with legal representatives engaged in real-life tax disputes. As I claimed, this phenomenon is, above all, the byproduct of the omnipresence of discretion in tax law application, and of the complicated interplay of interests between taxpayers and tax authorities. Clearly, parties in dispute see the value in negotiating deals.

I also claimed that if this is the case, tax ADR should be regulated in procedural law. Deals between taxpayers and tax authorities should no longer be kept in obscurity. Turning a blind eye to the practice does not make it disappear but rather – naturally – makes us lose sight of it. Tax ADR *de facto* should be regulated as *de iure* to shed light on their practical operation and constrain the managerial discretion of tax administration.

Given the valuable insight offered by my interviewees, I believe that public consultations of any potential future legal regulation of tax ADR should involve those having hands-on experience: professionals who have been engaged in actual negotiations between taxpayers and tax authorities. Organically developed practice of consensual resolution of tax cases serves as a natural experiment – the results of this experiment, with corrections mandated by the Constitution, should be structured into legal provisions.

It is difficult to predict whether the idea of tax ADR, elaborated in the work of the Committee, will be revived. Yet I believe that the more we make tax ADR *de facto* a public knowledge, the more likely the decision-makers will care to regulate it in the law. I hope that this paper contributes to disseminating such knowledge.

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Right to be heard as a part of due process of law in arbitration proceedings: current challenges and lessons for Ukraine

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Abstract: International commercial arbitration as a type of alternative dispute resolution is gaining popularity quite rapidly and its use is not the result of a lack of trust in national courts, but a desire to resolve a dispute as soon as possible with the least amount of time and the ability to manage the process independently. This can be considered one of the most important reasons for choosing arbitration, as the events of the last 5 years in the world (such as the Pandemic, Climate change) have demonstrated to everyone the importance of prompt communication and, as a result, the importance of introducing various forms of arbitration proceedings. Such forms include direct (traditional) consideration of the case in the arbitration courtroom, online and hybrid forms. And in this aspect, a fairly reasonable question arises as to whether such forms of arbitration proceedings comply with the due process of law. The article will analyze the doctrinal approaches of both Ukrainian and foreign legal schools and examples of the law enforcement practice of national courts on this problematic issue. In addition, the article will analyze the Ukrainian legislation on the compliance of arbitration proceedings with due process of law and propose amendments to the current legislation.
The article consists of 3 main parts which are logically interrelated and methodologically structured. The first part is devoted to the analysis of the main approaches to due process of law, which is revealed through the prism of comparative legal analysis of doctrinal concepts and analysis of law enforcement practice of national and arbitration courts. The second part reveals the essence of such a structural element of the due process of law in arbitration proceedings as the right to be heard, which plays a key role not only in the course of international commercial arbitration proceedings, but also in the procedure for recognition and enforcement of international commercial arbitration awards by national courts. The last section reveals the peculiarities of due process in virtual arbitration as a specific mechanism of alternative dispute resolution. Using a comparative legal analysis of arbitration practice and the current rules of the leading arbitration institutions, the author concludes that the introduction of online mechanisms in arbitration proceedings is effective.

Keywords: Due Process of Law. Arbitration Agreement. International Commercial Arbitration.

Summary: **I** Introduction – **II** General Doctrinal Approaches to Due Process of Law – **III** The Right to be Heard as an Integral Part of Effective Arbitration Proceedings – **IV** Observance of Due Process During Virtual Arbitration Proceedings – **V** Conclusions.

I Introduction

Despite the attractiveness of the varied forms of arbitration hearings, not all of the international community was optimistic about this innovation. Of course, in cases where the will of the two parties to the dispute was available, no questions arose, as there was a clear observance of due process as a mechanism for the realization of "autonomy of will". However, as previously mentioned, problematic issues arise when any party to the case objects to the hybrid form of arbitration and insists on the arbitration proceedings being held in person. That is why it can be concluded that there is a discrepancy between the discretionary powers of international commercial arbitration and, accordingly, the rights of the parties to the dispute who object to the hybrid arbitration to due process (the right to be heard during a fair arbitration).

This inconsistency can be seen most clearly in the views expressed by Turkey during the discussion of amendments to the ICSID Rules. Thus, Turkey proposed that the form of hearings should be determined by agreement of the parties. In other words, if one party does not agree to the method proposed by the other party or the arbitral tribunal, the proposed method of arbitration should not be applied. This position is more appropriate than delegating powers to the arbitral tribunal, taking into account the parties' right to a fair trial and due process. That is why Turkey proposed to add to Article 32 of the ICSID Rules a rule requiring that hearings be held in person unless the parties agree otherwise, except in exceptional circumstances.[1] However, Turkey's suggestion regarding the proposed amendments to the ICSID Rules was rejected on the grounds that there may be circumstances in which the arbitral tribunal may, at its own discretion, decide on the advisability of choosing the form of arbitration (in person or remotely).[2]

II General Doctrinal Approaches to Due Process of Law

Speaking of due process of law, we can say with certainty that its guarantees have existed for several centuries.[3] However, the analysis of scientific points of view and law enforcement practice on this issue gives us grounds to assert

[1] "Compendium of Comments for Working Paper # 4 relating to Proposed Amendments to the ICSIO Arbitration Rules," ICSID, March 23 2021. URL: https://icsid.worldbank.org/sites/default/files/amendments/Compendium%20of%20State%20Comments%20on%20Proposed%20Amendments%20to%20the%20ICSID%20Rules%20– WP%20%23%204%20– %20As%20of%202021.03.23.pdf.

[2] Proposals for Amendment to ICSID Hides – Working Paper # 5, ICSID, June 15, 2021, para. 62 URL: https://icsid.worldbank.org/sites/default/files/publications/WP%205– Volume1– ENG– FINAL.pdf.

[3] Franco Ferrari, Friedrich Jakob Rosenfeld, et al., 'Chapter 1: General Report', Due Process as a Limit to Discretion in International Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 2020) p. 1.

that there are no clear boundaries of what constitutes due process. Frederick Schauer believes that the concept of due process of law has its roots in the origins (principles) of natural justice. In addition, as the scholar notes, the principles of natural justice consist of two interrelated rights – the right to be heard and the right to an impartial court.[4]

The abovementioned doctrinal aspects are reflected in the law enforcement practice of national courts. Attention should be drawn to the judgment of the Singapore Court of Appeal in the case *Gas and Fuel Corporation of Victoria v. Wood Hall Ltd and Leonard Pipeline Contractors Ltd*, which became the basis for the development of a consistent case law and further implementation of the *res judicata* principle. Thus, the judgment sets out two basic principles of natural justice:

- the obligation of the court to be independent and impartial (Latin: Nemo judex in causa sua – "*no one can be a judge in his own case*");
- the obligation to give due notification of the parties to the case and the right to be heard (Latin: audi alteram partem – "listen to the other side").

But, analyzing these principles, the Court states that each of them has its own extension or addition, and accordingly, the addition of the first principle is that justice must not only be done but also appear to be done; and the addition of the second principle is that each party must be guaranteed the right to a fair trial and a fair opportunity to provide explanations in the case. However, regardless of the extensive understanding of this concept, its main postulates are fairness and the adoption of a court decision only after a full and impartial consideration of the case.[5] This approach has been repeatedly used in similar cases in the national courts of Singapore to set aside an international commercial arbitration award, in which one of the parties claimed a violation of natural justice during the arbitration proceedings.[6]

Based on the foregoing, it is quite reasonable to conduct an analytical study of both case law and doctrinal approaches to the interpretation of the "right to a fair trial" and the "right to provide explanations in the case" in the context of disputes in international commercial arbitration.

[4] Frederick F. Shauer, English Natural Justice and American Due Process: An Analytical Comparison, 18 Wm. & Mary L. Rev. 47 (1976), URL: https://scholarship.law.wm.edu/wmlr/vol18/ iss1/3.

[5] Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd [1978] URL: https://doylesarbitrationlawyers.com/gas– and– fuel– corporation– of– victoria– v– wood– hall– ltd– and– leonard– pipeline– contractors– ltd– 1978– vicrp– 41– 1978– vr– 385– 11– april– 1978/.

[6] CA 100/2006, Soh Beng Tee & Co Pte Ltd. v Fairmount Development Pte Ltd URL: https://documents– dds– ny.un.org/doc/UNDOC/GEN/V07/881/97/PDF/V0788197.pdf?OpenElement.

For example, a party to an arbitration proceeding, having received an award not in its favor, tried to appeal it to a national court. The main motivation for setting aside the award was that the arbitration did not provide an opportunity to present evidence beyond the time limits agreed between the parties and the arbitrator at the preliminary hearing. The Court of Appeal of Singapore, considering this application, came to the conclusion that the basic prerequisite for procedural fairness is to provide the parties to the dispute with a "reasonable opportunity to present their case", and not the obligation of the arbitral tribunal to ensure that the parties use the full opportunity to present their case to which they are entitled. A full opportunity to present its case does not entitle a party to obstruct the proceedings by using delaying tactics by filing any complaints, motions, or additions on the eve of the arbitration.[7] Similar approaches are also reflected in the decision of the High Court of Australia in the case of *the Association of Architects of Australia ex parte Municipal Officers Association of Australia.*[8]

In this context, the point of view of Professor Lucy Reed, who analyzed the due process of arbitration through the prism of reforming the international legal regulation of arbitration, is quite useful:

- according to article 18 of the UNCITRAL Model Law (both in 2006 and 1986 versions), the parties shall be treated equally and each party shall be given every opportunity to present its position;
- in turn, Article 17(1) of the UNCITRAL Arbitration Rules (as amended in 2012) provides that the arbitral tribunal may conduct the proceedings in such manner as it considers appropriate, provided that the parties are treated equally and each party is given a reasonable opportunity at the appropriate stage of the proceedings to present its case. The arbitral tribunal shall exercise its discretion in conducting the proceedings in an effort to avoid unnecessary delay and expense and to ensure a fair and efficient dispute resolution process between the parties. It should be noted at the outset that the previous version of this rule referred specifically to the provision of a full opportunity for each party to present its position at any stage of the proceedings.

The author draws the following reasonable conclusions: the modified regulation of the proper arbitration procedure emphasizes the boundary between the ordinary and proper procedures; national arbitration laws and regulations cannot cover specific details of arbitration proceedings (such as the duration of the case, the number

[7] Triulzi Cesaresiu, v. Xinyi Group (Glass) Co Ltd, [2014] SGHC 220. URL: https://www.uncitral.org/docs/clout/SGP/SGP_301014_FT.pdf#.

[8] Association of Architects of Australia; ex parte Municipal Officers Association of Australia [1989] HCA 13 (21 February 1989) (Brennan, Dawson and Gaudron JJ.) URL: https://jade.io/article/67484?at.p=index.

of witnesses that may be involved, etc.), but they can act as a kind of qualitative catalyst between the ordinary and proper arbitration procedures.[9]

We should agree with the opinion of Tetiana Tsuvina, who considers that the principle of the right to be heard is one of the fundamental principles of civil procedure, which provides for the existence of a number of procedural guarantees, which are enshrined in paragraph 1 of Art. 6 ECHR constituting the concept of a fair hearing and is associated with three groups of guarantees: a) guarantees that are a prerequisite for the realization of the right to be heard (proper notification of the person about the date, time and place of the hearing); b) guarantees that form the core of the understanding of the right to be heard and are implemented during the proceedings (oral hearing; opportunity to participate in the hearing; the principle of "equal arms" and adversarial trial); c) guarantees that are implemented after the hearing ("reasoned judgment").[10]

Ukrainian case law does not provide a clear answer to this question. However, by applying the method of legal analogy, one can see attempts to interpret such definitional constructs as "due process" and "legal procedure" within the framework of administrative justice. Thus, in its decision, the Fifth Administrative Court of Appeal notes that the principles of legal procedure have already become universal due to the decisions of the European Court of Human Rights and apply to both procedural proceedings and legal procedures that must be followed by public authorities when adopting relevant acts regarding human rights, freedoms and legitimate interests.

However, as the court notes, the mentioned doctrine of legal procedure has been essentially used in the practice of the Constitutional Court of Ukraine. In the decisions of February 28, 2018, on the recognition of the law on language as unconstitutional and of April 26, 2018, on the recognition of the Law on Referendum as unconstitutional, the Constitutional Court of Ukraine, pointing to the direct connection between the observance of "due process" and guarantees of the rights and legitimate interests of man and citizen, actually gave procedural principles a binding value. That is, if the due process of law has been violated in the Parliament or in any other public authority, there is no point in checking the content of the relevant act, since it is null and void. The above allows us to use the concept

[9] Lucy Reed, Ab(use) of due process: sword vs shield, Arbitration International, Volume 33, Issue 3, September 2017, Pages 361–377, https://doi.org/10.1093/arbint/aix022.

[10] Tsuvina T.A. Principle of the Right to Be Heard in Civil Procedure: ELI/UNIDROIT Model European Rules of Civil Procedure, Case Law of the ECtHR and National Context. Bull. Taras Shevchenko Nat'l U. Kyiv Legal Stud. 2022. № 2(121). C. 88– 96.

of "due legal procedure", which is fully covered by the understanding of the rule of law – the principle of the rule of law (or the measure of the rule of law).[11]

In addition, the Resolution of the Administrative Court of Cassation notes that the legal procedure is a component of the principle of legality and the rule of law and provides for legal requirements for the proper adoption of acts by public authorities. The panel of judges notes that the established legal procedure as a component of the principle of legality and the rule of law is an important guarantee of preventing abuse by public authorities in making decisions and performing actions that should ensure fair treatment of a person.[12]

In addition, it is worth noting that since the main purpose of international commercial arbitration is to enable the recognition and enforcement of arbitral awards, the arbitration proceedings must be conducted in compliance with all due process for the losing party. The historical development of arbitration legislation in this context has also undergone modifications. Art. 2(b) of the 1927 Geneva Convention on the Recognition and Enforcement of Foreign Arbitral Awards stipulates that recognition and enforcement of an arbitral award may be refused if it is established that a party to the dispute was not notified of the arbitration proceedings in sufficient time to allow it to present its position.[13] In turn, Art. V(1)(b) of the New York Convention of 1958[14] provides that the recognition and enforcement of an arbitral award may be refused if the party against whom the award is made was not duly notified of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to submit its explanations.[15] The use of the word "other" allows national courts to arbitrarily interpret this ground for refusing to recognize and enforce an arbitral award, relying solely on the provisions of domestic law.

For a deeper understanding of the issue of compliance with due process during arbitration proceedings, we consider it appropriate to focus on the judgment of the Court of Appeal of Singapore in case *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another*. According to this judgment, the Court makes the following conclusions:

[11] Judgment of the Fifth Administrative Court of Appeal of 08.02.2022 in case 420/13647/21. URL: https://reyestr.court.gov.ua/Review/103202606.

[12] Judgment of the Administrative Court of Cassation dated 25.07.2019 in case No. 826/13000/18. URL: https://reyestr.court.gov.ua/Review/83331117.

[13] Convention on the Execution of Foreign Arbitral Awards. Geneva, 26 September 1927. URL: https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2092/v92.pdf.

[14] See DRAHOZAL, Christopher R. The New York Convention and the American Federal System. Revista Brasileira de Alternative Dispute Resolution, vol. 1, nº 1, pp. 37– 53, 2019.

[15] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958. URL: https://icac.org.ua/wp– content/uploads/Text– of– UN– Convention_New– York– 1958– 4.pdf.

- The concept of due process is an integral part of the basic guarantee of procedural fairness of the proceedings and reveals its essence through the right of each party to the proceedings to be duly notified of the case in which it is involved and to have a fair opportunity to prepare and present its arguments and objections before a neutral and impartial decision– making body. It is the combination of these two components that ensures the right to a fair trial, which is an integral part of its legitimacy for all parties to the case.
- Guarantees of procedural fairness may be of particular importance in international commercial arbitration since violation of the parties' rights to due process is one of the exhaustive list of grounds for setting aside or refusing to recognize and enforce an international commercial arbitral award.
- While the arbitral tribunal has discretionary powers to determine its procedure and to allow the parties to the dispute to determine the "rules of the game" in the arbitration, the requirement of due process is a significant limitation of such expanded autonomy.
- The arbitral tribunal must carefully review all components of due process to prevent abuse of the rights granted to the parties to the dispute. For example, filing unfounded complaints regarding violation of due process may not only increase the time and cost of the case but may also compromise the legitimacy of arbitration in general and its role as one of the effective alternative dispute resolution methods with binding awards.
- Since most complaints of violation of the legal procedure relate to the organization of the arbitral proceedings (extension of the time limits for consideration of the case, the possibility of submitting additional evidence outside the established time limits, etc.), the arbitral tribunal, which is empowered to consider them, must balance two opposed criteria – the need to clearly define the due process rights of the parties and the importance of understanding the clear limits of of the arbitral tribunal's discretionary powers in resolving all procedural issues of the arbitration.[16]

Based on the analysis of this judgment, we can confidently agree with its main theses, since the main problem faced by both arbitrators and national courts when considering motions to set aside or recognize and enforce international commercial

[16] Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd v. China Machine New Energy Corporation, ICC Case No. 20013/CYK, Judgment of the Court of Appeal of Singapore [2020] SGCA 12, 28 février 2020.

arbitration awards is the attempt of a party to the arbitration proceedings, which is at a disadvantage, to take actions that, although they may be considered the exercise of the right to fair procedure, are in fact nothing more than an abuse of its procedural rights.

The Ukrainian arbitration legislation (Article 36(1)(1) of the Law of Ukraine "On International Commercial Arbitration", subpara. "b", para. 1, part 1, Art. 478 of the Civil Procedure Code of Ukraine), although it has chosen the path of adaptation to international standards, it does not deprive the law enforcement practice of examples of such abuse of procedural rights by the parties to the arbitration proceedings. Thus, when dismissing a petition for recognition and enforcement of an international commercial arbitration award of the Portland, Oregon Arbitration Service, the Kyiv Court of Appeal as the court of first instance noted that the respondent's refusal to participate in the arbitration proceedings and refusal to receive any notices from the arbitration is an undeniable violation of a fair arbitration proceeding. Disagreeing with this position, the Civil Court of Cassation, in reversing the judgment of the court of first instance, concludes that since the Arbitration Rules provide that the refusal or inability of any party to participate in the arbitration proceedings or to attend the hearing or any part thereof or the failure of a party to seek an adjournment or postponement of the hearing or any part thereof after due notice by the ASP Rule shall not prevent the appointment of the arbitrator(s) or the continuation of the arbitration, nor shall it prevent the scheduling or conduct of the hearing, nor shall it prevent the conduct of the prima facie hearing or the rendering of the award. However, the arbitrator (arbitrators) shall not be entitled to make an award unless the evidence provided or presented at the hearing is sufficient to support the award.[17] Thus, as we can see, in this case, the Civil Court of Cassation comes to its interpretation of the international arbitration rules, considering the arbitral tribunal's discretionary powers regarding the proper arbitration procedure to be expanded.

Based on the above doctrinal approaches, analysis of international legal regulation of arbitration proceedings and national law enforcement practice regarding the due process of arbitration and general theoretical approaches to the right to be heard, the following conclusions can be made:

- Art. 17(1) of the UNCITRAL Arbitration Rules, unlike other international legal acts, reflects the current global trends in effective dispute resolution and, in our opinion, this rule should be reflected in national arbitration laws;

[17] Judgment of the Civil Court of Cassation of 26.01.2023 in case No. 824/253/21. URL: https://reyestr.court.gov.ua/Review/108686078.

- The mandatory provision by the arbitral tribunal of procedural guarantees for the parties to the arbitration by setting certain limits (deadlines for filing a response, motions, additions, etc.) falls within the category of "reasonable opportunity to provide explanations" and cannot be considered a violation of the right to a fair trial;
- The imperfection of Ukrainian procedural and arbitration legislation allows the Kyiv Court of Appeal and the Civil Court of Cassation to use their own judicial discretion without any justification of their legal positions.

III The Right to be Heard as an Integral Part of Effective Arbitration Proceedings

The analysis of the above reasoning for the right of a party to a dispute to be heard as an integral element of the right to a fair trial gives grounds to highlight another doctrinal issue which is the subject of active debate – does the right to be heard imply the obligation of the personal and direct presence of a party to a dispute during arbitration proceedings?

Before proceeding to the scientific study of this issue, it is worth noting that, firstly, a clear answer to this question cannot be given unequivocally, since, as follows from the law enforcement practice of both national and international judicial institutions and pro– arbitration scientific views, the right to be heard, as well as the right to a fair trial itself, are rather flexible definitional constructions. In support of this thesis, the Court of Appeal of Singapore in the case of Triulzi Cesare SRL V. Xinyi Group (Glass) Co Ltd. quite rightly noted that the content of the fair trial rule may differ significantly from case to case depending on the circu-mstances of each case since what may be considered a violation in one case may not be so in another.[18]

Secondly, it is only in the national legislation of the place of arbitration that one can see the approaches of different legal systems to this issue.

For example, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides that the parties shall be treated equally and given every opportunity to present their positions. It is further explained that, subject to the provisions of this Law, the parties may, at their own discretion, agree on the procedure for conducting arbitration proceedings. However, when disclosing the forms of organization of the arbitral proceedings, Article 24 of the UNCITRAL Model Law states that, subject to any agreement of the parties, the arbitral tribunal shall decide whether to hold an oral hearing or to proceed only on the basis of documents and other materials.

[18] Singapore / 30 October 2014 / Singapore, High Court / Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd / [2014] SGHC 220.

However, if the parties do not agree not to hold an oral hearing, the arbitral tribunal shall hold such a hearing at an appropriate stage of the proceedings at the request of either party.

This legal act clearly demonstrates the expanded discretionary powers of the arbitral tribunal regarding the procedure for conducting arbitral proceedings. Thus, on the one hand, the right of the parties to the dispute to choose the procedure and method of dispute resolution remains an undisputed manifestation of their autonomy of will, but on the other hand, their rights may be limited or narrowed by procedural decisions of the arbitral tribunal that will hear the case (in the absence of a request for an oral hearing, the arbitral tribunal may not hold an oral hearing).

Some national arbitration laws and the enforcement activities of national courts favor more discretionary powers of international commercial arbitration. For example, §1047(3) of the German Code of Civil Procedure provides a general idea of the format of the proceedings, stating that each party must be familiarized with any procedural documents of the arbitration proceedings. Based on this abstract definition, German courts have interpreted this provision in different ways.

Thus, in one of the cases, the party against whom the arbitral award was rendered filed a motion to set aside the arbitral award with the Frankfurt Court of Appeal, arguing that the arbitral tribunal did not hold oral hearings and that this violated its rights. The court, while not accepting the applicant's arguments, noted that since the respondent did not provide a response to the claim and no evidence during the arbitration proceedings, it cannot be recognized that an oral hearing could have contributed to clarifying the circumstances of the case or to the arbitral award. In conclusion, the Frankfurt Court of Appeal notes that the oral hearing in the arbitral tribunal is not a key stage of the arbitral proceedings, and to some extent its necessity remains at the discretion of the arbitral tribunal.[19]

This issue is explained in more detail in the Judgment of the Frankfurt Court of Appeal (2022). Thus, when considering a motion for the recognition and enforcement of an international commercial arbitration award, the defendant argued that the right to be heard was violated during the proceedings. Rejecting the defendant's arguments, the court comes to the following conclusions:

- Violation of the right to be heard (Articles 1066,1042 of the German Code of Civil Procedure) is an undeniable violation of the national procedural legal order;
- With regard to the constitutional guarantee to be heard, the principle that international commercial arbitration should provide the parties to the

[19] OLG Frankfurt, Beschluss vom 16. Januar 2014 – 26 Sch 2/13. URL: https://juris.de/perma?d=KORE561632014.

arbitration proceedings with the same right to be heard and to the same extent as in a state court should be applied in arbitration proceedings;

– The constitutional right of each party to the proceedings to be heard, which is enshrined in Article 103 of the German Constitution, is determined by the obligation of the arbitral tribunal to take note of and consider all procedural documents submitted by the parties to the arbitration. However, this requirement is not absolute and it will not be considered a violation of this principle if the award does not reflect all legal positions of the parties to the dispute, since the requirements to the form and content of the award are not identical to the state court decision;
– The arbitral award cannot be set aside solely on the grounds that oral hearings were not held, since the arbitral tribunal is fully empowered to consider the case in written proceedings on the basis of available documents, and the refusal to hold an oral hearing is not correlated with the causal link of the decision.[20]

A similar point of view is supported by states that have harmonized their national arbitration laws with the UNCITRAL Model Law (Spain,[21] Belgium,[22] Singapore,[23] etc.), as well as by states that have refused to do so (e.g. the United States and Switzerland).

To confirm this position, we can refer to the judgment of the Delhi High Court in the case of Sukhbir Singh v M/S Hindustan Petroleum corporation LTD, according to which the Court concludes that the right to be heard during the oral presentation of one's position and the presentation of evidence must be clearly agreed upon in the arbitration agreement between the parties to the contract, or directly by expressing a joint consent to such hearings. Despite the right granted to the parties to the dispute to determine the format of the arbitration proceedings, the final word remains with the arbitral tribunal, which may consider it inappropriate or such that it will lead to a delay in the consideration of the case by expressing such a position by the parties and make its own decision to conduct the case in written proceedings[24] .

Ukrainian arbitration law, although based on the principles enshrined in the UNCITRAL Model Law on International Commercial Arbitration, has its own

[20] OLG Frankfurt, Beschluss vom 24. Januar 2022 – 26 Sch 14/21 URL: https://juris.de/perma?d=KORE249042022.
[21] Spanish Arbitration Act 2011 URL: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Act_on_arbitration_%28Ley_60_2003__de_arbitraje%29.PDF.
[22] Belgian Judicial Code https://www.uv.es/medarb/observatorio/leyes– arbitraje/europa– resto/belgica–judicial– code– arbitration– 2013.pdf.
[23] Singapore Arbitration Act 2001 URL: https://sso.agc.gov.sg/Act/AA2001
[24] Sukhbir Singh v. Hindustan Petroleum Corp, 2020 URL: https://indiankanoon.org/doc/86294741/.

interpretation of the right to be heard. The arbitral tribunal's discretionary powers are absolutely unlimited in determining the form of arbitration proceedings.

Pursuant to Article 19 of the Law of Ukraine "On International Commercial Arbitration", subject to the provisions of this Law, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal. In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of this Law, conduct the arbitration proceedings in such manner as it deems appropriate. The powers granted to the arbitral tribunal include the power to determine the admissibility, relevance, essentiality and significance of any evidence.

Article 42 of the Rules of the ICAC at the Ukrainian CCI stipulates that, subject to the provisions of the Law of Ukraine "On International Commercial Arbitration" and the general principles of arbitration provided for in these Rules, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal.

In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of the Law of Ukraine "On International Commercial Arbitration", conduct the arbitration proceedings in such a manner as it considers appropriate in order to ensure the effective resolution of the dispute, while maintaining equal treatment of the parties and providing each party with equal and reasonable opportunities to protect its interests.

Article 47 of the Rules of the ICAC at the Ukrainian CCI, which was followed by the Arbitral Tribunal in the present case, stipulates that an oral hearing is held to allow the parties to present their positions on the basis of the evidence submitted and to hold oral arguments. The hearing shall be held in a closed session. With the permission of the arbitral tribunal and with the consent of the parties, the hearing may be attended by persons not participating in the arbitration.

A party may request the Arbitral Tribunal to participate in the oral hearing by means of video conferencing systems. Such request shall be considered by the arbitral tribunal taking into account the circumstances of the case and the opinion of the other party. The arbitral tribunal shall have the right to hear witnesses or experts by means of video conferencing systems.

Pursuant to Article 24 of the Law of Ukraine "On International Commercial Arbitration", subject to any other agreement of the parties, the arbitral tribunal shall decide whether to hold an oral hearing for the presentation of evidence or oral arguments or to proceed only on the basis of documents and other materials. However, unless the parties have agreed not to hold an oral hearing, the arbitral tribunal must hold such a hearing at the appropriate stage of the proceedings if requested by either party.

The Ukrainian law enforcement practice tries to adhere to the pro– arbitration policy and actually duplicates the existing views of many legal systems.

Thus, the Kyiv Court of Appeal, analyzing the provisions of the ICAC Rules, concludes that the oral hearing is an integral part of the entire arbitration proceedings, within which the parties submit written documents, in particular, a response to the statement of claim.[25]

We cannot fully agree with this point of view, since the use of such a morphological construction as "an integral part of the entire arbitration proceedings" should be understood to mean that the oral hearing is an obligatory part of it, in the absence of which the arbitral award may be set aside or refused to be recognized and enforced. Thus, in our opinion, such an interpretation of the national arbitration law is erroneous and does not comply with the unified approaches to the form of arbitration proceedings.

An equally interesting example of the abuse of arbitral discretion in the course of the proceedings is the consideration of a motion to set aside the award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, in which the debtor argued that since the Arbitral Tribunal had rejected its motion to hold an oral hearing directly in the courtroom and had independently chosen the format of the arbitration proceedings via video conferencing, the right to be heard had been violated. Despite such requirements, the Kyiv Court of Appeal dismissed the request and noted that the ICAC Rules and the Law of Ukraine "On International Commercial Arbitration" provide the arbitral tribunal with extensive powers regarding the procedure for conducting arbitration proceedings for the greatest efficiency. Taking into account the requirements of Art. 42 of the Rules, the Arbitral Tribunal considered that the videoconference hearing[26] did not in itself deprive a party of the opportunity to fully present its position and did not violate the adversarial principle, the autonomy of the parties' will and other principles of arbitration. Therefore, the Arbitral Tribunal concluded that it has the authority to conduct arbitration hearings by video conference and that such a format of arbitration will facilitate the effective resolution of the dispute in a pandemic with respect for all procedural rights of the parties.[27]

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[25] Judgment of the Kyiv Court of Appeal of 25.06.2021 in case No. 824/75/21 URL: https://reyestr.court.gov.ua/Review/97910473.

[26] FERREIRA, D.B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. Arbitration chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings, Technology in Society 68,101872, 2022. https://doi.org/10.1016/j.techsoc.2022.101872. See also FERREIRA, D.B., GIOVANNINI, C., GROMOVA, E., FERREIRA, J.B. Arbitration chambers and technology: Witness tampering and perceived effectiveness in videoconferenced dispute resolution proceedings. International Journal of Law and Information Technology, vol. 31, nº 1, pp. 75– 90, 2023. https://doi.org/10.1093/ijlit/eaad012.

[27] Judgment of the Kyiv Court of Appeal of 15.11.2021 in case 824/217/21 URL: https://reyestr.court.gov.ua/Review/101806306.

IV Observance of Due Process During Virtual Arbitration Proceedings

The analysis of the above approaches to the right to be heard during arbitration proceedings is of great importance for the further implementation of the procedure for the recognition and enforcement of international commercial arbitration awards, since violation of this right is an indisputable condition for its cancellation. Accordingly, the choice of the form of arbitration proceedings – virtual (online),[28] direct or hybrid – cannot contradict the right of a party to be heard as an integral part of the right of access to court.

The General Report of the International Council for Commercial Arbitration, which was prepared on the basis of reports from 78 countries on the question "Is there a right to a physical hearing in international arbitration?" demonstrates that national arbitration laws very rarely require a hearing to be held directly within the arbitral tribunal or in the personal presence of the parties to the case[29] [26]. Nevertheless, despite the existence of such flexible arbitration legislation regarding the form of arbitration proceedings, the arbitral tribunal cannot independently decide on the virtual format of the arbitration if a party to the dispute insists on holding a direct hearing with the personal participation of the parties or their representatives. The most important thing in this case is that the arbitral tribunal must check all the negative consequences of a possible violation of the right to be heard that may occur for such a party.

Thus, sometimes one can see certain conflicts in the national regulation of international commercial arbitration, since, on the one hand, the national arbitration laws of the place of consideration of the case empower the arbitral tribunal to choose to conduct virtual arbitration, and on the other hand, the autonomy of the parties to the arbitration is preferred, which is realised in the ability to independently determine the form and all further procedural aspects of the arbitration in the arbitration agreement, and in the absence of such a definition in the arbitration agreement, the right to In other words, such contradictions create a quintessential conflict between the arbitral tribunal's discretionary powers to organise the arbitration and the parties' right to due process.

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[28] FERREIRA, D.B., GROMOVA, E. FARIAS, B., GIOVANNINI, C. Online Sports Betting in Brazil and conflict solution clauses. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 4, nº 7, pp. 75– 87, 2022. See also ELISAVETSKY, A., MARUN, M. La tecnologia aplicada a la resolución de conflictos: su comprensión para la eficiência de las ODR y para su proyección en Latinoamérica. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, pp. 51– 70, 2020.

[29] Does a Right to a Physical Hearing Exist in International Arbitration? https://cdn.arbitration– icca.org/s3fs– public/document/media_document/ICCA_Reports_no_10_Right_to_a_Physical_Hearing_final_amended_7Nov2022.pdf.

It is worth noting that there is no unanimity in resolving this conflict between the arbitral tribunal's authority and the observance of due process rights in the organisation of the arbitral proceedings, as some arbitration institutions prefer the arbitral tribunal's discretionary powers over the right of the parties to the dispute to due process, while others determine the expediency of conducting virtual arbitration exclusively by agreement between the parties to the dispute and the arbitral tribunal.

For example, the International Chamber of Commerce Arbitration Rules 2021, which was amended to take into account the impact of the pandemic on arbitration practice, can be attributed to the first type of institutions, vesting discretionary powers in the arbitral tribunal as to whether a virtual hearing is appropriate. Thus, Art. 26(1) of the Rules provides that the arbitral tribunal, after consulting with the parties and taking into account the relevant facts and circumstances of the case, may decide that any hearing shall be held in person or remotely by videoconference, telephone or other appropriate means of communication.[30] This provision, without any reservations, obliges the arbitral tribunal to consult with the parties to the dispute on the feasibility of holding a virtual hearing, excluding the consent of the parties. Despite such legislative consolidation of the arbitral tribunal's discretionary powers, the Clarifications for the parties and arbitral tribunals on conducting arbitration proceedings under the ICC Arbitration Rules have identified certain concerns that the absence of the parties' consent to the virtual hearing may subsequently lead to the cancellation of the international commercial arbitration award. Pursuant to paragraph 99 of the Explanations, the arbitral tribunal should make any decision to conduct a hearing by remote means of communication instead of physical presence after carefully considering all relevant circumstances, including the nature of the hearing, possible travel restrictions, the expected duration of the hearing, the number of participants and witnesses and experts to be examined, the size and complexity of the case, the need for adequate preparation of the parties for the hearing, the costs that may be expected to be incurred by the use of remote means of communication, the need to ensure that the parties are able to participate in the hearing, and the need to ensure that the arbitral tribunal is able to conduct the hearing in a timely manner. If the arbitral tribunal decides to hold a virtual hearing without the consent of the parties or over their objections, it should carefully consider the relevant circumstances and assess whether the award will be enforceable. Any virtual hearing will require consultation between the arbitral tribunal and the parties to adopt measures – often referred

[30] ICC Arbitration Rules 2021 https://iccwbo.org/dispute– resolution/dispute– resolution– services/arbitration/rules– procedure/2021– arbitration– rules/#block– accordion– 26.

to as a cyber protocol – necessary to comply with any applicable data protection regulations.[31]

Particular attention should be paid to the legal regulation of the possibility of conducting virtual arbitration proceedings in Ukraine. Article 47 of the Rules of the ICAC at the UCCI provides that an oral hearing shall be held for the parties to present their positions on the basis of the evidence submitted and for oral arguments. A party may request the arbitral tribunal to participate in the oral hearing via video conferencing. The Arbitral Tribunal shall consider such request taking into account the circumstances of the case and the opinion of the other party. The arbitral tribunal shall have the right to hear witnesses or experts by means of video conferencing systems. The analysis of this Article does not provide a clear answer on the procedure for determining the format of the hearing. On the one hand, it is determined that an oral hearing is supposedly a mandatory element of the entire arbitration proceedings and only at the request of a party to the dispute the hearing may be scheduled in a variant format. However, Art. 46 of the Rules seems rather contradictory, as it states that the parties may agree to consider the case on the basis of written materials without holding an oral hearing. The Arbitral Tribunal may consider the case on the basis of written submissions even in the absence of such an agreement of the parties, if none of them requests an oral hearing. In other words, a party to the dispute must request an oral hearing, which is in fact a mandatory stage.

The comparative legal analysis of both national arbitration laws and regulations and the law enforcement practice of national courts leads to the conclusion that the rights of the parties to the dispute to choose the format of the arbitration proceedings – virtual or direct participation – may be limited by vesting the arbitral tribunal with exclusively discretionary competence in these matters. And such competence should be clearly provided for in the rules of international commercial arbitration, since it is the arbitral tribunal that can fully determine the feasibility of virtual arbitration, taking into account the complexity of the case, the composition of the parties to the case, the amount of the claim, and the feasibility of using modern technologies for efficient and prompt consideration of the case.

V Conclusions

Analyzing the case law of national courts, we can see a certain discrepancy with the legislative regulation of this issue. Both the Law of Ukraine “On International

31 Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration https://iccwbo.org/wp– content/uploads/sites/3/2020/12/icc– note– to– parties– and– arbitral– tribunals– on– the– conduct– of– arbitration– english– 2021.pdf.

Commercial Arbitration" and the Rules of the ICAC at the Ukrainian Chamber of Commerce and Industry clearly stipulate that the arbitral tribunal shall schedule the arbitration proceedings in the form of an oral hearing. However, due to the absence of a unified legal position on the definition of the definitional constructions "oral hearing", "arbitral proceedings" and "right to be heard", quite controversial points of view will arise in the future.

In our opinion, it is possible to eliminate contradictions in the law application of these definitions not only by amending the national legislation, but also by forming a consistent law application practice of the Civil Court of Cassation, which currently acts as a court of appeal and by improving the skills of judges of the Kyiv Court of Appeal, commercial courts and judges of the Civil Court of Cassation in the field of international commercial arbitration.

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Developing the Legal Regulation of Online Dispute Resolution

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Abstract: Online dispute resolution has the potential to challenge long-established stereotypes across various facets of society, including culture, politics, the economy, social perspectives, and existence. It's evident that as our mutual understanding becomes increasingly intertwined with communication, the rapid and efficient resolution of issues in this realm is only a matter of time. In the 21st century, the Internet has revolutionized various aspects of life, serving as a ubiquitous source of information, a vital means of communication, and a global platform for commerce. It has acted as a catalyst for integrating modern technological solutions into established operations. Consequently, the legal domain is poised to exert a substantial influence on public life, especially in mediation and arbitration. In the future, the definition of "Written form" should be expanded to include "letters, e-mails, and telegrams," and legal regulations should be simplified accordingly. The international implementation of this practice, including telegraphic forms, offers numerous advantages, facilitating the transmission of requests, petitions, and complaints over long distances while preserving their content. The need for electronic dispute resolution is underscored by the global expansion of digital buyers, which was expected to reach 2.05 billion in 2020. E-commerce companies have been instrumental in promoting the healthy growth of online commerce, including the establishment of efficient and prompt dispute resolution mechanisms to safeguard the rights of stakeholders and enforce obligations. This trend of choice is gaining prominence. The aftermath of the COVID-19 pandemic has expedited the transition to online dispute resolution in the legal sector. Whether implemented at the international or domestic level, there are universal principles that must be adhered to in digital mediation.

Keywords: Online Dispute Resolution. Social Perspectives. Legal Domain. Written Form. Global Platform. Information Security.

Summary: **1** Introduction: Mediation OR Dispute Resolution – **2** The Legal Regulation of Online Dispute Resolution – **3** Countries in Online Dispute Resolution – **4** Conclusion – **5** References

1 Introduction: Mediation OR Dispute Resolution

Citizens are increasingly turning to the courts to protect their rights, leading to a growing workload for the judicial system. This surge not only prolongs dispute resolution but also escalates legal costs in relation to the value of the disputes. Mediation, as an alternative dispute resolution method, offers a clear advantage due to its cost-effectiveness and swifter process compared to traditional court proceedings. However, without the advancement of e-mediation, the risk of an

overwhelmed court system with substantial backlogs and protracted proceedings remains a significant concern. This is why many countries worldwide are exploring various approaches to mediation, reflecting a rising interest in alternative dispute resolution over litigation.

Enhancing digital signature knowledge and information and communication technology skills is crucial for comprehending and analyzing e-mediation while intensifying relevant factors. Recent developments suggest that AI arbitration could be employed to handle procedural tasks in August 2023 disputes in Guangzhou. This includes intelligent case acceptance, multilingual real-time translation, blockchain-based evidence recognition, and submission of opinions and statements, potentially quadrupling the efficiency of dispute resolution.

With e-mediation, individuals can use their smartphones or computers to resolve disputes from their location. When encountering an electronic dispute, consider options such as negotiating independently, engaging with a known party, or seeking legal advice from local government agencies or bar associations. Online mediation is often the preferred choice due to its convenience and accessibility. Comparative and synthesis methods were used in this research.

Adversarial adjudication in public courts has always been the primary mode of formal dispute resolution. But it is bunged with the problems of backlog, delay and its limited accessibility to many citizens. These reasons have forced to search for alternatives. This movement began in the latter half of nineteenth century globally. Many alternatives were proposed. But mediation has emerged as the most viable alternative. Mediation is a voluntary dispute resolution method that attempts to settle disputes with an amicable approach.[1]

2 The Legal Regulation of Online Dispute Resolution

Online dispute resolution offers the advantage of being quick and user-friendly. With a smartphone, individuals can easily access the necessary information and follow on-screen instructions to navigate e-mediation. Moreover, the absence of physical meetings provides the flexibility to engage in the process from anywhere and at any time. Even if one opts for court proceedings, legal consultations, or independent negotiations, there are instances where access to document preparation or advice can be challenging. Additionally, e-mediation is often cost-effective or even free. However, it is important to note that online mediation may not be suitable for all types of disputes.

[1] Revista Brasileira de Alternative Dispute Resolution. Anirban Chakraborty, Shuvro Prosun Sarker. Resolving disputes with an healing effect: the practice of mediation in India. DOI: 10.52028/rbadr.v4i8.4. p 62.

A drawback of online dispute resolution is its limited applicability to certain dispute categories, and in some cases, it may not lead to a final resolution. E-mediation can be challenging to apply in non-negotiable or complex disputes, and existing e-mediation mechanisms worldwide may not encompass all dispute types. In cases where parties fail to reach an agreement, they may resort to alternative measures such as initiating legal proceedings or seeking legal counsel.[2]

On the international front, e-commerce continues to experience substantial annual growth rates, prompting an increased quest for e-dispute solutions in a globalized world. As envisioned by technologists, traditional litigation cannot match the potential, effort, time, and cost savings associated with online dispute resolution.[3] These principles are assumed to encompass fundamental tenets of dispute resolution, including justice, transparency, and neutrality.

However, integrating these principles into a unified set of universal standards proves challenging due to their individual nature. Digital mediation must ensure procedural fairness and equal treatment of all parties.[4] The trust of the involved parties in the process is vital for its success. In evaluating the fairness of the procedure during dispute resolution, four key elements come into play:

1. Neutrality
2. Delivering your voice
3. Be kind and respectful
4. Equality and transparency

In 1998, the European Commission introduced seven fundamental principles for handling consumer disputes beyond traditional court settings:

1. Independence
2. Transparency
3. Adherence to the principle of open discussion
4. Effectiveness
5. Legitimacy
6. Free access
7. Consideration of principles such as representation for resolving electronic disputes.[5]

Three critical scenarios pave the way for the realization of digital mediation, including:

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2 JIMC-SIMC Joint Covid-19 Protocol, https://www.amt-law.com/asset/pdf/bulletins3_pdf/211110_1.pdf (accessed October 18, 2023

3 E. Katsh & J. Rifkin, Online Dispute Resolution, Resolving Conflicts in Cyberspace, 1st edition, Wiley, San Francisco, p. 226. 2001

4 O. Turel & Y. Yuan, 'Online Dispute Resolution Services: Justice, Concepts and Challenges', in Handbook of Group Decision and Negotiation, pp. 425-429. 2010

5 オンライン調停(ODR)の流れ、注意事項など.https://adr.tokyo-gyosei.or.jp/2022/11/30/ accessed October 10, 2023.

1. Monetary Disputes: Online dispute resolution is exceptionally well-suited for settling financial disputes, especially those in which the obligation to pay is clear, but details such as the division of the amount, payment duration, and method need agreement. These disputes typically involve straightforward and non-controversial issues. Online dispute resolution excels in such cases, as traditional dispute resolution methods may be impractical due to costs and complexity, particularly for smaller sums.
2. Child Allowance: Disputes related to child support and alimony are often financially driven and may vary depending on factors like parental employment, the child's age, the number of children, income status of divorced couples, and the specified payment amount. Exploring digital mediation as an avenue to reach agreements becomes a viable option.
3. Inconsistencies within Internet Platform Services: Discrepancies within internet platform services, such as disputes between buyers and sellers on online marketplaces, lend themselves well to electronic reconciliation. These disputes are often characterized by their limited scope, making online mediation a cost-effective and efficient solution. However, it's crucial to acknowledge that the potential solutions may be constrained by the nature of the disputes.

3 Countries in Online Dispute Resolution

3.1 Japan

Introducing Japan's most convenient online mediation service, which now offers an expedited resolution process, taking just around a month – a significant improvement over traditional dispute resolution methods. What's even better is that notification fees are completely waived.

This development aligns with the Japanese government's decision on July 17, 2020, when they established the "ODR Support Council." This council was created with the vision that electronic reconciliation would become a vital part of our social infrastructure. The council is wholeheartedly committed to making the public aware of the numerous benefits of mediation, including its flexibility in managing cases, simplicity, speed, confidentiality, and its ability to adapt to the specific needs of each dispute. What's more, this service can be accessed using a smartphone, providing the flexibility to resolve disputes at any time and from any location.

Thanks to electronic reconciliation in Japan, a wide range of disputes, such as those involving child support, rent, medical expenses, and loans, are now being successfully resolved.

3.2 United States of America

In the United States, the rise of electronic reconciliation has coincided with the widespread expansion of the Internet. By 2019, more than 50 electronic courts had been established across the country. The extensive geographic reach of the United States has greatly benefited from electronic reconciliation, fostering the growth of mediation. Mediation has effectively alleviated many issues by offering digital reconciliation, resulting in a substantial reduction in costs compared to traditional solutions, making justice accessible to a broader population. The U.S. has pioneered the development of three major ODR platforms with global reach, including Modria, Cybersettle, and SquareTrade.

Modria, headquartered in San Francisco, focuses on resolving civil disputes in the commercial sector and aims to provide ODR technology for internal business disputes. It has expanded its services to ease the caseload in New York and collaborate with U.S. public institutions like the American Arbitration Association, handling over 300,000 cases annually.

Cybersettle, in operation since 1996, has gained significant support and resolved nearly 200,000 claims, amounting to a payment of $1,457,299,751 to date. In contrast, the SquareTrade platform, which is no longer available independently, played a pivotal role in shaping the "eBay" ODR system. Unlike other platforms, SquareTrade offered digital mediation in cases where mutual agreements could not be reached, finalizing matters through digital agreements. Currently, SquareTrade has been integrated into the eBay ODR platform, providing dispute resolution services.

The algorithmic nature of these platforms ensures fair treatment in dispute resolution, eliminating human errors and one-sided biases. They also offer computer-mediated communication options for buyers and sellers, along with patent-pending technology. The process typically begins with the complainant registering with a unique identifier and password on the SquareTrade platform, providing details of the dispute. Mediation allows parties to independently resolve the issue within a timeframe of up to 10 days.

eBay has gained international recognition for its acceptance of ODR, handling over 60 million disputes annually.[6] Another platform, PayPal, employs a distinct dispute resolution process, where sellers must rebut claims by demonstrating their fulfillment of responsibilities. The process commences with the buyer raising a dispute, temporarily halting money transfers between the involved parties. Parties

[6] A. Pearlstein, B. Hanson & N. Ebner, 'ODR in North America', in M. S. Abdel Wahab, E. Katsh & D. Rainey (Eds.), Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution, Eleven International Publishing, The Netherlands, pp. 443-464. 2012

are obligated to resolve disputes within 20 days.[7] Unresolved disputes proceed to a drafting requirement and a final decision before the PayPal case is reviewed. The platform imposes restrictions on the appeals process to prevent unnecessary appeals. In the United States, ODR coverage has proven to be limitless in its scope and impact.

3.3 China

China, as a global technology and e-commerce leader, is recognized for its pioneering efforts in digital reconciliation mediation. With a staggering 800 million Internet users, the necessity to transition virtual disputes into digital formats has driven the transformation of traditional dispute resolution mechanisms. China has witnessed two significant initiatives to introduce Online Dispute Resolution (ODR) into its legal landscape.

The first initiative involves digital reconciliation mediation facilitated by internally integrated ODR platforms with substantial support from the national e-commerce industry.[8] Notably, Chinese courts have undergone a radical transformation by adopting digital processes, with three digital courts operating in major cities, including Hangzhou, Beijing, and Guangzhou, handling over 120,000 disputes by 2019. Hangzhou's digital court has specialized in internet and e-commerce disputes and is regarded as a leading example of electronic reconciliation mediation.

The court procedures in Hangzhou underscore the prevalence of online mediation, where mediators connect with parties through phone, online communication, or video conferencing, mirroring the Internet court concept.[9] An intriguing aspect of these courts is their inclination towards the integration of artificial intelligence, raising the possibility of AI-driven dispute resolution in the future.

These three digital courts adhere to a set of standards defined by the "Rules of Procedure for the Control of Electronic Matters of the People's Republic of China," which came into effect on August 1, 2021. Although the effectiveness of these procedures and their implementation by the courts remains a subject of ongoing assessment, mediation through electronic reconciliation is thriving within the Chinese judiciary.

This flourishing is, however, showing signs of deceleration, which can be attributed to two primary factors. First, the absence of a formal legal framework

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7 www.paypal.com/us/webapps/mpp/security/resolve-disputes.

8 C. S. Shang & W. Guo, 'The Rise of Online Dispute Resolution-led Justice in China: An Initial Look', Australian National University Journal of Law and Technology, Vol. 1, No. 2, pp. 25-42. 2020

9 NCTDR, 'Hangzhou Internet Court', NCTDR (August 18, 2017), http://odr.info/hangzhou-internet-court/, accessed August 21, 2021

has impeded the e-commerce industry's development. Second, the readiness of experienced private sector entities to take on the risk of ODR implementation has facilitated the integration of ODR into their complaint resolution systems.[10] Notably, Alibaba Group, with over one billion users, including the world's largest C2C e-commerce platform, Taobao, has harnessed ODR successfully.[11]

Addressing information security concerns in electronic mediation remains a challenge, but in 2019, China's Ministry of Industry and Information Technology, Cyberspace Administration, and the Ministry of Public Security and Market Regulation adopted guidelines for the detection, collection, and use of personal information by software. Whether implemented at the private or public level, China demonstrates an unwavering commitment to the continuous evolution of the digital dispute resolution process, establishing itself as a pioneer in the field of ODR.

3.4 European Union

The European Union (EU) boasts a unique feature in the way its member states are intricately connected and are progressively embracing digital technologies. This interconnectedness has led to the rapid adoption of Online Dispute Resolution (ODR) within the EU. The EU has already established a framework of common policies and regulations covering various areas, including e-commerce and online procedures. As a result, ODR has been widely accepted, and its implementation is well-regarded, particularly within the context of e-commerce.

One notable milestone is the EU Parliament's adoption of ODR legislation, known as the Regulation, specifically focused on consumer disputes in the realm of e-commerce. This legislation seeks to safeguard consumer rights by creating a European ODR platform with the objective of resolving disputes between consumers and merchants online, independently, fairly, efficiently, and expeditiously, thus bypassing traditional court proceedings.[12]

The Council of the EU has taken the responsibility of developing, designing, and maintaining this ODR platform, offering cost-free services for notifying respondents of complaints and supplying electronic tools for redress. Furthermore, an e-reconciliation point of contact is mandated to have at least two consultants with expertise in ODR. The regulations also address critical aspects related to databases, personal data processing, data privacy, security, user data, and the roles of competent authorities.

[10] L. Liu & B. R. Weingast, 'Law Chinese Style: Solving the Authoritarian's Legal Dilemma through the Private Provision of Law'. Working Paper, August 2020.

[11] L. Liu & B. R. Weingast, 'Taobao, Federalism, and the Emergence of Law, Chinese Style', Minnesota Law Review, Vol. 102, No. 1563, 2018, p. 1583.

[12] Council Regulation 524/2013, pp. 165. 2013

The inherently cooperative nature of the EU has driven the modernization of traditional dispute resolution mechanisms both at the national and international levels. This transformation has facilitated the gradual transition towards electronic dispute resolution. The EU's remarkable success in integrating ODR can be attributed to its member states' strong interconnectedness and the presence of established legislative bodies, ensuring consistency across various domains.

The EU has set a pioneering example for e-mediation in cross-border disputes and has become a global model for ODR implementation. Additionally, the EU's focus on handling e-commerce disputes, particularly those involving consumers and small businesses, has played a crucial role in ensuring equal treatment throughout the dispute resolution process.

3.5 Australia

Australia has made significant strides in establishing a stable Alternative Dispute Resolution (ADR) environment over the past few decades. Courts and arbitral tribunals in Australia now possess the authority to direct disputes towards ADR processes, making ADR a de facto prerequisite before pursuing litigation. Alongside this progress, Online Dispute Resolution (ODR) has slowly but successfully integrated into the legal framework, with the Australian Dispute Resolution Advisory Council (ADRAC) taking a leading role in evaluating ODR's development in the country.

While Australia has achieved an advanced stage of ODR development by international standards, ADRAC has recognized that this growth hasn't fully met initial expectations. The country's unique characteristics, including its vast geographical remoteness and a forward-thinking population, have the potential to accelerate legal innovation in the realm of electronic mediation.

However, Australia has exhibited some reluctance in embracing the electronic revolution in the legal sector. Concerns about the perceived impersonality of electronic processes and the complexity that users may encounter have contributed to this cautious approach. Nonetheless, a significant milestone was reached when the Federal Court of Australia recently introduced e-litigation within domestic courts, signifying a pivotal moment in the reform of e-mediation within the judicial system.

While there is no specific legislation solely dedicated to e-mediation, several laws related to e-commerce encompass the foundational principles of ODR. These laws include the Australian E-Commerce Regulations, the Competition Act, and the Electronic Transactions Act. The Australian E-Commerce Regulations are designed to enhance public confidence in businesses engaged in e-commerce activities. The Competition Act serves as the primary federal instrument for regulating fair trade and commercial matters, ensuring the adherence to legal standards in commercial transactions. Consequently, the Competition Act is often examined in conjunction

with the Electronic Transactions Act. These legislative changes have contributed to the adaptation of the legal framework to the online environment. Although they do not explicitly outline ODR, the mechanisms in e-commerce regulations align closely with the core principles of ODR.[13]

Conclusion

The development of e-mediation in any jurisdiction faces a significant challenge due to the heightened risk of data breaches and privacy infringements. Studies conducted in countries that employ e-mediation reveal notable shortcomings in data protection and consumer safeguard dissatisfaction. However, e-mediation has demonstrated its exceptional utility, particularly in cases of infectious disease outbreaks and domestic violence, effectively alleviating the burdensome time constraints associated with traditional court processes. This approach, which entails resolving legal issues through expert-guided discussions without the need for court intervention, offers numerous advantages. Notably, e-mediation operates seamlessly even on weekends and holidays, facilitating smoother negotiation processes.

1. Expanding the definition of the term “Written form” to encompass “letters, e-mails, and telegrams” while simplifying the regulation of legal content is a progressive step. This approach, already successfully adopted internationally, offers several advantages, particularly in enabling the transmission of requests, petitions, and complaints over long distances while preserving their content.
2. Conduct an investigation into and introduce e-courts, which have brought about a profound transformation in the exercise of judicial authority through electronic processes. The initial step should involve the implementation of e-mediation for dispute resolution. It is believed that this approach can pave the way for the regulation of legal relations within our country, mirroring the rules and standards set forth in the “Rules for Electronic Proceedings of the People’s Court of the People’s Republic of China.”
3. As per the Government of Japan’s decision dated July 17, 2020, it is advisable to consider the establishment of a council akin to the “Council to Support Online Dispute Resolution.” This council can play a vital role in overseeing and supporting the implementation of online dispute resolution initiatives.

[13] M. Kirby, ‘The Future of the Courts – Do They Have One?’, Journal of Law, Information and Science, Vol. 9, No. 2, p. 141. 1998

4. Embrace the adoption and testing of an Online Dispute Resolution (ODR) platform. In essence, this involves studying and leveraging global experiences in the field of electronic mediation to enhance the effectiveness and applicability of ODR in your jurisdiction.
5. Leverage e-commerce platforms to facilitate the submission of claims by both consumers and merchants. In the event of a dispute, consider employing electronic mediation as a means of resolution. This approach will help alleviate the burden on traditional courts, ensuring that such disputes do not overburden the court system.
6. Legal regulation can be effectively achieved by incorporating principles within existing laws related to e-commerce, negating the necessity for the creation of a separate law specifically dedicated to Online Dispute Resolution (ODR). This can encompass various areas, such as Civil Law, Family Law, Conciliation Law, E-Commerce Regulations, Competition Law, and laws pertaining to Electronic Transactions.
7. In the process of dispute resolution, it is advisable to incorporate the four essential elements or principles that ascertain procedural fairness. These elements, which include Neutrality, Voice, Courtesy, Equality, and Transparency, should be integrated into laws and regulations as guiding principles for every electronic mediation process. This will ensure that the process is fair, transparent, and equitable for all parties involved.

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Mediation in Cases of Halal Abuse: a Consumer's Perspective

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Abstract: Halal is a term that is frequently used in both Muslim and non-Muslim nations. A growing demand for Halal goods and services together with instances of fraudulent or incorrect claims regarding the adherence to Halal standards has increased consumers' ethical and religious concerns. The Halal

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sector is faced with innumerable problems, both domestically and internationally, which are mostly related to the misuse of the Halal stamp and other offences related to the Halal logo. Consumers are generally becoming increasingly aware of the Halal logo and information regarding the Halal status of a product's ingredients before making a purchase. This qualitative study intended to identify the need for mediation when resolving Halal-related disputes from a consumer's perspective. Information and data were sourced from statutes, articles, journals, newspapers, and magazines. Findings from the document analysis indicated that consumer expectations and producer education on Halal standards, procedures, and practices can all be accomplished through mediation. The ensuing awareness could aid in averting potential conflicts and raise general consumer satisfaction concerning the current degree of Halal abuse prevalent in the consumer market.

Keywords: Halal. Abuse. Consumers. Disputes. Mediation.

Introduction

The emergence of Halal certification was influenced by both the demand from Muslim consumers and the fact that it is a successful marketing strategy. One of the main factors influencing the success and rapid expansion of the Halal industry in Malaysia is the country's internationally renowned Halal certification program. The nation's Halal imports is currently valued at US$25 billion (RM104 billion) and it is projected to increase to US$80 billion (RM333 billion) by 2030. The Halal market, or the world Halal economy, was launched by the Malaysian Halal Certification initiative, which was created and overseen by the Malaysian Islamic Development Department (JAKIM) and state-level Islamic Religious Departments (JAIN) (Abdullah et al., 2021; Ab Halim et al., 2022).

The Halal market has become one of the most lucrative and significant marketplaces in today's business sector because of the expanding Muslim population. Generally, Muslim consumers are economically stable, which has a tremendous impact on how many Halal-food items are sought after by them daily. Some of the well-known food producers catering to the Halal industry in Malaysia include Adabi Consumer Industries, Ramly Group, Ayamas Food Corporation, and Faiza Marketing Sdn. Bhd. The Syariah-compliant food sector practices several processes involved in processing, preparing, preserving, distribution, food and beverage service etc. This sector represents a complicated and international network of innumerable companies that provide most of the Halal food items to Muslim consumers around the globe (Ruslan et al., 2018).

When food items are labelled "Halal" or are Halal certified, Muslim consumers would then assume that the food was manufactured or produced in accordance with Shariah guidelines and norms. Foods with an explicit Halal stamp provide a greater degree of reassurance as it reflects adherence to other high food processing standards, in addition to being Shariah-compliant. The Halal logo also represents

assurance and trust. Most Muslim consumers in Malaysia are concerned about Halal food and the Halal stamp found on food products (Shirin Asa, 2019a).

The integrity of "*halalan tayyiban*", in terms of the Halal status and food safety aspects, continues to be threatened by several factors involved in the production of Halal food items. Halal food must specifically comply with Islamic principles, whereas "*tayyiban*" food is defined as being devoid of poison, illness causing, dangerous, and involving fraudulent elements (weight, quality, expiration date, contents, and branding). Hence, the threat posed by food-chain related criminal acts must be addressed in order for the Halal economy to expand and thrive. Many food-related offences are caused by personal interests. The rise in cases of food fraud and logo piracy suggests that this crime is spreading exponentially (Mohd Farhan Md Ariffin, 2021; Mustafa Afifi et all, 2013). When it comes to food and food products, there is a glaring abuse of the Halal label. The issue at hand is whether the rights of Muslims are exceptionally safeguarded by the Halal law and the prevailing legislation that protects against wayward and irresponsible food producers. For example, the concern regarding the origin of food items or ingredients and whether they adhere to Islamic requirements, and if not, what is the appropriate procedure to resolve this problem to safeguard the Muslim consumer (Ab Halim & Mohd Salleh, 2020).

Hence, in the case of a Halal violation, consumers might react differently depending on the seriousness of the Halal violation perpetrated by a company. Inaction to the Halal infringement incident could lead to a catastrophic loss of the business because consuming Halal food is a crucial principle in the Islamic faith (Omar et al., 2017). Therefore, this study aimed to identify the need for mediation when resolving Halal-related disputes from a consumer's perspective. The goal of mediation is to facilitate dialogue amongst disputants in order to resolve their differences and reach an amicable solution to the problem (Zuure, 2014).

This qualitative study used the descriptive document analysis method to gather information and data through bibliographic research on several sources, such as journals and articles, seminars and conference papers, as well as related websites.

This study explored the possibility of using mediation for resolving disputes in the Halal industry. A mediator[1] is a third party who serves as a neutral facilitator during a dialogue or discussion aimed at addressing an issue between disputing parties. In the context of Halal abuse, which refers to situations whereby procedures related to Halal (permissible) practices are disregarded or abused, mediation could

[1] About the mediator's profession in Brazil see AWAD, Dora R. Mediação de conflitos no Brasil: atividade ou profissão. . Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 4, pp. 57-66, 2020.

be utilized to address and settle disputes that result from such an abuse. Conflicts between customers, producers, certifying organizations, and other Halal industry stakeholders might fall under this category.

Literature Review

1. Understanding Halal Abuse from the Consumer's Perspective

Halal certification is crucial to Malaysia's food and beverage industry. This accreditation guarantees the food product's safety, hygienic practices, and observance to religious principles and practices (Yusuf et al., 2020). Muslims, in general, have a duty to consume goods produced using Halal methods or ingredients. Even though it can be difficult to introduce or integrate Islamic norms into a non-Muslim majority environment, it is every Muslim's duty to uphold the standards and values outlined in the Holy Quran and Hadiths in their day-to-day lives in accordance with Islamic principles (Khan & Haleem, 2016). Therefore, the Halal certification system is essential for consumers who favour Halal products.

When referring to Halal certification in the context of the food sector, it refers to the inspection of food preparation, slaughtering of livestock, ingredients, cleanliness, handling, processing, storage, as well as transportation and distribution. The food must be nutritious and made from permitted ingredients that are clean and hygienic in order to receive the Halal certification. Even after consuming a product, the customer cannot independently confirm or declare that a product is Halal. Halal certification serves as an example of an industrial convention and demonstrates how coordination and quality-related norms can be utilized to convey quality (Yunos et al., 2017).

The Malaysian Muslim community upholds the Halal emblem in high regard. Consumers now use this logo as a benchmark when determining whether a certain food item is Halal. Thus, no one can tell if a food item is Halal because of society's over-zealous reliance on the emblem. Although having this emblem or stamp is a good thing for Malaysian Muslims, this situation forces the community to play an overwhelming role in deciding on Halal-status issues, instead of JAKIM. However, the community's degree of expertise in determining what is Halal is suspect as the community generally lacks knowledge required to assess the Halal status of a food item (Zaini et al., 2019; Halim et al., 2014a).

Choosing Halal food is vital as it is part of adhering to religious commitments and principles. Muslims are zealously concerned about undesirable practices that lead to Halal food fraud along the food supply chain because the Halal food sector

encompasses the farm-to-table concept. Since food fraud is a subjective concept, thus, it is challenging to objectively evaluate fraudulent acts and the level of the fraud. Muslim consumers have recently expressed serious concerns about Halal food products due to frequent media reports of food fraud scandals along the food supply chain (Ruslan et al., 2018). According to Mohd Farhan Md Ariffin et al. (2021), Halal food is sometimes used as a tool of crime by some careless self-centred individuals. Food terrorism, food fraud, food adulteration, and other serious challenges related to food crime are becoming ever prevalent. Therefore, this study also intended is to analyse Malaysia's problem with food crime, particularly the problem of illicit meat cartels.

According to Halim and Ahmad (2014), the Halal business faces significant problems on both, a national and international scale, particularly regarding abuses in Halal branding and other offences involving the Halal stamp. In addition, there are also other problems, particularly related to the adherence to pertinent Halal certification requirements. This study also aimed to examine the topic of consumer protection and the enforcement of Halal-related legislation that has been put in place by two state religious departments, namely the religious departments of Selangor (JAIS) and Kelantan (JAHEIK).

The Halal logo and Halal-related information about a product are generally becoming increasingly important to consumers when making a decision to purchase a product. This study had assessed consumers' views and behaviours regarding Halal food products in Malaysia. Consumers' perceptions were measured based on their assessment of a product that has a Halal or a non-halal logo. Three types of consumer behaviour were used to gauge consumer behaviour, such as abstinence from purchasing, possibility of purchasing, and certainty of purchasing (Zaimah et al., 2018).

Based on previous studies mentioned above, it can be briefly ascertained that Halal certification is an important aspect in a Muslim's daily life because it is distinctly relevant to Islam in several aspects, such as cleanliness, livestock slaughtering methods and so on. There are various offenses related to the abuse of the Halal status in this country, such as offenses related to the use of the Halal logo, and implementation of consumer protection initiatives by JAKIM and JAIN, whereby these authorities need to elaborately explain the offenses related to Halal abuse (Halim & Salleh, 2018). This is important because the average Muslim consumer depends on the Halal logo when choosing or using a product or food item.

2 The Role of Mediation in Resolving Halal-Related Disputes

The mediation practice in Malaysia[2] has advanced significantly since its early inception in the middle of the 1990s. Today, mediation is a crucial aspect of the Malaysian judicial system since it provides disputing parties an alternative avenue to settle their differences outside the courts. This article focuses on the institutionalized mediation process known as court-assisted or court-referred mediation and sheds some light on this formalized mediation technique (Choy et al., 2016).

All the parties involved continue to face difficulties notwithstanding resolutions to different conflicts and legal provisions on corporate, firm, and shareholder rights. As for those who want justice but do not want to go through the judicial process, one alternative conflict resolution approach would be mediation, which is an efficient and affordable conflict resolving method. It is the mediator's responsibility to assist the conflicting parties in reaching an agreement by conducting joint and/or private sessions. A private settlement would be favourable to both parties due to economic reasons and the intention of maintaining their business relations (Dahlan et al., 2021). Thus, it is understandable why this study mainly discusses and focuses on mediation from the corporate, firm or shareholders' perspectives but less so in relation to the issue of Halal abuse.

Mediation and conciliation both use a neutral third party to help the conflicting parties reach a mutually beneficial resolution to their disagreement, which are voluntary and non-binding processes. The mediator assists the interested parties in making their own decision regarding whether and how to settle their contention, unlike an arbitrator who enforces a decision. Theoretical foundations for mediation include non-leakage of communication information, interweaving of information exchange, characteristic matching, de-conflicting, and solutions unrestricted by judicial requirements (Richard Hill, 1998).

The five different principles of voluntary involvement, neutrality, confidentiality, impartiality, and conflict of interest are the foundations of mediation that are widely accepted. Hence, without any one of these principles, mediation will fall short or cannot even be called a mediation (Mariam Pilishvili, n.d.). Disagreements can be

[2] On mediation in Palestine see SHAAT, Haia. Mediation in Palestine. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 3, p. 231-249, 2020. On multiparty mediation in Brazil see FERREIRA, Daniel B.; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A case analysis from Brazil. BRICS Law Journal, v. VIII, n. 3, p. 5-29, 2021. DOI: https://doi.org/10.21684/2412-2343-2021-8-3-5-29. On mediation in educational environments in Brazil see FARIAS, Bianca O. Mediação de conflitos em ambientes educacionais: um horizonte com novas perspectivas. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 3, p. 157- 194, 2020. On family mediation in Brazil see BRAGANÇA, Fernanda; Netto, Fernando G. M. O protocolo familiar e a mediação: instrumentos de prevenção de conflitos nas empresas familiares. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 3, p. 217-230, 2020.

resolved through mediation by a neutral third party assisting the conflicting parties to identify common problems and create resolution options. Mediation has already demonstrated its immense value and like any good system, it has the potential to greatly enhance living standards (Niraula, n.d.)

Numerous government organizations are directly or indirectly involved in managing Malaysia's Halal business sector. JAKIM and the Halal Industry Development Centre (HDC) are two primary organizations that are frequently linked to Halal certification in Malaysia. For example, the Halal Hub Division, a unique division established by JAKIM, oversees the Halal certification process. Each of these organizations have significant and diverse roles to play in Malaysia's Halal industry. HDC's jurisdiction focuses on the growth of the local and international Halal business sector as well as the marketing of Halal products, whereas JAKIM is concerned with processing Halal certification and enforcing adherence to Halal standards. The Department of Standards Malaysia, Department of Veterinary Services, Ministry of Health (MOH), Royal Customs Department Malaysian, and the various Local Authorities are additional organizations that contribute towards the enhancement and expansion of the Halal industry in Malaysia. Each agency plays a particular role in the growth of the Halal market. There are several distinct agencies involved in the success of this sector due to the Halal industry's broad, and in some cases, inevitable overlapping jurisdiction (Soraji et al., 2017).

Previous literature had generally elaborated on an overview of mediation and the advantages of mediation, but none of them had specifically explained the need for mediation to resolve Halal abuse disputes, hence, there is a necessity to study mediation in terms of Halal abuse. Mediation affords parties to have culturally and religiously aware conversations on Halal-related issues. Mediators who are knowledgeable in Islam should guide parties through the many subtleties of these issues.

Discussion And Findings

Consumer Awareness and Perception of Halal Abuse

The Muslim community's awareness is a powerful tool for educating Halal food product manufacturers. An understanding and awareness of the Halal and Haram concept is crucial for Muslims as they cannot merely rely on legislation and enforcement authorities. For example, Muslim consumers should pay attention to the ingredients and contents of food items or other items they purchase. Additionally, they need to be aware and ensure that the processing technique is Shariah compliant. In relation to food items, there are nine different Halal and Haram categories (Yusoff & Adzharuddin, 2017).

Consumer behaviour is largely influenced by three factors, namely attitude, perceived value, and behavioural control. It takes an attitude to determine if something is appreciated or despised. It is a personal evaluation of a certain self-behavioural performance, which could be either positive or negative. An individual's subjective value is related to how one feels about the social pressure to do or not to do certain things. At this point, a community's cultural life can influence how its members act. The way a person feels about having control over activities refers to a sense of behavioural control (Zaimah et al., 2018b)

Factors Influencing a Consumer's Perception of Halal Abuse

Halal Logo, Labelling and Packaging, Authorities' Exposure and Enforcement, as well as Consumer's Attitude were the three criteria revealed in the analysis (Ruslan et al., 2018).

1. Halal Logo, Labelling and Packaging

The Halal logo (stamp), labelling and packaging are among the product qualities that attract the interest of Muslim consumers when making purchasing decisions involving any product, particularly a food item. In order to tackle the Halal food fraud menace, the industry's compliance with all pertinent aspects need to be evaluated by consumers, who also have the right to denounce any fraudulent act, including the use of unauthorised Halal logos by manufacturers or producers.

Furthermore, packaging and processing activities in the food supply chain are critical aspects of a food product's Halal status. Muslim consumers' interest in processed foods contaminated by prohibited (Haram) substances along the supply chain, possibly during processing and transportation, is growing. Hidden components from dubious sources are another important issue, especially when firms fail to label non-Halal ingredients that are mainly incorporated to reduce manufacturing costs and increase profits.

Moreover, non-Halal food and beverage products should be kept separate on a different shelf or partitioned from similar category of Halal products consumed by Muslims. Muslim consumers should only purchase food items that have been certified Halal by JAKIM by inspecting the product package before making a purchase (Ruslan et al., 2018).

2. Authority's Exposure and Enforcement

An authority's proactive exposure and enforcement is a crucial part of combating fraudulent activities that should be enhanced on a regular basis.

Authorities, such as the Department of Islamic Development Malaysia (JAKIM) and the state-level Department of Islamic Religion (JAIN) should strengthen their monitoring activities to combat Halal food fraud issues.

As a Halal-authorization organization, JAKIM must take firm action against manufacturers who do not comply with Malaysian halal food standard MS 1500:2009. Such proactive initiatives by the relevant authorities are important for educating Malaysian Muslims on the Halal food fraud issue.

In addition, strategic collaborations between the Ministry of International Trade and Industry (MITI), Malaysia External Trade Development Corporation (MATRADE), and the Royal Malaysian Customs Department (RMCD) should be encouraged to promote strict control on imported food products entering the local market (Ruslan et al., 2018).

3. Consumer's Attitude

Consumers' attitude towards the purchase of food items is influenced by their negative perception of Halal food fraud. Consumers are starting to pay attention to the ingredients before purchasing a food item as their knowledge and attitude towards Halal food fraud are growing. This inspection is enhanced if there are reports of Halal food fraud in the media. When consumers are aware, they tend to purchase food items with a Halal logo on the product's packaging rather than the taste of the food product. Hence, Muslim consumers prefer to purchase food products with the JAKIM Halal stamp (Ruslan et al., 2018).

According to Yusoff and Adzharuddin, (2017) and Ruslan et al, (2018), the lack of awareness is one of the main threats in curtailing Halal abuse because of the subjective factors involved, such as values, religious devotion, consumer's attitude, information processing, and external factors (e.g., environmental culture). Muslim customers' understanding of Halal products is important in efforts to train Halal industry operators in the market to manufacture food products that comply with Islamic principles. Transparency in food labelling, such as the certified Halal logo, expiry date, price, brand name, list of ingredients, place of production or origin, and other pertinent information, provides consumers with knowledge and information when selecting food products. Consumer perception is usually influenced by advertising, reviews, social media, public relations, personal experience, and many other factors. Consumers' actions when choosing food products is related to their attitude associated with a complex set of ideas, motivations, and experience.

Impact of Halal Abuse on Consumer Trust and Purchasing Behaviour

Consumers who have been duped by Halal abuse may lose faith in all items bearing the certification, which will then lead to increased examination of labels and ingredients. This increased scepticism might lead to a decline in overall Halal product purchases, which would otherwise affect companies that genuinely sell Halal goods. Additionally, negative word-of-mouth and social media debates about such instances can spread quickly, eventually escalating negative consequences to the brand's reputation. Halal abuse has repercussions beyond the short-term effects on trust and purchase patterns as it could also contribute to a general feeling of disdain and cultural insensitivity. Brands that are found to be abusing the Halal designation run the danger of alienating not only Muslim customers but also everyone concerned about moral and ethical business practices.

Muslims have been confused by the abuse of the Halal logo and Halal certificate, which has resulted in consumers losing confidence in the Malaysian Halal label. Muslim consumers have therefore begun the custom of examining the product labels before making a purchase. In some cases, producers employ their own Halal logos, which is against TDA 2011 regulations (Shirin Asa, 2019). Customers' trust is reduced by fallacious Halal certification and fake or fabricated news that causes a loss in confidence and affects their intention to buy Halal products (Derahman et al., 2017; Madun et al., 2022; Mohamed et al., 2013; Aslan, 2023).

Exploring the Mediation Mechanism in Halal Abuse Cases

As it emphasizes and augments the value of peace, forgiveness, and compromise, mediation is a suggested procedure and avenue for resolving disputes in some legal sectors. Parties that opt for this dispute resolving method will find it flexible and simple to follow and comprehend. Moreover, mediation is less expensive than traditional court cases or litigation. Although mediation has numerous benefits, one drawback is that it cannot be used in situations where the law is clear, and the case is sufficiently uncomplicated for arriving at a determined decision. However, wherever possible, parties involved in a disagreement could consider this avenue and are encouraged to do so too (Manaf et al., 2018).

It is important to take a thorough and considerate approach regarding the concerns of all parties in order to successfully mediate Halal abuse cases. A broad plan that can be employed in such circumstances in order to accomplish a successful mediation outcome is as follows.

First is to determine the parties involved, which refers to identifying the interested parties, such as the consumers, companies, Halal certificate issuing

agencies, and regulatory agencies involved. It is important to take note of the apprehensions and objectives of each party.

Second, engage a third-party mediator. This procedure can be facilitated by an impartial and skilled mediator who is trained in mediation procedures and Halal certification. The mediator must direct the conversation, maintain an honourable and respectful discourse, and assist the parties in finding a compromise that is acceptable to all. Third, set clear ground rules for the mediation process, such as confidentiality, considerate communication, a dedicated effort to reach an agreement and obtain information that permits each side to explain their position on the matter. This entails being aware of the precise charge of Halal abuse, effect on consumers' confidence, and any monetary or reputational harm caused. Next is to establish interest, which means encouraging the relevant parties to express their underlying interests instead of taking a firm position. This can assist in identifying areas of agreement and potential compromise.

Then, investigate potential solutions, such as generating a variety of answers that might allay everyone's apprehensions. This might involve expanded verification procedures, enhanced compensation measures, as well as improved remedial actions and label transparency. Efforts must be made to prioritize solutions by examining and ranking the suggested solutions according to their viability, fairness, and ability to win back confidence, while maintaining their adherence to Halal and ethical standards. The parties should be guided through the negotiating process by encouraging them to make concessions while keeping their best interests in mind. The mediator's job is to create a conducive environment for discourse and assist the parties in reaching a compromise.

Lastly, creating a written agreement once a consensus has been reached. The agreement should specify the agreed-upon tasks, obligations, deadlines, and penalties for non-compliance. Ensure that the agreed-upon actions are carried out in accordance with the terms of the agreement. Consumer confidence can be preserved, and future Halal abuse can be avoided with regular monitoring and follow-up action. Finally, educational outreach, which refers to the curtailment of potential Halal abuse and implementation of educational programs that emphasise the significance of Halal certification, its requirements, and its effect on consumer confidence.

In conclusion, it is crucial to remember that for a successful mediation to materialise, all parties must be willing to participate in the process and find common ground. The matter should be handled by mediators who possess ahigh degree of cultural sensitivity as they need to be aware of the importance of Halal requirements and the psychological effects of Halal abuse on the Muslim community.

Barriers and Challenges in Halal Mediation

Mediation in Halal-related disputes can be complicated due to diverse cultural, religious, and legal considerations. Halal status-related conflicts frequently entail engrained cultural and religious values. Thus, to avoid offending either party or aggravating the situation, mediators must tread carefully around these delicate issues. Religious scholars and communities might interpret Halal practices differently as there are no set standards and it can be difficult to define a legitimate Halal claim.

Moreover, food hygiene standards are still sub-par in some parts of the world today, even though country-to-country variations in food hygiene measures are dependent on the availability of certain resources. Religiously mandated dietary restrictions do assist in lowering mortality rates and controlling the spread of endemic diseases among many groups (Abdallah et al., 2021).

In addition, Halal certification laws and requirements might differ between nations and jurisdictions, hence, it can be difficult to negotiate these legal disparities and harmonize them during mediation.

Conclusion

Mediation in Halal abuse situations from a consumer's perspective is crucial when dealing with complicated issues that occur when a religious community's trust is violated. False Halal certification not only diminishes a consumer's confidence but also violates the religious sanctity and beliefs of those who rely on them. Meanwhile, from a consumer's perspective, mediation provides a forum for their views to be heard and concerns to be recognized. It gives impacted consumers a chance to voice their psychological and spiritual suffering caused by Halal abuse, which then promotes a sense of empowerment and justice. A successful mediation can help rebuild confidence among Muslims, emphasize the value of real Halal food, and establish a standard for moral corporate conduct.

However, there are still some difficulties. From a consumer's point of view it is necessary to surpass the hurt feelings caused by the trust deficit, while striking a balance between the need for justice and the feasibility of a solution in order to effectively mediate. The procedure is made much more complex by the absence of standardized Halal regulations and the intricate nature of supply chain relations. A skilled mediator who is aware of the legal implications and cultural sensitivities is essential in efforts to help parties reach a just and long-lasting agreement. Mediation in Halal abuse cases lead to consumer empowerment, trust-rebuilding, and upholding the sanctity of Halal values. It strongly implies that companies must be held responsible for their statements, claims or actions, thus, preserving the

Halal market's integrity. Stakeholders can cooperate to repair relationships, create public awareness, and provide a guarantee that their Halal products are authentic and Shariah-compliant by accepting mediation as a dispute resolution mechanism.

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From Courtrooms to Algorithms: the Evolution of Dispute Resolution with AI

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Abstract: Technology usage in the Dispute Resolution process across different levels has been encouraged. Technology assists in making the process more accessible, convenient, and efficient for the parties involved. The development of Artificial Intelligence (AI) has seen calls for integrating the usage of technology with the adjudicatory process. The usage of alternative methods for the resolution of disputes, like arbitration, mediation, negotiation, and conciliation, which depart from the traditional courtroom litigation has further increased the scope for integration of AI into the process. The COVID-19 pandemic played an essential role in the shift towards these alternative methods and took the process of dispute resolution online. This has further allowed for the creation of a scenario where AI is introduced into the process. However, it still needs to be deciphered if the usage of AI is conducive or detrimental to the Dispute Resolution Process. The arguments in favour of AI revolve around increased efficiency, more possibility of resolution, and fair decisions. However, the lack of humane touch, human sympathy, and human emotions are sought as major grounds to dissuade the usage of AI. Moreover, being something programmed and developed by humans, the objectivity of the AI is also questioned. The extent and usage of AI in Dispute Resolution is a key contention that has been explored in this paper. It analyses the existing developments in AI, the application of Intelligent Resolution systems to already ongoing conflicts, and the potential for the future.

Keywords: Dispute Resolution. Artificial Intelligence. Mediation. Negotiation. Online Dispute Resolution.

Summary: **1** Introduction to AI as a Tool for Alternative Dispute Resolution – **2** Development of Technology Influenced Negotiation Systems – **3** An Analysis of the Use of Artificial Intelligence for Dispute Resolution – **4** Final Considerations – References

Research Methodology

The secondary research methodology employed for this paper on the integration of AI in dispute resolution encompasses a multi-step approach. It commences with a thorough literature review involving academic databases, peer-reviewed journals, government reports, and authoritative sources. The objective is to grasp the current landscape of AI implementation in dispute resolution, the arguments for and against it, and future prospects. The collected data is then meticulously analysed to identify prevalent themes, trends, and differing perspectives. Ethical and technological dimensions are scrutinized, examining the impact on human

emotions and AI objectivity. Real-world case studies are explored to provide practical insights. A comparative analysis of sources is conducted to highlight consensus and discrepancies. The findings and insights obtained through this methodology will be instrumental in delivering a well-rounded understanding of the role of AI in dispute resolution, addressing arguments and implications in a structured and evidence-based manner in the paper.

1 Introduction to AI as a Tool for Alternative Dispute Resolution

Artificial Intelligence, commonly abbreviated to AI has become the new buzzword in recent times. The popularity of AI has skyrocketed with the advent of ChatGPT, which is a chatbot that was developed by Open AI. It acquired 100 million users between December 2022 and January 2023. The application was used in February 2023 by a Columbian Judge for a judicial decision.[1] Several questions were posed to him to the AI chatbot and he used the responses in conjunction with his ruling to better elucidate the decision.[2]

Similarly, in India, the Punjab and Haryana High Court became the first court in India to use the Chat GPT AI in judicial decisions. A bench led by Justice Anoop Chitkara took the assistance of the chatbot in deciding the bail application of the accused. The AI provided research assistance to the bench and analyzed that as per earlier decisions, the accused does not deserve bail.[3] This shows that the usage of AI is gradually gaining acceptance across the globe by judicial institutions. While there is still some skepticism about the usage of AI in Courts, it represents a positive step forward.

When it comes to decisions by Courts, the skepticism about the usage of AI is somewhat justified since AI does not have the same level of compassion or subjective understanding of the case that a human does. However, when it comes to Alternative Dispute Resolution (ADR), the process is voluntary and offers an alternative to the traditional modes of dispute settlement like litigation. The commonly used methods of ADR are Mediation, Arbitration, and Negotiation. Since

1 Cindy Gordon, *ChatGPT Is the Fastest Growing App in the History of Web Applications*, Forbes (2023), https://www.forbes.com/sites/cindygordon/2023/02/02/chatgpt-is-the-fastest-growing-ap-in-the-history-of-web-applications/?sh=7cd25af9678c. (last visited Sep 20, 2023).

2 Luke Taylor, *Colombian Judge Says He Used ChatGPT in Ruling*, The Guardian, Feb. 3, 2023, https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling (last visited Sep 20, 2023).

3 ANI, *In a first, Punjab and Haryana High Court Uses Chat GPT for Deciding upon Bail Plea*, The Times of India, Mar. 28, 2023, https://timesofindia.indiatimes.com/india/in-a-first-punjab-and-haryana-high-court-uses-chat-gpt-for-deciding-upon-bail-plea/articleshow/99070238.cms?from=mdr (last visited Sep 20, 2023).

these processes are based on informed and voluntary consent of the parties, the usage of AI to facilitate such a process will also be a voluntary and informed decision. This makes AI suitable for application in ADR.

The use of intelligent systems for Dispute Resolution is not new and there have been several intelligent systems used in the past as well. These were primarily used for the calculation of probabilities and with the advent of technology not widespread, did not find a lot of takers. The advent of the COVID-19 pandemic forced the shifting of the dispute resolution process to online platforms. The process of Online Dispute Resolution (ODR) gained traction and people adapted to it. Despite the Pandemic being almost over, ODR has retained its popularity and is seen as a cost-effective method for dispute resolution. It further allows for increased usage of technology since the process is undertaken entirely online and AI can provide assistance with the resolution process or as some predict take over the resolution process as a whole.

Covid-19, Dispute Resolution and AI

The COVID-19 pandemic resulted in the creation of a significant backlog of legal disputes. The courts are filled with lawsuits and the delays in justice are not taken kindly by the people. In such circumstances, there is wide room for the emergence of alternative technologies that can address the issue effectively and efficiently. This provides a ripe time for the entry of AI into the ODR system. It can be particularly useful in the resolution of disputes which are related to employment, supply chain disruptions, contract breaches, and insurance claims that arose during the Pandemic.

The AI-powered dispute resolution software possesses the ability to handle a large volume of disputes quickly and efficiently. This can work wonders for the reduction of the backlog of cases and result in the timely resolution of disputes. It also lowers the cost of the process as it can automate routine tasks which include document review, analysis, and more. The lowered cost will in turn result in increased accessibility for individuals and organizations. It is particularly beneficial for those who are in dire financial straits as a result of the Pandemic.

However, the road to using AI in dispute-resolution processes is laden with potential challenges. There are some circumstances such as the ones which had been created during the Covid-19 Pandemic which could pose difficulty for the AI systems to understand and interpret. The concerns about bias in AI systems are not unfounded, particularly considering that the data used for training the systems could reflect historical disparities or systemic inequalities that have been exacerbated by the pandemic.

This indicates that while the use of AI in dispute resolution has the potential to offer significant benefits, it is important to analyze and understand the potential challenges and limitations faced by AI systems. This will ensure that their usage is done in a manner that is fair and effective. To understand the usage of AI and its potential impact, it's important to understand the general development of technology-influenced negotiation systems to get a holistic overview of how it has evolved to its current stage.

2 Development of Technology Influenced Negotiation Systems

The resolution of disputes by human beings has been theorized. There has been extensive research undertaken by mathematicians to improve and optimize the resolution of disputes. This led to the development of early negotiation systems. In recent times, AI researchers have also focussed on the same, which paves the way for the usage of AI in the Dispute Resolution Process.

In 1979, the notion that commercial and civil disputes are resolved in the shadow of law was introduced by Mnookin and Kornhauser.[4] This was logical as even in daily life we see that people seek the help of a court of law or the legislation to resolve disputes where it is difficult to arrive at a resolution through simple discussion. This prompted even the early negotiation support systems to focus on legal domains.

The focus towards formally adopting ADR methods began in the 1970s and also led to the creation of the Artificial Intelligence and Law movement. The idea of a Multidoor Courthouse was put forth by Frank Sander in the year 1976. Under this concept, disputes are assigned to the most suitable method for their resolution.[5] He predicted that it would be in use for the year 2000. This era saw a lot of research in the field of negotiation, The work 'The Art and Science of Negotiation' by Howard Raiffa examined how game theory, mathematics, and optimization could be used to enhance negotiation amongst disputants.[6]

The Rand Corporation in the early 1980s developed negotiation support systems that used AI for advice related to risk assessment in the claims for damages. The Lift Dispatching System (LDS) developed by them was used by legal

4 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 The Yale Law Journal 950 (1979).

5 Gladys Kessler & Linda Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 Cath. U. L. Rev 577 (1988), https://scholarship.law.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1897&context=lawreview (last visited Sep 20, 2023).

6 Howard Raiffa, The Art and Science of Negotiation (1982), https://books.google.co.in/books/about/The_Art_and_Science_of_Negotiation.html?id=y-4T88h3ntAC&redir_esc=y (last visited Sep 20, 2023).

experts in the settling of cases related to product liability.[7] The LDS had knowledge related to legislation, case law, and the informal principles and strategies that were commonly employed by lawyers and claim adjusters to settle cases.

Another system that was used for negotiation was the NEGOPLAN. It is a rule-based system that is written in PROLOG.[8] The system was not used for the simulation of the entire negotiation process. One of the parties was given a competitive advantage since the goals and subgoals of the opposite party were hidden by the side that NEGOPLAN supported. Only the issues which were the subject of the bargaining were revealed. The PERSUADER was a system that relied on case-based reasoning and game theory for providing decision support about labor disputes in the USA.[9] The major characteristics of such systems are that they can improve their performance in efficiency and quality of solutions using machine learning. The usage of the case-based reasoning method also proves to be effective since the system can exploit the previous successful decisions, which cuts down the time taken to resolve the dispute and avoids failures by recognizing past failures.

Internet was developed as a commercial entity in the 1990s and Online Dispute Resolution (ODR) was sought to be developed. Even during its initial stage, the development of ODR was carried out by legal academics. They saw the potential of using it to resolve online disputes. In 2005, eBay and PayPal started to use ODR for E-commerce. This was followed by the development of ODR with a practical utility like Rechtwijzer in the Netherlands and the UK and the Civil Resolution Tribunal in British Columbia, Canada.

The traditional forms of dispute resolution were based on face-to-face communication. Several forms of technology have been used to enhance negotiation. The telephone was hailed as an important technology in dispute resolution as it allows for communication between people who are physically distant and in cases where their meeting is not the best idea, like in cases of domestic violence. The development and widespread nature of the internet meant that access to digital technology has been much easier. It offers more features in addition to telephone calls as it allows the users to interact via text, text voice, and real-time video. This can be useful and adjusted as per the needs and requirements of the case.

The emergence of the COVID-19 virus furthered the importance of the development of ODR systems. It created a scenario where the people were forced into isolation and face-to-face meetings for dispute resolution were no longer

[7] DONALD A. WATERMAN, JODY PAUL & MARK PETERSON, *Expert Systems for Legal Decision Making*, 3 Expert Systems 212 (1986).

[8] S. Matwin et al., *Negoplan: an Expert System Shell for Negotiation support*, 4 IEEE Expert 50 (1989).

[9] Katia P. Sycara, *Machine learning for intelligent support of conflict resolution*, 10 Decision Support Systems 121 (1993).

possible.[10] Despite this, disputes continued to occur, and to ensure that the pendency of disputes was not unmanageable, it was essential to find a way for the continued operation of the justice system. This was particularly important in cases that needed urgent attention like bail applications, domestic violence, and family disputes.

The development of ODR is not limited to merely providing a new and better platform for communication. There is an effort to develop intelligent systems that can assist and improve negotiation outcomes. Some of the technology presently in use for dispute resolution has been discussed.

Use of Technology for Negotiation

The Rechtwijzer System

This system was originally used as an informational website that provided information about common conflicts like consumer, tenant, and debt issues.[11] The website aimed to allow people to understand the problem by encouraging *"self-reliance by improving control over the conflict process and understanding of your own and the other party's positions and motivations in the conflict."* The aim was to guide parties to solve conflicts on their own and seek legal help wherever needed. It did not only offer general information but also included question-and-answer tools, or "guided pathways," where users could find information relevant to their situation and seek related support services.

The role played by technology in promoting self-reliance amongst people in the resolution of conflicts was recognized. In 2014, in partnership with the Hague Institute on the Innovation of Law and with Modria, it developed an online self-help tool for divorce was built. It was designed for the couples who were separating. It seeks to assist the citizens in solving their mutual problems through the advice of experts. It charges a nominal amount of 100 Euros for access to the system. It asks the users to enter their personal information, their priorities in the dispute, and specific questions related to the information they enter. This can include contentions for custody of children, splitting of income, and other important preferences. Roger Smith wrote that "Rechtwijzer 2.0 does inherently a different job

[10] Sourdin T, Zeleznikow J (2020) Courts, mediation and COVID-19. To appear in Australian Business Law Review Tania Sourdin & John Zeleznikow, *Courts, Mediation and COVID-19*, papers.ssrn.com (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595910.

[11] Social Value UK, *Principles of Social Value*, Social Value UK, https://socialvalueuk.org/principles-of-social-value/ (last visited Sep 20, 2023).

from the first version: it was designed to go beyond signposting (like Rechtwijzer 1.0) and provided a means of resolution itself."[12]

The system follows a four-step procedure:

- A diagnosis phase.
- An intake phase for the party which initiated the usage of the system.
- An intake phase for the responding party.

Once the intake process is completed, the parties are required to work on agreement and issues that occur during their separation. These can include:

- Future channels for communication
- Issues as to the distribution of property and expenses.
- Child Custody, Maintenance, Child Support, and more.

The system aims to be one of integrative negotiation. It is focused upon the balanced protection of the interests of all the parties and not specifically for the rights of each of the parties. The legal processes involved in the settlement are informed to the parties so that there is informed consent the agreements made are valid under the prevalent law and the bargaining process is undertaken in the Shadow of Law.

Once the parties have reached an agreement, it is reviewed by an independent lawyer. The system uses the AI algorithm to find points of agreement in the responses of both parties and proposes a solution. If the estranged couple is not satisfied with the solution, they have the option of requesting a mediator by paying an additional amount or requesting an adjudicator who can make a binding decision under the law. It is to be noted that unless the parties mutually agree on an adjudicator, the whole process is voluntary and non-binding. Once the adjudication is requested, the decision becomes binding.

The system was in operation from 2014 to 2017. The system garnered substantial interest at both the national as well as international levels. The users generally had positive reviews with the couples reporting a good level of satisfaction. It was said to be a generally used tool that focused on the prevention of conflict.[13] However, the Bar Association of the Netherlands voiced several concerns about the system. They questioned the lawyers on their ability to maintain a duty of care while using the system. The interest at the international level was also high with the team behind the development of the system invited to present the platforms

[12] Roger Smith, *DIGITAL DELIVERY OF LEGAL SERVICES TO PEOPLE ON LOW INCOMES QUARTERLY UPDATE*, (2015), https://thelegaleducationfoundation.org/wp-content/uploads/2015/09/Digital-Technology-Spring-2015.pdf (last visited Sep 20, 2023).

[13] Margreet Vermeulen, *DPG Media Privacy Gate*, Dpgmedia (2023), https://myprivacy.dpgmedia.nl/consent?siteKey=PUBX2BuuZfEPJ6vF&callbackUrl=https%3a%2f%2fwww.volkskrant.nl%2fprivacy-wall%2faccept%3fredirectUri%3d%252f%252520mensen%252fdoe-het-zelfscheiden-op-internet%257ebb80ac25%252f (last visited Sep 21, 2023).

at various conferences. It saw interest from British Columbia and the UK. It was implemented by British Columbia where they adopted a version tailored to their local needs through the website, MyLawBC. A version was proposed to be developed for landlords and tenants but not rolled out.

The developments of the project were not enough to lead to a breakeven point on the financial level. The Dutch Government no longer wanted to invest in the innovation by providing subsidies. Therefore, the divorce system was scrapped and Rechtwijzer functioned in its original form where it guided dispute resolution. The team that was involved in Rechtwijzer *uit elkaar* attempted revival. They convinced investors and set up a new company called Justice42 ("Justice for Two"). The platform mirrored Rechtwijzer *uit elkaar* and also incorporated the lessons learned during its operation.

Lessons Learnt and Incorporated into the New Uitelkaar.nl System

The Rechtwijzer aimed to be fully automated and online. Its motive was to limit human interaction. When lawyers were involved in the review of agreements, they only communicated with the clients online. A client contact center was facilitated by the Legal Aid Board. The primary function of the center was to provide general legal information. It did not provide any targeted legal advice. This was because the system attempted to take the entire procedure online. However, the parties involved, which included both the divorcing couple and the lawyers expressed interest in more guidance offline.

Therefore, Uitelkaar.nl incorporated this into its system and created a hybrid system combining both online and offline processes. It created a new role in the system called the "case manager". The role of the case manager is to join the case right after it has been taken up by the system. It communicates using chat and can also be approached via the phone. It performs the role of taking the couple through the process and answering legal questions. It also double-checks the agreements, verifies the uploaded documents to be correct, and ensures that the case is in a lawyer-ready state. Moreover, a face-to-face meeting with the lawyer once the process has been completed is now a standard provision. This was also useful in understanding the experience of the clients, their satisfaction levels, and working towards further development of the system. It complemented the inputs received from online surveys of the earlier systems.

Moreover, it was also noted that there is a need to include more 'modules' both online and offline so that the needs of the people that can be tended to. It was also noted that not everyone did not required all divorce-related services

like alimony calculation, pension advice, or help with tax issues and may only require mediation or support to figure out child custody. However, the changes were not implemented during the Rechtwijzer era. Some of the changes have been implemented in Uitelkaar.nl and there is also an intention to implement more changes in the future with additional investment.

It was also realized that the Rechtwijzer system is not *"one size fits all"*. There is an intention to develop a platform to assist in all divorce cases. However, the expectations were lowered and efforts were made to better understand target groups. It was also realized that running an ODR platform is not an easy task. There is a requirement for a dedicated team for operations management, marketing, and more. The role of lawyers has changed over time from a legal professional who directs the divorce process and influences the decision of the parties to someone who makes people understand the consequences of their decisions and pushes back when decisions are legal, financially, or from a practical standpoint not sound or out of balance, but always respecting the autonomy of the couple.

Analysis of Data

To understand the level of success of the Rechtwijzer system and its successor, it is important to analyze the response of the users to the data. The parties involved were sent out surveys four times during the process:

1. After completion of the intake process.
2. After the culmination of the collaboration phase, the parties agree and interact extensively with the case manager.
3. After the review meeting with the lawyer.
4. Six months after the whole process has been completed.

A total of 5600 surveys were sent out in the period between September 2017 to December 2019. A total of 880 surveys were filled out. A total of 118 questions were asked throughout four surveys. The satisfaction score increased to 7.9 out of 10 from 7.0 in the Rechtwijzer era. The case manager and the reviewer both scored highly with an average score of 8.4 overall and 8.3 overall. The distance for reaching the reviewer was rated the worst with a rating of 7.5. It can further be improved through the addition of more lawyers to the platform.

More lawyers being admitted to the platform could make this better. However, having too many solicitors would stretch out the cases too thin, which would hurt their involvement. The case manager receives the highest possible rating of 8.8 for "speed of work," whereas the reviewer receives a significantly lower rating of 8.1. Additionally, a case manager's "availability" is valued more highly with an 8.7 than it is with an 8.2 for the reviewer. This reflects the fact that the case manager

is accessible all day during business hours while the lawyers are frequently preoccupied with client meetings or court appearances.

The case manager's outcome prompted the decision not to extend the contact center's hours to include evenings and weekends. The reviewers' knowledgeability score is where they do best: 8.7. Other intriguing findings include the fact that 76% of respondents to a poll conducted six months after completion said the agreements struck with the aid of Uitelkaar.nl have worked in practice to a very large extent or a significant extent and will continue to be upheld in the future. And 80% believe that the money spent on Uitelkaar.nl was worthwhile.

Another feature of the surveys was that instead of directly calculating the financial return of the product, they calculated its *"social return on investment"*. This calculated how much every Euro going into the system generated in terms of social value. The return during the period was estimated to be 3 Euros for every Euro Generated. The results which make up the SROI are:

- *"65% agree that Uitelkaar.nl contributed to a decrease in the emotional pain of divorce;*
- *84% agree that cooperating with the ex-partner on Uitelkaar.nl enabled them to make agreements that worked;*
- *71% indicates that Uitelkaar.nl helped to keep good communication with the ex-partner."*[14]

The research also intended to find out the primary motivation for people to choose Uitelkaar.nl. It said that the most important factor that drives people to use the software is the trust to predict user intention compared to other factors like usefulness and relative advantage over other solutions.[15]

British Columbia Civil Resolution Tribunal

This is the most widely used ODR system in the present times. It not only provides advice but also provides the facility of manually drafting agreements. It analyzes the dispute and provides the relevant legal information and customized templates. At the initial stage, it uses a rule-based solution explorer to provide advice for the resolution of a dispute. The advice is based on BATNA and the concept of bargaining in the Shadow of Law. If the dispute is not resolved at the initial stage, the Civil Dispute Resolution tribunal can be used by the applicants. The applicants are required to fill in the application forms and submit them. Once the application is accepted, they enter into a secure and confidential platform for negotiation where they attempt to resolve the dispute without the engagement of a third party.

[14] Laura Kistemaker, *Rechtwijzer and Uitelkaar.nl. Dutch Experiences with ODR for Divorce*, Family Court Review.

[15] Uitelkaar.nl: Ervaringen Van Gescheiden Stellen, uitelkaar.nl (2022), https://uitelkaar.nl/info-over-scheiden/uitelkaar.nl-ervaringen-van-gescheiden-stellen#:~:text=68%25%20van%20onze%20klanten%20vindt (last visited Sep 20, 2023).

If no resolution is reached, they can engage a facilitator or mediator for the resolution of the conflict. If the parties reach a mutual agreement, it is turned into enforceable orders. However, if the process does not work out, an independent member of the Civil Resolution Tribunal makes a ruling about the case. As of now, the following cases are taken up by the Civil Resolution Tribunal:

- Housing cases up to 5,000 Canadian Dollars
- Motor Injury cases up to 50,000 Canadian Dollars
- Owners Corporation cases for any amount
- Cases involving Cooperative Associations and Societies for any amount.
- Small Claims Cases up to 5,000 Canadian Dollars

There are plans to introduce more categories to increase the utility of the system.

This is similar to the Rechtwijzer System, where the system first aims to provide an automated solution after considering the contents of the dispute. However, if it does not work out, it provides the opportunity for an informal and formal negotiation process, with the final step being adjudication by a member of a Civil Resolution Tribunal. The scope of cases dealt with under the system is much wider and it has enjoyed considerable success over the years. It has shown how the use of technology can be effective in the dispute resolution process.

It performs a role where it allows the users to generate the necessary legal documents and information for the resolution of the dispute. It assists in drafting the application forms which allows for more comfortable access to the Civil Resolution Tribunal. If the parties settle, it allows for the conversion of the agreements reached into enforceable orders. It has the support of the State as well which has enhanced its usage. The Government of British Columbia has decreed it as the only forum that can be used by the residents for the resolution of disputes listed above.

Online Dispute Resolution Systems

There are several different types of Online Dispute Resolution Systems and each of them performs a specific role. Some of these systems are Document Management Systems, E e-negotiation systems, Systems customized for a particular dispute, General virtual mediation rooms, and arbitration systems.[16] They include the multifaceted approaches to ODR which include the usage of Game Theory, Artificial Intelligence, and Social Psychology. It has been noted that there is

[16] Arno Lodder & John Zeleznikow, *Artificial Intelligence and Online Dispute Resolution*, (2004), https://core.ac.uk/download/pdf/15470488.pdf (last visited Sep 21, 2023).

no universally applicable technique, and the viability of a technique can vary based on the context.[17]

The systems are built differently and vary based on the place of the dispute, jurisdiction of the dispute, legal systems, social norms, and other factors that influence the process of dispute resolution. The Online systems in themselves can be hybrid where a part of the dispute is resolved online, and the rest is carried out in face-to-face meetings. An ODR is useful even in cases where it cannot fully resolve the dispute as it might be able to resolve some of the issues which results in saving time and money. It might also result in breakthroughs for other issues and reduce the number of arguments for the pending issues.

3 An analysis of the use of Artificial Intelligence for Dispute Resolution

A significant role can be played by AI in the resolution of disputes. This can be carried out through automation of tasks, increase in efficiency, and consistent and accurate analysis of the data which results in the process becoming more cost-effective and accessible. The automation of tasks by AI is a major advantage as it can perform tasks that would need substantial human effort. An example of this is the analysis of large volumes of data like texts and images. An AI can complete the process at a pace much faster than a human. Moreover, it is capable of identifying the relationships and patterns which are difficult to spot for a human. This can help in the reduction of time needed and costs associated with the dispute. This enables the process to be more efficient for all the parties which are involved.

Applicability to Dispute Resolution

AI in ODR can be used as a Decision Support System (DSS) or an expert system. This means it will be able to perform simple activities which will vary from the compilation of data to more complex analysis, which could include suggestions regarding the best strategy or the fairest outcome possible.[18] It can also be used as an expert system which would work at a standard similar to humans and even exceed it in certain cases. The system will be able to learn by itself and its knowledge will progressively grow as it handles more cases.

[17] N.R. Jennings et al., *Automated Negotiation: Prospects, Methods and Challenges*, 10 Group Decision and Negotiation 199 (2001).

[18] Davide Carneiro et al., *Online Dispute resolution: an Artificial Intelligence Perspective*, 41 Artificial Intelligence Review 211 (2012).

The DSS would be used for assisting humans in resolving disputes while the expert system would replace the humans in the ODR process and give advice on its own. The use of DSS software is predicted to become more common since the usage of such systems can be used to analyze agreements and contracts within a few minutes, a task that would require a long time if done by a human.

The nature of assistance provided by AI will vary. For example. In some cases, the programs will be assisting with the neutral party in deciding the dispute. Some can act as neutral systems themselves. Some systems can be used by one of the parties to make a stronger case for itself. For example, eBrevia is software that has the capability of analyzing a contract within minutes and extracting relevant data.[19] However, the software by itself does not provide any significant advice to anyone unless there is a human who uses the analysis.

Other software can suggest solutions and only needs input from humans to arrive at a solution. Smart Settle is a software that can handle a wide variety of issues which include rental issues to mergers and acquisitions. The working of the software involves a process where the parties rate their preference in a specific order with the constructive outcome of each preference. The program pits the preferences of the parties against each other and suggests solutions accordingly. The solutions are provided through the analyses of thousands of previously resolved cases in its database.[20]

The usage of AI can be revolutionary in ADR processes like mediation where the primary role of the neutral party is to ensure that the proceedings of the dispute are confidential and there is no bias in their decision-making ability. An AI program will provide a platform where people can conveniently share personal information and sensitive information regarding the dispute which they may be apprehensive about sharing with a human.[21] Moreover, a machine can provide greater certainty concerning ensuring objectivity and no bias. This will prove beneficial in several disputes, particularly matrimonial disputes.

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[19] Diana Shepherd, 'How Artificial Intelligence Could Impact the Future of Family Law' (*Family Lawyer Magazine*, 12 September 2019) <https://familylawyermagazine.com/articles/artificial-intelligence-and-the-future-of-family-law/> accessed 11 May 2020.

[20] Hibah Alessa, *The Role of Artificial Intelligence in Online Dispute Resolution: a Brief and Critical Overview*, 31 Information & Communications Technology Law 1 (2022).

[21] Mitchell Hamline & David Larson, *Mitchell Hamline School of Law Artificial Intelligence: Robots, Avatars and the Demise of the Human Mediator Publication Information 25 Ohio State Journal on Dispute Resolution 105 (2010)*, (2010), https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1352&context=facsch (last visited Sep 21, 2023).

Application of Existing Technology to International Conflicts

The usage of technology combined with game theory has been important in supporting the resolution of international conflicts. For example, MEDIATOR is a tool that has been used for proposing solutions to international disputes. The method used by it is case retrieval and adaptation.[22] The program understands the issue at hand, looks into its database to identify relevant data sets from the past, takes into account the feedback of the disputing parties, and uses it to propose a feasible solution.

An automated agent which was presented by Kraus and others can efficiently negotiate with human players in the simulation of an international bilateral crisis.[23] The negotiation is carried out by an agent in a situation where several variables such as time constraints, deadlines, and the possibility of the parties opting out of negotiation. The experiment was carried out using a conflict that occurred between Canada and Spain over fisheries in the North Atlantic Ocean. The automated negotiator was played in a simulation where it interacted with humans. The model used the game theory coupled with heuristics. It was found in the experiment that in at least one of the two roles, the agent was able to perform its duties significantly better than a human player. It was also able to deal with the variables and provide solutions accordingly indicating good potential for further development for actual use in the dispute.[24]

Computer modeling has also been used for the resolution of international disputes. The Adjusted Winner algorithm has been used by Denoon and Brams to advise over the disputes of the South China Sea as well as the Panama Canal Treaty and Camp David Accords. The final status issues between Israel and Palestine were analyzed using Adjusted Winner by Brams and Togman.[25] They were of the view that the agreement which is reached by using the procedure of Adjusted Winner was fairly close to the actual agreement that had been reached. This saw a new usage of technology in the decision-making process where instead of using the technology for the resolution of the dispute, it was used to measure the fairness of the agreement reached in the accord.

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[22] Janet L. Kolodner & Robert L. Simpson, *The MEDIATOR: Analysis of an Early case-based Problem Solver*, 13 Cognitive Science 507 (1989), https://www.sciencedirect.com/science/article/abs/pii/0364021389900220 (last visited Sep 20, 2023).

[23] S. Sarit Kraus et al., *Resolving Crises through Automated Bilateral Negotiations*, 172 Artificial Intelligence 1 (2008).

[24] Ibid.

[25] Steven Brams & Jeffrey M. Togman, *Camp David: Was the Agreement Fair?*, NYU Scholars 306 (1998), https://nyuscholars.nyu.edu/en/publications/camp-david-was-the-agreement-fair-2 (last visited Sep 20, 2023).

An important observation from such a use is how AI had been used for the managing of a dispute instead of resolving it. This can ensure that minimal conflict occurs which could lead to the resolution process becoming much easier. The application of the same for the resolution of family law disputes has also been projected by researchers which has been further discussed and analysed.

Application of AI to Family Law Disputes

The concept that the management of a dispute can greatly assist in its resolution is particularly useful for family law disputes. The parties in such a dispute know each other and there is a possibility in the future that the dispute may no longer exist due to changed circumstances. The resolution of the Israel Palestine Dispute using the asset divider system was contrasted by Zeleznikow with family mediation.[26]

One of the main arguments put forth for using technology-based software for the process was that there are several thousand family mediations every year in most major jurisdictions around the globe such as Canada, Australia, the United Kingdom, and more. International disputes such as the Israel-Palestine dispute can have diverse facets which make it difficult for the AI to reach a concrete solution as it does not have many similar cases to refer to. However, in family law mediations, the sheer volume of cases implies that large amounts of crucial information can be obtained from previously solved cases. This assists in obtaining the requisite information to provide a resolution to the parties involved in the dispute.[27]

Moreover, the number of parties that are involved in a family law dispute is minimal and does not include a lot of personal interests in most cases. The third-party involvement is minimal which makes it easier to work towards a solution. The parties are personally involved in the dispute and represent themselves in ODR processes in most cases. This means the information for the AI to work with is directly obtained and since the parties themselves give the information, potential biases can be identified.

If the AI can address the concerns of both parties without prejudicing the interests of either of the parties, the possibility of an amicable resolution increases. Moreover, there may be cases where the dispute is simply a result of different perspectives and misunderstandings between the parties. In such cases, AI can be greatly beneficial as it can identify such concerns and address them accordingly. It

[26] John Zeleznikow, *Comparing the Israel–Palestinian Dispute to Australian Family Mediation*, 23 Group Decision and Negotiation 1301 (2011).

[27] Emilia Bellucci, Deborah Macfarlane & John Zeleznikow, *How Information Technology Can Support Family Law and Mediation*, Lecture Notes in Business Information Processing (2010).

can also predict if some of the important variables will greatly change shortly which can be used as a tool for convincing the parties to make amends or proceed in a manner through which the dispute is resolved.

Application of AI to ODR: The Whole Picture

The use of AI will also result in the process of decision making more consistent. If programmed objectively, AI will not be influenced by prejudices and biases which are a normal part of human nature. As a result, its judgment will not be affected. This would result in the decisions being made based on a consistent set of rules and criteria. This would make the process fair and impartial.

Despite its advantages, there are certain limitations to the usage of AI as a tool for resolution of disputes. For example, there is a possibility that AI will struggle to understand the actual context of a dispute. This will determine the best outcome for a difficult process. Further, there is a possibility that the ability of the AI to adapt to the changing circumstances is limited and the new information or evidence which arises during the process of resolution is not fully processed by AI.

Moreover, there is a possibility that the AI interface is not entirely secure and may be vulnerable to attacks from hackers. There is a possibility that confidential and sensitive information is leaked during a data breach which can greatly jeopardize the benefits of AI. Therefore, great emphasis has to be laid upon the protection of information that is disclosed to the AI during the dispute resolution process. It has to be ensured that strict standards of data privacy and confidentiality are maintained.

Ethical Considerations

A system for the resolution of disputes which is fully dependent on humans, holds them accountable for any errors in judgment or any oversight that may occur during the process. The usage of AI for the same raises questions about accountability and transparency. The process of affixing liability becomes difficult if an erroneous judgment is given by the AI. Moreover, the transparency of the decision-making process can be impacted negatively as the complex algorithms that are used for the programming of the AI software are complex and not easily understandable. This can lead to a lack of transparency.

There is also a need for legal professionals to be informed about the ethical considerations of AI when engaging an AI-based mediator. The data fed into the AI can be manipulated in a manner where it is freely giving decisions with bias. This would raise a question regarding the fair treatment of the parties by AI. The parties when using AI for assistance may have relatively less autonomy to make their own

decisions for reaching a resolution plan which is acceptable to them. The AI-based mediator may not truly respect the autonomies of the party.

It can be observed that while AI-based mediations have their own sets of advantages like transparency and promise of unbiased participation, there remains a possibility that the AI suffers from shortcomings like humans performing similar roles do. However, with an adequate number of safeguards and regular checks, AI has the potential to surpass humans in its capabilities in certain areas of the dispute-resolution process. For the usage of AI to materialize on a large scale, a concrete system of checks and balances must be developed where the participants are assured that the AI is neutral and works from a position of fairness and justice. This will help in ensuring that large-scale adoption of AI as a tool for ODR is undertaken.

4 Final Considerations

The regulation of AI and ADR is done using the rules that apply to general areas such as privacy and advertising practices. Moreover, the rules about disclosures in conflict situations that apply to ADR are also applicable to AI. AI is already a significant part of several ODR and ADR processes. It performs various functions ranging from simple tasks such as enabling video conferencing or scheduling to calculation of probabilities in an international conflict situation. The role of AI and the future of ODR has been critically analyzed in this paper. The popularity of AI software like Chat GPT, Google Bard, Kira, and more would greatly increase the integration of AI in the legal dispute resolution process.

The normalization of the usage of AI for everyday tasks certainly assists in making people more open to the use of AI in the process of dispute resolution. Moreover, with the increasing number of transactions taking place at a global scale, the possibility of disputes arising greatly increases. In such cases, AI can prove to be useful as it will be able to handle the complex nature of transactions and provide an efficient and cost-effective solution compared to if the process was carried out entirely by humans.

AI has the potential to play a significant role in the application of justice and the preservation of the rights of people. It can provide people with a forum to know about their legal rights and provide them with an initial consultation on the options available to them to resolve a dispute. Moreover, AI unlike the other digital technologies that are used for aiding resolution like telephones, video conferencing applications, document sharing services, and more, can be used for shaping the nature of the legal discourse. It can assist in the process of dispute resolution and some cases, entirely take up the role of the negotiator or the adjudicator. There is

a possibility that AI in itself becomes the forum and replaces the humans present in the dispute resolution process fully or partially.

However, it has been struggling with slower-than-expected development. The emergence of a new technology usually results in optimism about its capabilities and its potential to be a magical solution to present-day problems. However, even with AI, the development has not been a linear process and the pace of development has been slower than expected. However, by developing an understanding of the shortcomings and benefits of AI, there is still a huge possibility that AI will prove to be a revolution in the dispute-resolution process in the long run.

AI has the potential to wade through bureaucratic hurdles and red tape, which often limit access to litigation. It can replace the traditional justice system with a more cost-effective, efficient, and accessible process. The initial process of creation and access may be high which would limit its use to the organizations and individuals who can afford it. However, with time the development would lower the overall costs and become an easily accessible viable alternative.

Despite this, there is a chance that developing excessive reliance on AI systems can prove to be detrimental in case they are not periodically re-examined. The AI once developed has the potential to grow itself and adapt to the changing needs. However, the evolution of software developed by humans may not be in line with what they need at that particular period in time. As a result, constant evolution is necessary to ensure that it does not drift away from performing the role it was created for and performs its tasks as per expectations. While AI is projected as a messiah that will promote access to justice, it should be ensured that the costs are not overbearing for the general populace as it could exacerbate the problem of impeded access to justice. Therefore, the costs must be kept low and affordable while still ensuring that the negative impacts associated with using AI as a mechanism for dispute resolution are mitigated.

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Development of online mediation in Russia and the Republic of Kazakhstan

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Abstract: Taking into account the practical and further legal implementation of alternative dispute resolution methods in the Russian Federation and the Republic of Kazakhstan, the legal community pays attention to the legislative consolidation of the status of mediation technology for dispute resolution, since the rights of citizens and legal entities and extrajudicial forms of protection of interests contribute to the development of social harmony, reducing conflict in society, as well as the development of cooperation relations in the long term. The authors drew attention to the implementation and increasing introduction of online mediation. However, in this regard, neither the Russian Federation nor the Republic of Kazakhstan have developed rules for virtual mediation, there are no regulations for conducting the procedure in the online space. The authors propose to standardize this institution.

Today, the use of the mediation institute shows that this mechanism may be necessary as one of the universal ways to resolve conflicts and disputes. When studying the application of the mediation regulations of the two countries, some features and differences were identified, as well as general rules for the use of alternative dispute resolution methods. At the same time, there is no special regulation for virtual dispute resolution in the legislation of the countries under consideration.

The authors recommend expanding the scope of virtual mediation in school life, using this institution more widely in intellectual property law and in other legal relations. Despite the fact that in the countries represented, various ways are used to achieve a mutually acceptable solution between the parties in court and out of court, but, as a whole, the institute of mediation and the institute of online mediation need to be expanded and standardized according to certain models, depending on the disputes under consideration.

Keywords: Alternative Dispute Resolution Methods. Mediation. Online Mediation. Mediation. Mediator.

Summary: **1** Introduction – **2** Literature Review – **3** Methodology – **4** Results – **5** Online-Mediation – **6** Opportunities and Disadvantages of Online Mediation – **7** Conclusions – References

1 Introduction

In recent years, mediation has become increasingly popular in many countries, including Russia and Kazakhstan. This article will consider the development of

mediation, as well as online mediation in Kazakhstan and Russia, the advantages and prospects of using this institution.

In this regard, the features of online mediation are considered and the disadvantages of such a procedure in these countries are noted. The authors raised the question of expanding such a procedure and the necessary steps for its implementation.

In the process of integration processes taking place in the modern world, both in Russia and in Kazakhstan, the norms governing the issues of alternative dispute resolution are converging, especially in the context of the trade development of the two states, family relations, cooperation related to intellectual property.

Therefore, it is necessary to expand and use modern technologies in virtual mediation for quick and effective consideration of disputes between entrepreneurs, in school, family areas, as well as in the field of intellectual property.

The development and convergence of economic, cultural and social integration are aimed at creating regulatory prerequisites for the convergence of issues of alternative dispute resolution of neighboring States. Issues of cultural integration, trade and business cooperation, the connection of national economies will increasingly generate disputes, therefore mediation helps to effectively use its methods related to the protection of rights, both on the basis of international principles and on the national principle of two states. In this regard, alternative dispute resolution, both in Russia and in Kazakhstan, has its positive sides, namely, the participants in such a dispute are independent, they voluntarily enter into mediation relations using an independent and honest mediator.

The Law of the Republic of Kazakhstan «On Mediation» defines mediation as a procedure for resolving a dispute (conflict) between the parties with the assistance of a mediator (mediators) in order to achieve a mutually acceptable solution implemented by the voluntary consent of the parties. The scope of mediation is disputes (conflicts) arising from civil, labor, family, administrative legal relations and other public relations involving individuals and legal entities, administrative bodies, officials, as well as those considered in the course of proceedings on administrative offenses, in the course of criminal proceedings in cases of criminal offenses, crimes. and of moderate severity, as well as relations arising during the execution of enforcement proceedings.[1]

The Russian law does not directly list the scope of mediation in criminal legal relations, however, it states that mediation procedures can be applied to public legal relations.

[1] The Law of the Republic of Kazakhstan «On Mediation» dated January 28, 2011 [Electronic resource] — URL: https://adilet.zan.kz/rus/docs/Z1100000401 (accessed: 10.08.2023).

Public relations in the specific conditions of a market economy, which are formed by the state, their institutions of various organizations, as well as individuals, legal entities, are very often characterized by the growth of various interactions in various legal, political and economic, cultural and other relations. In addition, as experience shows, in the process of interaction, subjects often get into different conflict situations that require their own solutions. Alternative dispute resolution methods and various conciliation procedures always have advantages due to the parties' free choice of intermediaries with high qualifications. In Russia, Federal Law No. 193-FZ of 27.07.2010 (as amended on 26.07.2019) «On Alternative dispute settlement procedure with the participation of an intermediary (mediation procedure)» (hereinafter the Law of Russia on Mediation), in the Republic of Kazakhstan the Law of the Republic of Kazakhstan «On Mediation» of 28.01. No. 401-IV of 2011 (as amended on 01.05.2023) (hereinafter referred to as the Law of the Republic of Kazakhstan «On Mediation») are aimed at improving the productive consideration of disputes using certain features in certain areas: be it family, corporate relations, intellectual property. In this regard, we attribute the institution of alternative dispute resolution to the sphere of both public and private law. Comparing the institute of mediation in Russia and Kazakhstan, it should be noted that in practice in these countries alternative dispute resolution is mainly common in family legal relations. As V.S. Savina points out, regarding Russia, this is also common in consumer protection issues, in housing and insurance disputes, as well as in cases arising from property and other relations (debt collection).[2] School mediation has also become popular and rapidly developing in Kazakhstan.

2 Literature Review

In modern research, both in Russia and in Kazakhstan, mediation issues are increasingly being discussed. In modern realities, the very nature of mediation and its developing counterpart – online mediation, their advantages, features of the consideration of individual cases on various legal relations are considered. This topic was studied by experts from Russia and Kazakhstan: R.R. Maksudov, A.Ya. Kurbatov, V.S. Savina, S.N. Gavryushkin, A.K. Sheremetyeva, S.N. Velitchenko, E.V. Mitskaya, A.T. Ismagulova and other authors. The authors' conclusions are that the Russian and Kazakh forms of mediation are created on a voluntary basis with the consent of all participants in alternative dispute resolution and are of a private nature.

[2] SAVINA V.S. Mediation in the field of intellectual property: opportunities and prospects of application. Intellectual property. Copyright and Mixed Rights, №. 10, pp. 35-42, 2017.

3 Methodology

The object of this study is the course and development of individual mediation institutions in Russia and Kazakhstan, as well as the consolidation of the legal status of conciliation procedures in individual areas, the fixation of mediation technologies for dispute resolution. Particular attention is paid to the use of online mediation in dispute resolution, which has begun to develop thanks to digital technologies. The subject of the study were normative legal acts regulating the scope of mediation, modern theoretical views on ways to resolve legal disputes in private and public legal relations. The methodological basis of the research is based on the unity of cognitive, rational and practical activities, a general scientific dialectical method of cognition of natural objective activity, which studies current legal issues of mediation. In the course of the study, systemic-structural, comparative-legal methods were also used. The methodology of the study includes the study of certain aspects of mediation, comparison of the institute of alternative dispute resolution of the Russian Federation and the Republic of Kazakhstan, their relationship in historical terms and their difference. The dialectical method was used to study the doctrine of dispute resolution in the two countries, to determine, first of all, the national influence on individual dispute resolution procedures, especially in the field of family relations, in the field of school mediation and intellectual property law.

Indeed, when it comes to family disputes, «stakeholders involved in mediation often take responsibility for implementing the best available practices, especially when it comes to a child; thus, it benefits one of the most vulnerable segments of society»[3].

Assessing school conflicts, we note that it is better to involve teachers to resolve a dispute in the relations of schoolchildren, since «mediation helps the teacher mediator better understand the points of view of others…».[4]

Mediation is not only a choice of alternatives and a departure from the state court, it is also «a way of behavior in conflict, as a culture of positive communication».[5]

Disputes in the field of intellectual property are the most complex requiring more precise regulation and depend on the one hand on violations of the exclusive

[3] GONZALEZ-MARTÍN N. Mexico-U.S. cross-border family mediation: legal issues in Mexico. Mexican Law Review. Том 9, выпуск 2, январь–июнь 2017 г., p.139. Pages 129-139.

[4] GARCIA S., IRIARTEREDIN C. Evaluation of a School Mediation Experience. Procedia - Social and Behavioral Sciences. Volume 84, 9 July 2013, p. 185.

[5] SHARAPOVA A., MARKOV S. Mediation in Russia and China: similarities and differences in the interpretation of an alternative dispute resolution procedure (mediation). American Scientific Journal. 2017. Vol. 3 (11). Pages 32-39. https://www.researchgate.net/publication/330728850_MEDIACIA_V_ROSSII_I_KITAE_SHODSTVA_I_RAZLICIA_V_TRAKTOVKE_ALTERNATIVNOJ_PROCEDURY_RAZRESENIA_SPOROV_MEDIACII (accessed: 02.11.2023).

right to various intellectual property objects and on the other, on the parties involved in the dispute.

The system-structural method made it possible to show the features of legal regulation of means and methods, the classification of individual mediation technologies used in mediation in Russia and Kazakhstan. Comparative methods allowed us to show the most acceptable ways to quickly resolve disputes.

4 Results

Mediation in Kazakhstan began to develop actively in 2011 with the adoption of the Law of the Republic of Kazakhstan «On Mediation». This law established the legal basis for mediation and defined its goals, principles and procedures. Since then, mediation has become a widely used dispute resolution tool in Kazakhstan. Mediation has a number of advantages over traditional dispute resolution methods, such as lawsuits. Firstly, mediation is a fast and cost-effective way to resolve disputes. Instead of spending a lot of time and money on lawsuits, the parties can reach an agreement through mediation in a short time and with minimal costs. Secondly, mediation allows the parties to maintain good relations after the dispute is resolved. Since the decision is made by the parties themselves, they feel more satisfied with the result and are ready to maintain further relationships. Kazakhstan, like Russia, strives to create an effective mediation system accessible to all citizens and organizations. More and more people and organizations are realizing the benefits of mediation and are ready to use it to resolve their disputes. In Russia, after the adoption of the Law on Mediation, alternative dispute resolution procedures began to develop. But today, unlike Kazakhstan, this method of dispute resolution is not developing enough in Russia, as it can be quite difficult to persuade the parties to resolve contradictions by mediation due to various circumstances.

At the same time, the Government of Kazakhstan actively supports the development of mediation and provides financial and organizational support. Alternative civil rights protection is developing widely in this country as the economy develops.

In Russia, family mediation centers are working dynamically in the regions, especially within the framework of the Concept of state Family Policy in the Russian Federation for the period up to 1925, it is envisaged to use the institute of mediation everywhere in resolving conflicts in family relations. However, as many experts note, despite the widespread development of regional family mediation,

this institution requires more detailed legal regulation, as it is still in its infancy in Russia.[6]

In 2021, in Kazakhstan, in connection with the adopted amendments to the Law of the Republic of Kazakhstan «On Mediation», the possibilities of alternative dispute resolution were expanded: namely, the areas for the use of conciliation procedures were increased, citizens' expenses in this area were minimized, the activities of professional (in cities) and public mediators (in villages) were divided. In Russia, the mediator's activity is divided into professional and non-professional, which gives free choice to the parties to the dispute.

Mediation unloads the judicial system, not being – contrary to its name – its alternative, but, most likely, its complement.[7]

In Russia, unlike Kazakhstan, cases involving a mediator in intellectual property law are considered much more often. So an interesting case was the dispute over a short literary work that has commercial success, as a result of which the parties agreed on co-authorship of the disputed object. As the well-known mediator Yana Stuf points out, the parties have come to a Mediation Agreement, in which a separate section is devoted to the Agreement on Co-authorship. The proofs of this dispute were drafts belonging to both authors.

Disputes with the results of intellectual activity are complex disputes. So in the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation[8] all disputes are divided into particularly complex, complex and less complex with assignment of case complexity coefficients.

The use of mediation in resolving disputes in intellectual property law has become a popular way.

Especially if it is connected with the payment of compensation in case of violation of the exclusive right to an object of intellectual property by individual entrepreneurs, who can take advantage of a reduction in compensation in court proceedings and, as practice shows, such payments can be assigned during court proceedings below the existing limits established by the legislation of the Russian Federation from 10,000 thousand rubles to 5000000 million rubles.

In intellectual property law, the role of service objects is also important, therefore, it is proposed to divide the consideration of such disputes between an employee and an employer in more detail. The authors propose to consider service

[6] GURKO T. A. Formation of the institute of mediation in the field of family disputes in Russia: laws, theories and practices // Sociological science and social practice. , v. 4. n. 2(14), p. 41, 2016.

[7] DRONZINA T. Mediation. Astana: public opinion. 2015, p. 72.

[8] Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated July 1, 2014 №. 167 «Recommendations on the application of criteria for the complexity of disputes considered in arbitration courts of the Russian Federation» (Based on the materials of «Consultant-Plus»).

disputes on special online platforms or in a specially designated place, outside the employer's premises.

Another problematic issue, both in Russia and in Kazakhstan, is the involvement of mediators with special professional training in the process, which is of particular importance for intellectual property law, corporate disputes.

The mediation procedure in this sense is beneficial both to the entrepreneur who violated the right for the first time, and to the copyright holder himself. A mediation agreement on the amount of compensation in this sense will not only be beneficial to the parties to the dispute, but will also be subject to a quick solution of the problem.

In our opinion, alternative methods of dispute resolution (mediation) in the field of intellectual property should be regulated depending on the participants, objects, since, for example, the secret of production (know-how) has a trade secret regime, respectively, in such a dispute there is a question of strict confidentiality.

Focusing on family mediation, the most common dispute resolution, it is generally considered that this is a procedure, mainly divorce. However, we believe that the issues of family business, which is diverse, from small to large, the maintenance of elderly parents, the upbringing of children are also a complex process. Also, the solution of complex cross-border family relations can become the subject of mediation. Using the example of the Union of European States, we agree that with regard to cross-border disputes, it is necessary to ensure the full dissemination of the agreement reached in any member State on the basis of general norms of private international law on key aspects of cross-border mediation.[9]

For the Russian alternative dispute resolution in this area, the national peculiarities of the Republic of Kazakhstan are also important, especially if it concerns disputes over the care of elderly parents. Indicative points for the Republic of Kazakhstan are the issues of resolving the rights of heirs in the family business, registration of rights to trademarks (service marks), the use of commercial designations in the family business, taxation issues and others.

Labor disputes are one of the spheres in the countries under consideration, which testifies to the effectiveness of the participation of the mediator, due to the fact that the employee is a less protected party to the labor dispute. However, statistics show that mediation in labor disputes in Russia and Kazakhstan is not popular and not widespread, due to the complexity of the execution of mediation agreements, especially on the part of the employer.

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[9] ESPIUGUES C. Mediation and private international law: improving free circulation of mediation agreements across the EU IN-DEPTH ANALYSIS. p. 1, November. 2016.

However, in the Republic of Kazakhstan, «after the December events in Zhanaozen, the government created a social partnership center, whose functions include monitoring labor relations, resolving labor disputes and preventing them»[10]

As part of the unification of Russian legislation and the legislation of the Republic of Kazakhstan, it is necessary in Russia, as in Kazakhstan, to extend mediation to collective labor disputes. This type of dispute resolution is also common in foreign law, where specialized entities are created to solve such special issues.

For comparison, let's consider different types and methods of resolving alternative disputes in the United States. Out-of-court dispute resolution methods of the American legal system have emerged as an alternative to expensive litigation. To adopt the general term «Alternative Dispute Resolution» (Alternative Dispute Resolution) arbitration — ADR. There are currently twenty different dispute resolution procedures in America. It can be noted that ADR acts on three tangible types:

1. Through negotiations between the parties without involving other participants;
2. Using an intermediary to resolve a conflict;
3. Dispute resolution with the help of a professional arbitrator who is independent. These three types are combined into different variants. Therefore, negotiations are part of any other procedure.

If the parties do not come to an agreement, the form of «mediation-arbitration» is widespread, which means the settlement of the dispute with the help of an authorized mediator-arbitrator.[11]

The spread of mediation widely and the improvement of the legal framework on this issue will most likely be possible only by taking into account factors such as the level of legal literacy of citizens, their culture and legal awareness, mentality.

Disputes (conflicts) arising from legal relations, as well as disputes (conflicts) considered in the course of criminal proceedings in cases of crimes of minor and medium gravity, criminal offenses, and relations arising in the course of enforcement proceedings, are the scope of mediation. From a philosophical point of view, conflict is a natural part of human life, a corridor of growth, dynamics and stimulation.

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[10] BEISSENOVA A., NURBEKOVA ZH., ZHANAZAROVA Z., DZYURENICH Y., TUREBAYEVA A. Labour Conflicts in Kazakhstan: A Specific Character of their Solution. Procedia - Social and Behavioral Sciences 82 (2013), p. 877.

[11] NOSYREVA E. Alternative means of dispute registration in the USA. Economy and law. №. 1, pp. 90-96, 1998.

But it is better to get out of any conflict without losses, nerves, money and time. Therefore, dispute resolution through mediation is a necessity of a modern civilized society.

A dispute, conflict (Latin conflictus – conflict) is a conflict of goals and views of two or more parties in the course of a relationship. In his article «The Concept of Conflict», Pratik Dave suggests that there are three different views or approaches to conflict:

1. The traditional point of view: it is assumed that any form of conflict is bad and should be avoided. This term has a negative connotation in the traditional sense. This is largely due to the lack of good communication and trust between people, as well as the inability of managers to understand and respond to the needs of subordinates.
2. Approach to human relations: According to this approach, conflict is a natural and inevitable phenomenon and therefore cannot be completely excluded from any organization. In this case, the conflict is viewed positively, since it is assumed that the conflict can improve the work of the group.
3. Interactive approach. The latter approach, the interactive approach, assumes that a certain level of conflict is necessary for the effective functioning of the group. Even a joint team can become static, unresponsive to the need for change and innovation.[12]

The conflict should be resolved in such a way that everyone feels like winners. Therefore, disputes (conflicts) considered in the Law of the Republic of Kazakhstan «On Mediation», it is better not to refer to one concept, but to separate them as «disputes and conflicts».

The prospects of the institute of out-of-court settlement of legal disputes arising from administrative and other public-law relations in the Republic of Kazakhstan, as well as the use of mediation in administrative disputes, are related to its advantages and will be of great relevance today, as noted by Zh.U. Tlembayeva.[13]

However, the Russian legislator did not extend the effect of the Law on Mediation to the administrative and legal sphere, limiting himself only to the sphere of resolving disputes arising from civil, labor and family legal relations.[14]

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[12] PRATIK D. The concept of conflict in organizational behavior, types and sources of conflicts. Channel of India. p. 40, 2021.

[13] TLEMBAYEVA ZH.U. Out-of-court registration of legal disputes, appeals from administrative and other social and legal relations in the Republic of Kazakhstan: state and prospects of development. https://online.zakon.kz/Document/?doc_id=37502772 (accessed 16.10.2023).

[14] KUTSENKO T.M. The problems of the implementation of mediation procedures in the proceedings on administrative offenses. Administrative law and process. № 1, p. 46-49, 2022.

To date, the introduction of alternative methods of resolving legal disputes using mediation is in demand in the social sphere due to the aggravation of migration processes, since Russia and Kazakhstan are attractive to other republics of the post-Soviet space in an economic sense. Moreover, Russia and Kazakhstan are multinational states, and in this sense, ethno-mediation is an interethnic and interfaith way of resolving emerging conflicts.

Of course, among these problems, one of the important issues related to the well-being of citizens is the issue of society as a whole, the social conditions of citizens formed in the conditions of the modern economic crisis (medical, housing issues, etc.), the increase in family conflicts, the problems of our future youth (education, offenses committed by minors, etc.). Therefore these issues require solutions and assistance from any side – from the state, society, lawyers, conciliators (mediators, arbitrators, etc.), and the parties to the dispute themselves.

It is well known that disputes often arise between underage students everywhere. This fact is also related to crime and crime statistics. According to the survey results, as usual, conflicts with friends and classmates are in the first place (56% and 47%, respectively), conflicts with parents (31%) and conflicts with teachers (11%) are in the second and third place. %) are in fourth place. At the same time, schools, on the one hand, taking into account the underage age and statistics, and on the other hand, as usual, offer to resolve the dispute only by administrative method. To solve this problem, one of the mechanisms that are effective for the educational environment and meet the requirements of modern society is the coordination of school activities. For example, we can say that if teenage schoolchildren work as leaders (mediators), they will not only resolve disputes with the help of mediators, teachers, psychologists, but also show an effective way to prevent conflicts and prevent illegal actions. Teenagers work under the guidance of an adult curator, undergo special psychological training, and also acquire the skills necessary for future adult life, and will probably be perceived by classmates who trust him as a person who helps and finds the right way. Today, school mediation projects are rapidly developing along the way of further application and implementation of mediation on the territory of both the Republic of Kazakhstan and the Russian Federation. In the age of the development of innovative, digital technologies, the project of the school mediation service needs to be developed. Inform schoolchildren and parents about the existence of such sites and specially authorized persons dealing with this type of dispute. The school administration should strive to resolve disputes and conflicts between them, and if they are successfully resolved, it should be possible to conclude a mediation agreement in accordance with the law, even if the educational institution of secondary schools is a «state institution». In the long term, the use of school mediation will have

a positive impact on reducing the level of conflicts in school, creating a more favorable psychological atmosphere, will lead to a new level of relationships based on a culture of mutual understanding, tolerance, mutual support and nonviolence.

Thus, there is a need to distinguish not only certain types of mediation, depending on the types of activities, from offenses, but also from the participation of certain subjects, violations of the rights to the objects used.

«The role of mediation is to help parties to identify those solutions that ensure a win – win solution for both sides of the conflict and therefore being likely to extinguish the conflict»[15] Indeed this is the main purpose of mediation.

5 Online Mediation

Virtual mediation is expanding more and more. This is especially important between participants from different countries in the framework of resolving cross-border disputes. The most important advantages of online mediation are: a certain distance, the absence of borders and, accordingly, costs to the place of dispute resolution.

«Literature on the subject describes two meanings of the term "online mediation" – the first relating to the place in which the legal relation for the dispute was created, and the second having its basis in the online tools used to resolve the dispute, regardless of the place of its creation»[16]

Alternative dispute resolution, especially virtual mediation, provides the parties to solve their problem out of court, without going through all the formal procedures established by law.

Of great importance to the parties is the conflict itself and the amount of stress that the parties are immersed in. Therefore, developing online mediation, it should be noted that «the emotional stress arising in any conflict situation is significantly reduced compared to the situation in open court».[17]

Virtual mediation expands and improves conflict resolution, and technologies only help to better analyze what is happening with the help of multimedia systems, online questionnaires, questionnaires and other virtual opportunities.

Various online dispute resolution services can be organized by the mediator himself using various technical capabilities of virtual platforms. Disagreements in cross-border trade relations, disputes between consumers of trading services are

[15] RAZVAN-LUCIAN A., STEFU J., OLTEANU C. Mediation in Romania context and principles of action. Procedia - Social and Behavioral Sciences 84 (2013) p. 1132. Pages 1128 – 1132

[16] MANIA K. Online dispute resolution: The future of justice. International Comparative Jurisprudence. Volume 1, Issue 1, November 2015, p. 79.

[17] RADULESCU DR. M.. Mediation an alternative way to solve conflicts in the international business environment. Procedia - Social and Behavioral Sciences 62 (2012), p. 291.

increasing every year, so issues in the digital environment need to be resolved through the widespread introduction of online dispute regulation. In the Russian Federation, such platforms are mainly involved in consumer protection issues, such as, for example, the marketplace support service. Yandex-Market, Ozon, etc. have their own arbitrations.

We agree with the author that for disputes on digital platforms it is advisable to propose «the structure of a unified automated information system that resolves disputes between enterprises and consumers in a digital environment».[18]

Due to the expansion of e-commerce, the development of digital technologies, and the use of big data by artificial intelligence systems, the number of disputes is increasing, in the resolution of which a large role is assigned to intermediaries-mediators. In our opinion, such specialists should understand the peculiarity of digital technologies on platforms in order to be able to protect the weak side. Working with big data involves the creation of services using blockchain technologies, which are electronic proofs of concluded transactions, fixing the rights of copyright holders.

For example, since 2017, China's Internet courts have recognized the use of blockchain «as a method of protecting evidence to overcome the risks of hacking or falsification of evidence stored on the Internet».[19]

Online mediation, like online court, involves the consideration of disputes using digital technologies, but at the same time online mediation is an alternative digital way to resolve a dispute.

Undoubtedly, the Internet influences the creation of various Internet courts «because of its ubiquity, wide usefulness and low cost, and offers new means to improve the provision of judicial services and the realization of the purpose of the judiciary – to serve people».[20]

In virtual mediation, a certain algorithm of actions must be established in accordance with the law and the agreement of the parties. Thus, L.V. Sannikova and Y.S. Kharitonova note in their research that «in Russia, access to justice through electronic and information technologies is considered a priority task of the judicial system, indicating the following measures necessary for this: obtaining information in electronic form, both about the activities of the court and about a specific case; technical and software support court proceedings (video conferences,

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[18] PALANISSAMY A., KESAVAMOORTHY R. Automated Dispute Resolution System (ADRS) – A Proposed Initial Framework for Digital Justice in Online Consumer Transactions in India Procedia Computer Science Том 165, 2019, p. 224.

[19] SUNG H.C. Can Online Courts Promote Access to Justice? Обзор компьютерного права и безопасности. Том 39, ноябрь 2020.

[20] GUO M. Internet court's challenges and future in China. Computer Law & Security Review. Volume 40, April 2021.

devices, ensuring the study of electronic evidence, recording of the court session, exchange of information and documents between participants in the trial and the court, ensuring the security of information stored in the systems)».[21]

In order to conduct online mediation, the parties conclude an agreement in which they agree to participate in the virtual space on a pre-agreed platform, then a Mediation agreement is prepared, where the method of signing it is noted. Digital platforms are becoming increasingly important for a wider range of enterprises and, in fact, are an element of the architecture of the digital economy itself.[22] The use of digital platforms is gaining popularity in mediation, but at the same time, if the online platform is not sufficiently protected, then the parties and the mediator will not be responsible for it. The Agreement also describes the process of video recording; the presence of other persons with the consent of the parties to the dispute.

Alternative dispute resolution (AUS) is also offered by the World Intellectual Property Organization (WIPO), which considers, in addition to disputes related to intellectual property objects, domain disputes.

The owner of the domain name, filing a complaint with WIPO, must collectively prove three facts: 1. The disputed domain name is identical or confusingly similar to the trademark or service mark of which it is the rightholder; 2. The owner of the domain name has no rights or legitimate interests in relation to the domain name; 3. The domain name has been registered and is being used in bad faith. The Arbitration Center focuses on the third fact when considering disputes. The targeted and fair use of the domain name is a priority in this regard when considering a complaint.[23]

A bona fide owner of a domain name has the right to protect it by any means that do not contradict. Therefore, a mediator dealing with such disputes should understand that the domain can be of different levels, and therefore there may be various mechanisms for its protection and consideration in different national courts.

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[21] SANNIKOVA L., KHARITONOVA Y. Digital Platforms in China and Europe: Legal Challenges. BRICS Law Journal. October 2021, p. 139. https://www.researchgate.net/publication/355661498.

[22] SINGH MALIK N., KHARITONOVA Y., YANG T. The legal issue of deterrence of algorithmic control of digital platforms: the experience of China, the European Union, Russia and India. BRICS LAW JOURNAL Volume X (2023) Issue 1, p.148. https://www.researchgate.net/publication/370130377.

[23] KROBKA N. N. Activities of WIPO on dispute resolution in the field of intellectual property. Scientific notes of the V. I. Vernadsky Crimean Federal University Legal sciences. v . 6 (72), №. 1, p. 334-349, 2020.

6 Opportunities and Disadvantages of Online Mediation

The process of virtual mediation has its own characteristics and positive aspects. At the same time, online mediation processes are constantly growing. Firstly, it is convenient. The process can be carried out at any time and regardless of the place and territory. There is no need to search for a room. Secondly, the parties do not feel pressure on each other in the online space.

In order to conduct the mediation process more effectively, it is necessary to prepare for it. In this regard, mediators create their own specific rules and regulations for preparing for the online procedure. The mediator coordinates all aspects of online mediation with each representative, prepares documents and tests the platform on which the dispute between the parties will be considered.

The mediator introduces the parties to the rules and procedures that the parties must adopt, for example, these are the actions of the parties in an online dispute: the time of messages, answers to each other's questions and the mediator's questions, the reaction of the parties in case of technical failures, the indication of their full data that identifies the parties to the process, the obligation of a permanent broadcast.

In addition, the head of the entire online process himself must be confident in its security and confidentiality. The mediator must notify the parties about the non-disclosure of data, documents and other information to third parties. In this regard, it would be advisable for such a procedure to develop a special document on the non-disclosure of all information to third parties. In addition to the parties directly involved in online mediation, the mediator may invite other persons who provide the technical side of the process, who also undertake to keep confidential information.

Another side of the process in the online space is the recording of the entire course of the dispute. The online recording must also be agreed with the participants of the process.

In our opinion, in the online mediation of both Russia and Kazakhstan, special rules for the consideration of online disputes should be developed, as well as special rules for online platforms for the consideration of disputes in the mediation process.

The disadvantages of modern online mediation arise due to technical failures, the inability to use new digital technologies due to their high cost, and communication limitations.

7 Conclusions

Thus, we believe that in a market economy, the availability of alternative ways to protect violated rights, the improvement of reconciliation procedures are of great importance for the development of civil society and its institutions and its approval from a legislative point of view is necessary.

Based on the above and in order to further develop the institute of mediation in the Russian Federation and the Republic of Kazakhstan, the timely settlement of the scope of mediation contributes to the coordination of public relations, a favorable settlement of conflicts and tensions, and the development of corporate business relations. It is necessary to expand the scope of mediation procedures in accordance with the experience of foreign countries.

Under the influence of the economic crisis in the market era, social relations are becoming more complicated, therefore it is necessary to expand the scope of mediation, since the protection of citizens' rights and freedoms is a high value of any legal and social state.

In order to further develop the project of the school mediation service in the Republic of Kazakhstan, it is necessary to amend the Law of the Republic of Kazakhstan «On Mediation», since disputes between participants of an educational institution, including parents, students and teachers, an educational institution, must be prevented in a timely manner. In the Russian Federation, it is also advisable to declare alternative dispute resolution more openly in this area.

Public authorities and local self–government bodies should have a full dialogue with the population, even if the situation is «socially explosive» – they need to accept criticism, state their position, propose concrete measures to resolve conflicts with an indication of the exact timing of their implementation, work with civil activists and the population in order to spread their arguments.

There should be an understanding on the part of society about the inadmissibility of solving social conflicts by illegal means, the inadmissibility of destabilizing the situation on a separate territory. In order to reach agreement between society and the authorities, it is necessary to involve professional mediators who contribute to the settlement of social conflict and prevent its further escalation. Strengthening the role of intermediaries, giving them moderator functions in resolving disputes and disagreements, will allow the parties to find mutually acceptable compromise solutions.

The introduction of conciliation procedures is one of the main features of dispute settlement. Both in the Russian Federation and in the Republic of Kazakhstan, it is necessary to encourage mediators to carry out such procedures. In order for professional specialists to participate in disputes, it is necessary to

reduce the tax burden that is imposed on mediators, both in Russia (Article 419 of the Tax Code of the Russian Federation) and in Kazakhstan (sub-paragraph 19 of paragraph 1 of Article 1 of the Tax Code of the RK), or it should be other motivating motives to participate in mediation.

On the other hand, mediators in certain disputes must have special or technical or other additional knowledge, as established in the legislation of foreign countries. In this regard, this experience of attracting narrow specialists solves the issues raised promptly. However, the mediator does not advise the parties to the conflict, he helps to resolve the dispute.

Since the Russian Federation and the Republic of Kazakhstan are members of the Eurasian Economic Union (EAEU), an organization that forms trade turnover between the participating countries, there is a need to harmonize norms and create special mechanisms for alternative dispute resolution. Such dispute resolution mechanisms will primarily be aimed at developing business relations between the countries of the Union.

The inclusion of the institute of alternative dispute resolution in the EEC regulations will ensure integration into the national mediation procedures of the member states of the Union.

Based on the above, one of the effective ways of mediation is the speed of dispute resolution, since it is not necessary to present different evidence, to confirm other factors. The dates associated with meditation should not be long, especially since the parties themselves can extend them with the consent of the mediator.

The next factor that matters is the expected solution that will suit both sides, the low salary of the mediator, the confidentiality of all dispute procedures.

As a result of a comparative analysis of the alternative dispute resolution procedure in the Russian Federation and the Republic of Kazakhstan, the authors came to the conclusion that the mediation institute of Kazakhstan is more implemented in other normative acts, in Russia the mediation institute is developing separately. The legal doctrine of the two states classifies in detail certain types of mediation.

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A Study on Resolving Disputes in Trial Courts Through online Dispute Resolution in India

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Abstract: Byzantine methods and cumbersome process clog the approximately 672 district courts and their subordinate courts, which is the first door to access for violation of rights for the common citizenry. India is an emerging economy slated to become one of the topmost economies in the world in future years. With an overwhelmingly large population of smartphone users, which is almost 55% of the people with an average age of 28, it can only be estimated that the numbers will grow exponentially. One of the benchmarks for tracking the growth of a democratic polity along with emerging markets is the quality of the justice delivery system. The justice delivery system in India, with the courts being in the eye of the storm, is often harshly criticized for working at a snail's pace, mainly due to a lack of infrastructure and judges and a burgeoning population of litigants. The last reason is substantiated by the fact that the majority of people repose their constant faith in institutional adjudication of disputes. So, the question is how dispute resolution can be time-bound? Now, considering the above facts and putting them in perspective, i.e., a young working population with smartphones having access to justice to resolve their personal or professional feuds, or be it a company, body of persons, or the biggest litigant of all, the government if in a specific criminal, civil proceeding, can settle the dispute having online access to court process it will help immensely in resolving disputes and claims on time. The authors suggest measures to implement the procedure and method to address and effectively implement the online mechanism in trial courts involving all concerned and interest parties and usher a new vista in the justice delivery system.

Keywords: Trial Court. Online Justice Delivery. Litigant; Government.

Summary: **I** Introduction – **II** Trial Courts Overwhelmed to the Point Being Kaput – **III** From ADR to ODR – A Technological Breakthrough – **IV** The Future Of ODR in India – **V** Conclusion – References

I Introduction

Karl Popper, the Austrian-British philosopher, once remarked "Unlimited tolerance must lead to the disappearance of tolerance". Popper stated that if we extend unlimited tolerance even to those who are intolerant, if we are not prepared

to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. If we tweak this observation then similar optics can be applied amongst the Courts (at all the three tiers), common litigants (barring the Government which is the biggest litigant) and all stake holders who are concerned with administration of justice in India. The administration of justice is largely carried on by a hierarchy of courts in India wherein at the lowest rung the District Courts and Sub- divisional Courts are situated, which is also known as Subordinate judiciary in Constitutional and legal parlance and are exclusively controlled and supervised by the respective High Courts of the respective States. It is pertinent to mention here that through the legislative mandate under section 7 of Code of Criminal Procedure, 1973 every Indian State shall be a sessions division or shall consist of sessions division; and every session division shall be a district or consist of districts. It also states that every metropolitan area shall be a separate sessions division and district. The State Government after consultation with the High Court can alter the limits and number of such divisions and districts and also may divide such district into sub divisions and may alter the limits or number of such sub divisions. That in a very welcome move the Full Court of Madhya Pradesh made Constitutional history at a meeting on December 15 2022, passing an unanimous resolution to that effect that all courts thereinafter be referred as the ‘district judiciary’ and not as ‘subordinate judiciary’ and that all courts other than the High Courts shall be referred to as ‘trial courts’ and not as ‘subordinate courts’. This has been marked to be “the beginning of the end of judicial feudalism in India and restores dignity and grace to the notions of independence of the judiciary and the rule of law” as stated by Prof. Upendra Baxi, the eminent legal scholar.[1] Although the Indian Constitution vouches by the principle of separation of power between judiciary and executive in public spheres of life, but when it comes to administration of justice through district and sub divisional courts, the power of the judiciary and executive seems always to overlap. That if we take in context the appointment procedure, the condition of services for the judges in the subordinate judiciary along with creation of court infrastructure and providing with staffs, infrastructure and other logistic supports the process and procedure prescribed is often byzantine. Questions like “how justice delivery system (particularly in lower judiciary) can be augmented and delivered in a time bound manner?” or “how justice can be extended to the marginalized sections of the society where they are juxtaposed against a person/institution with better bargaining power?” remain largely unanswered and have been perplexing for lawyers, judges, legal scholars and there is great consternation as to how to approach the problem and find a

[1] The Indian Express, 6th January, 2023.

suitable solution. The key to this problem lies in shared power structure between the executive and judiciary in regulating various features of subordinate judiciary. A plain reading of Part VI, Chapter VI of the Indian Constitution, which encapsulates the provisions relating to subordinate judiciary (ARTICLE 233-237) along with the civil and criminal procedure code, creates space for executive to intrude the space of judicial appointment, of designating Public Prosecutor/Assistant Public Prosecutor, Government Pleaders, Assistant Government pleaders. The executive arm of any State Government also takes crucial decision regarding allocation of funds needed for infrastructure development of a subordinate court other than appointing staff and acting as the sole resource person. In recent years the state Governments and Central Governments in particular have tried to make funds and resources available for smooth functioning of the subordinate Judiciary. In 2017, an evaluation study of centrally sponsored scheme was submitted by Economic Services Group, National Productivity Council, New Delhi (the study sponsored by Department Of Justice, Ministry of law & Justice Govt. of India.) made some startling revelation as to how infrastructure hindrance is holding back access to justice and smooth functioning of Subordinate Judiciary. The report inter-alia in its introductory chapter (Pg-8) states 'The subordinate judiciary works under the severe deficiency of 5018 court rooms. As on 30-9-2016, there are 16513 court halls available for subordinate judiciary against the working strength of 16528 judicial officers. Further 2447 court halls are under construction. In addition 14420 residential units are available for judges/judicial officers of District and Subordinate Courts and 1868 residential units are under construction as on 31-12-2015". The report opened with mention of pending cases before subordinate judiciary tracking it through the national grid system. It mentioned that as on 20 April 2017, 241.33 lakhs cases are pending in subordinate judiciary all over India. The latest data available on the national grid regarding pendency of cases in subordinate judiciary has really raised eyebrows and an alarm has been created. Close to 4 crore 30 lakh cases are pending in subordinate court as per the latest data available and the government is the biggest litigator. The pendency of cases is as high as 85% and the government is a litigant in almost in 50% of the cases. In this context it is quite relevant to mention about a research paper titled "Bottlenecks in Civil Justice Administration Before The Courts and Remedies Thereof", the authors Dr Gyanendra Kumar Sharma and Pranav Vashishtha listed roadblocks to access to justice and one of the reason attributed were 'Administrative Inaction and laxity in discharging Statutory notice and also Judicial Inaction in ADR mechanism'.

With an ever-growing population of litigants at the backdrop, the Indians (the average of India now stands at 28) who are ever ready to knock the doors of court, need an alternative mechanism to claim their rights. The authors of this article

try to answer the question and the arm they rest to find solution to the problem is adoption of online mode as part of Alternative Dispute Resolution System to resolve issues as to solving cases which can save valuable time and money and can present a smooth and concrete mechanism as to various problems the subordinate judiciary is subject too.

The article tries to dissect the above problems in hand and provide for proper prognosis of the same. The methodology used for this research paper is primarily a doctrinal method where the data has been collected from various primary and secondary sources. Real time data has been collected from various research institutes like Vidhi Institute.

II Trial Courts Overwhelmed to the Point Being Kaput

The golden thread of "LIBERTY, EQUALITY AND FRATERNITY" runs throughout the length and breadth of the Indian Constitution starting from the Preamble and "Justice – Social, Political and Economic" is the essence of achieving the Holy Trinity of LIBERTY, EQULAITY AND FRATERNITY.[2] Right to speedy justice is a concept which emanates from the right to equality and right to life. Within the realms of Indian Constitution judiciary is a co-equal branch of governance. The guarantee of equal justice for all citizens under Indian Constitution is a very complex issues as it not only adjudicates between citizens and state (its institution and agencies), but disparate body of individuals from variety of socio- economic strata and educational background. That the Constitution mandates the subordinate courts to be monitored by the respective High Courts, the challenges faced therein by the subordinate courts are manifold. There is enormous backlog of cases in subordinate courts and the reasons are many varying from infrastructural issues, to paucity of judges and supporting staffs, inadequate courts, process of adjournments, no comprehensive scheme regarding witnesses and multiple processes under both civil and criminal adjudication processes.

Procedural delay is one of the major reasons for backlog and pendency of cases. The numbers shown in the following table regarding civil matters in subordinate judiciary, points out the deep lesion in our judiciary:

[2] Soma Dey Sarkar, et al., *"Administration of Civil Justice and Its Glorious Uncertainty in the Indian Legal System: A Long, Expensive Journey to Justice",* Advancing Civil Justice Reform and Conflict Resolution in Africa and Asia: Comparative Analyses and Case Studies, 93, Elijah Tukwariba Yin and Nelson F. Kofie (Ed.) [IGI Global, Hershey, USA].

TABLE 1

Supreme Court of India	67,898	01-05-2021
High Courts	4,168, 350	23-06-2021
District and Taluka Courts	10, 172,245	23-06-2021

Source: https://njdg.ecourts.gov.in/[3].

The alarming number of pending civil litigations with more than 4 million in High Courts and 10 million in the Lower Courts show the sad state of affairs of the Indian judiciary.

TABLE 2

TIME	DISTRICT AND TALUKA COURTS	HIGH COURTS
0-1 YEARS	2,805,045	697,517
3-5 YEARS	1,675,502	673,847
5-10 YEARS	1,627,335	861,386
10-20 YEARS	550,737	711289
<30 YEARS	37,036	109,284

Source: https://njdg.ecourts.gov.in/[4].

Table 2 displays the number of pending civil cases for a duration of 1 year, 3 to 5 years, 5 to 10 years, 10 to 20 years, more 30 years at the District and Taluka Courts and various High Courts. A report by the Times of India on 16 February, 2021 suggests that in the last two years backlog of 30-year-old cases have gone up by 61%. The subordinate and district judiciary in six states of Uttar Pradesh, Maharashtra, West Bengal, Bihar, Gujarat and Odisha accounted for 98% of more than a lakh of these three decades old pending cases.[5]

Over a considerable period of time certain administrative and judicial measures have been taken to lessen the burden of the subordinate court in both spheres of civil and criminal administration of justice. On the civil side, to ease the civil court's burden, its subject- matter jurisdiction has been curtailed by introducing new tribunals and forums, such as the Debt Recovery Tribunal or the three tier

[3] Ibid 4.
[4] Id.
[5] Ibid 4 at 96-98.

Consumer Forums. To adjudicate over Commercial disputes specific Commercial courts have come up, and the Arbitration and Conciliation Act, 1996 have totally ousted the jurisdiction of civil courts. In the famous case of Hussainara khatoon vs Home Secretary, State of Bihar,[6] the Supreme Court opined that speedy trial is the fundamental right of every citizen and as a result of this judgement, fast track courts were set up in the premises of the subordinate courts. It is very much within the ambits of civil courts to invoke the jurisdiction of Section 89 of Code of Civil Procedure to settle the disputes between parties amicably through arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation, to enable the courts for fast decongestion of cases. To ease the burden of criminal courts, certain measures such as a new chapter on 'Plea Bargaining' in Code of Criminal Procedure has been inserted, where procedural details have been done away with and the parties to the proceeding, with the aid of the Prosecutors and under the observation of the court, may come with an amicable solution. One of the ills which is pervasive and puts up hindrance in the working of criminal courts is false or trivial cases. To arrest this situation, the Supreme Court issued guidelines in Lalita Kumari v Govt. of U.P,[7] whereby it stated that in matters pertaining to matrimonial disputes/family disputes, commercial offences, medical negligence cases, corruption cases and cases where there is abnormal delay in filing of First Information Report and in relation to cognizable offences, a preliminary inquiry must proceed prior to registering an First Information Report. The measures discussed above have in place for two to three decades but the system is unable to stem, the continuous clogging of cases which leads to frustration for all stake holders associated therein. A more cautious look will help us to discern what has led to the problem we are straddled with? India has a huge population of people who are educated, resourceful and in the journey of 75th year of independence; we can say with gusto that democratic principles within common citizens have deep rooted and hence any violation of the same brings them to the doors of the court, which is manifested in rising litigation in the Court of law. That while an informed citizen is an asset for any country but the cause of concern and alarm is that the same people can be agitated if access to justice is kept out of reach due to circumstances which are beyond their control.

The Centre for Research and Planning wing of Supreme Court of India, in the year of 2016 submitted a detailed and a very well researched report titled 'Subordinate Courts Of India: A Report on Access to Justice', where multiple issues plaguing the process of administration of justice was identified, discussed,

[6] 1979 AIR 1369,1979 SCR(3)532.

[7] 2014 2SCC 1.

deliberated and concrete suggestion were given to provide for more smooth functioning of subordinate courts and if recommendations were to be put in place then it would usher new vistas for common citizens to get access to justice. It suggested 'E- Justice' for improvement in case flow system and better management of record in subordinate courts. It also suggested to identify certain subordinate courts to be as model courts and a software be developed in order to cater to the demands of the public at large and better balancing of workload, file tracking, document management, exhibit management and enabling e-litigation including e- filing, e-court fess, e notarization of e documents. Over a period of time, the Supreme Court, through a catena of judgments, tried to ameliorate the conditions of the subordinate judiciary in all its capacities. In the case of All India Judges' Association & Ors v. Union of India & Ors,[8] the court stated for creation of All India Judicial Service and also suggested measures to ameliorate the condition of judges and to bring a certain degree of parity in their conditions of service. Similarly in the case of P. Ramchandran Rao v State of Karnataka,[9] the court speaking on the contours of right to speedy trial being one of the facet of Right to Life under Article 21, laid down certain guidelines and said that the criminal courts (trial courts) should by virtue of power conferred under section 309, 311 and 258 of the Code of Criminal Procedure, 1973, ensure speedy trial. In the case of Brij Mohan Lal v Union of India & Ors,[10] the Supreme Court upheld the constitutional validity of the Fast Track Court Schemes and framed guidelines for the same. It also ensured monitoring of the fast track courts. In Malik Mazhar Sultan & Anr v Uttar Pradesh Public Service Commission & Ors,[11] the Apex Court vide an order dated 4/1/2007, gave a detailed order regarding conditions of recruitment and service in the subordinate judiciary. It laid down the fact that as to how candidates are to be selected, it stated that candidates are to be selected from prelims in 1: 10 ratio of vacancies and gave directions to improve the conditions of subordinate judiciary. The Supreme Court in particular through its various directives had tried to arrest the deteriorating working conditions of the Subordinate judiciary with very limited success. As discussed earlier in this article without the total separation of executive from the judiciary, the judiciary being allocated separate financial allocation both from the Central and State Government, the subordinate judiciary stands on the brink of being collapsed.

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[8] (2002) 4 SCC 247.
[9] (2002) 4 SC 92.
[10] (2012) 6 SCC 502.
[11] Appeal (C) No 1867 of 2006.

III From ADR to ODR – A Technological Breakthrough

One of the popular remedies to deal with pendency and backlogs in courts in India has been suggested by experts and judiciary, to be the Alternative Dispute Resolution System (ADR). Processes including arbitration, conciliation, negotiation and mediation within the purview of the ADR and not involving courtroom processes have proved to be effective methods to some extent, to reduce the burden of backlogging on the Indian Judiciary.

A. Alternative Dispute Resolution System in India-The Backdrop

ADR has been prevalent in India in the form of panchayats even before the British came to India and established their authority. At the international front, the Geneva Convention, approved by the League of Nations in 1923, contained clauses for arbitration. In India, S.89 of the Civil Procedure Code, 1908 provided for resolving of disputes for the first time which was later repealed by S. 49 and Schedule III of the Arbitration Act, 1940. The Preamble to the Arbitration (Protocol and Convention) Act, 1937, enacted even before the 1940 Act, empowered India as a signatory as a State to the Protocol on arbitration as established by the League of Nations. The Arbitration Act, 1940 repealed all the acts enacted prior to it which was also repealed and replaced by the Arbitration Act, 1960.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards held on June 10, 1958 in New York (The New York Convention) adhered by more than 160 countries, made the way for the legislation of the Foreign Awards (Recognition and Enforcement) Act, 1961 to filling the gaps present in the Arbitration Act, 1960. The Arbitration Act, 1960 failed miserably in cost and time effectiveness and people ended up approaching the courts for litigation resolution. In 1985, the United Nations Commission on International Trade Law (UNCITRAL) presented a comprehensive model for arbitration. Based on the UNCITRAL, the Arbitration and Conciliation Act, 1996, was enacted which was again subjected to amendment in 2015 and 2019. To further the cause of conciliation and cost efficacy, the Legal Services Authorities Act, 1987 was legislated. The proceedings used alternative methods where psychological skills are more operational than legal expertise. The Lok Adalat, established under the Legal Services Authorities Act and Legal Aid are twin institutions that are intended to promote equal justice and free legal aid as envisaged under Article 39-A of the Constitution of India.

In P.T. Thomas v. Thomas Job[12] the court highlighted the benefits of the Legal Services Authorities as following:-

1. No Court Fee is charged and if any fee is deposited, refund of the amount shall be made on settlement of disputes;
2. There is procedural flexibility resulting in expeditious resolution of disputes.
3. Interaction with retired Judges may be done.
4. Unlike the court rooms procedures, no adversarial order can be passed by the judges.
5. The settled disputes under this Act, has the effect of a court decree and enforceability of the court decree and enforceability of the Court. No Appeals lie against these settlements.

The Mediation Rules, 2003 govern mediation in India where the proceedings are more informal than arbitration and conciliation. The role of the mediation is limited to providing guidance and clears any misunderstanding that arises between parties and merely regulates the settlement process. Rather than imposing a decision, the parties to the dispute reach at a settlement on their own.

On the recommendation of the Law Commission of India, the Commercial Courts Act was enacted in 2015. The amendment in 2018 in the Commercial Courts Act, 2015, introduced pre-litigation mediation for all commercial disputes. S.12 of the Act, imposed compulsory mediation where no interim relief is required [S. 12-A(1)] and empowers the Central Government, through notification, to authorise the authorities under the Legal Services Authorities Act, 1987 for pre-institution mediation [S.12-A(2)].

By an amendment to S. 89 of the Civil Procedure Code, 1908 in 2002, various alternative dispute resolution mechanism was brought within the ambit of the S. 89. In Salem Advocate Bar Assn. (1) v. Union of India,[13] the constitutionality of the new S. 89 was upheld.

B. The Online Dispute Resolution System and the Digitalisation of the Indian Judiciary

The ambitious ADR system introduced in the Indian legal system to reduce the burden of the courts and to make dispute resolution cost effective, has not churned out the expected results. Richard Susskind, a renowned author in the field of law and technology, stated that ADR “has not entirely fulfilled its early promise of resolving disputes without recourse to the conventional court system”. The reason

[12] (2005) 6 SCC 478.
[13] (2003) 1 SCC 49.

why the ADR system could not perform optimally, as identified by Susskind, is the adoption of 'quite court-like' processes in ADR.

The problems that plagued the court room trials and ushered the ADR venture have seeped in the ADR system as well, instead of extending the respite for complicated processes along with time and cost constraints. The wrath of COVID-19, globally and in India, has further given the impetus to rethink on introducing alternative devices in litigation resolution in India. It is in this backdrop that digitalisation of the Indian Judiciary and the role of Online Dispute Resolution system in Indian must be brought into perspective.

Digitisation has revolutionised service and industrial sector and the legal system has also not been immune to the impact of digitisation. Though the stages of development of digital technology in court room proceedings or ADR are still in its nascent stage as compared to the digital economy, the COVID-19 and its restrictions have been major incentive in the way courts, legal departments and firms will work in a digital environment. There has been gradual implementation of electronic filing for time-sensitive matters and increase in the number of hearings held via video conferencing under the aegis of the Supreme Court and High Courts. Reduction in pendency of cases and preservation of documents that are over ten years are the chief object behind digitisation of the Indian Judiciary. With newer challenges at hand, the Indian Judiciary needs modernisation through introduction and optimum utilisation of information and communication technology and hence, the e-Courts project was launched. In the wake of the pandemic, the Supreme Court issued an order to all lower courts instructing them to make extensive use of video conferencing for judicial proceedings. With e-filing of cases, the process of filing a First Information Report (FIR), a civil case, an application for Right to Information (RTI), a consumer grievance, an application for verification of documents, driving license, etc. are going to be hassle free. The Allahabad High Court has played a pivotal role under the leadership of Justice D Y Chandrachud, the then Chief Justice of Allahabad High Court, and serves as a model in conceptualising and starting the digitisation process. In Krishna Veni Nagam v. Harish Nagam,[14] the Supreme Court authorised the hearing of matrimonial cases via videoconferencing in 2017. Live streaming of cases with constitutional and national significance was permitted in Swapnil Tripathi v. Supreme Court of India.[15]

The live streaming of court proceedings is an effort to guarantee openness and transparency. The Gujarat High Court was the first court in the nation to stream

[14] AIR 2017 SC 1345.

[15] (2018) 10 SCC 628.

its proceedings live in July 2021 and was adopted by the High Courts of Karnataka, Odisha, Madhya Pradesh and Patna.

To oversee the implementation of the e-Courts Project under the 'National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary, 2005', an e-Committee of the Supreme Court was constituted.

The roles and responsibilities of the e-Committee have evolved over the last fifteen years to include the following objectives:[16]

- Interlinking of all Courts across the country
- ICT enablement of Indian Judicial System
- Enhancing judicial productivity
- Making the justice delivery system accessible, cost effective, transparent and accountable
- Providing citizen-centric services

With Phase II of the e-Courts project at the verge of conclusion, the Vision Document for Phase III has been prepared in November, 2022 which outlines an "inclusive, agile, open and user-centric" vision for courts in Phase III of the e-Courts Project. The Vision Document for Phase III articulates the need to exponentially advance the digitisation of courts by:

a. Simplifying procedures,
b. Creating a digital infrastructure, and
c. Establishment of the right institutional and governance framework, such as technology offices at various levels to enable the judiciary to appropriately employ technology.

Achievements of E-Courts Project during the Phase II and Phase III

The achievements of the e-Courts Project during Phase I and Phase II may be enlisted under the following categories:

A. Public Infrastructure:

a. Depending upon the number of functioning court and providing upto 13,606 court rooms, ensuring BSNL MPLS WAN connectivity through optical fibre having speed of 10 Mbps to 100 Mbps.
b. Solar energy backup for 242 court complexes
c. Installing hardwares and softwares needed to support digital efforts across approximately 13,500 courts
d. Enabling video conferencing facilities across 3477 courts.

[16] https://ecommitteesci.gov.in/vision-document-for-phase-iii-of-ecourts-project/, visited on 2.06.2023 at 10 am.

B. Systems:

a. Development of CIS based on free and open source software for case management.
b. Development of a unique case number record (CNR) for each case, essential for both processing of case related data as well as enabling interactions with other services in relation to a case (suych as video conferencing, e-filing, tagging, scheduling)
c. Development of a quick response code (QR code) to link with pleadings, orders, and judgements to enable easy access to all related documents of a particular case.
d. Creation of a judicial officer code (JO Code) to provide a unique ID for every judge. This enables tracking of case statistics of judicial officers and builds the capability for judicial assessment.
e. Development of national codes for case types and legislations across all districts. This is to create back-end standardisation for diverse case classification systems across different High Courts, to enable collation of comparable meta-data at state and national levels.
f. Launch of the Interoperable Criminal Justice System (ICJS) to improve transparency and effectiveness of the criminal justice system. ICJS aims to integrate and make data interoperable between different institutions such as police, prisons and courts involved in the criminal justice system.
g. Launch of the National Judicial Data Grid (NJDG), which makes summary statistics of all cases across High Courts and District Courts, transparent and accessible to all.
h. Launch of National Service and Tracking of Electronic Processes (NSTEP) to track service of processes by bailiffs / process servers though a global positioning system (GPS) enabled application. This is aimed at increasing accountability and transparency in the summons service processes.
i. Digitisation of case records, especially old case records. This is essential to provide a foundation and capacity for digitisation of all administrative functions in the judiciary

C. Services:

FOR LAWYERS AND LITIGANTS

a) Launch of Virtual Courts: to reduce costs and increase speed of disposal of cases, virtual courts were set up for disputes relating to traffic challans in various states.

b) E-seva Kendras were set up at all High Courts and one district court in each state to improve access of information and services to litigants and lawyers on the other side of the digital divide. It enables users to file cases online and access court related information.
c) Information kiosks were set up at High Courts to provide access to case information to litigants and advocates. A few examples worth highlighting are: display boards outside the filing counters which inform a user about filing status, defects detected etc, a mobile based application which helps retrieve case information, and for legal aid services.
d) Launch of a free downloadable e-Courts Services App that provides easy access and search of relevant case information (status, orders and cause list) using the QR code.
e) Setting up systems for e-filing of pleadings and supporting documents at High Courts and District Courts. This has enabled lawyers to file their cases 24x7 as per their convenience.
f) Setting up systems to accept e-payment of court fees, fines, penalties and judicial deposits at several High Courts to enable seamless payments online.
g) Several District Court websites have been rolled out to disseminate all information relating to the cases in their respective jurisdictions.
h) Launch of automated emailing systems to provide advocates and litigants with case status, next date of hearing, cause list, orders, if the email is registered in the system.

FOR JUDGES

a) Launch of 'JustIS Mobile App' for all judges in the district judiciary. It provides details of cases in their courts along with features to support case management such as calendaring.
b) Few High Courts have developed dashboards or e-diary for judges indicating daily disposal in addition to other details such as pending cases, number of judgements, etc which are available for every judge to track.

From the services and benefits highlighted above, it can be concluded that the first two phases of e-Courts project have not only built a solid foundation for the modernisation of the judiciary at all levels but have also allowed for innovation. The modular services developed by individual High Courts are a testament to the same.

In addition, the following measures were taken to create a supportive framework for the technology systems and services that were introduced:

1. Training programmes were designed to train court masters, court staff, advocates and their clerks, District Court judges, High Court judges, trainee judicial officers, system administrators, and registrars to use the services effectively. This was done by creating a large pool of master trainers who in turn trained other officials through training programmes developed by the e-Committee in coordination with state judicial academies. Further, support for stakeholders was made available through kiosks and e-Sewa Kendra on court premises.
2. Support materials were provided through a consolidated 'Knowledge Management' tab on e-Courts website linking video tutorials on YouTube, brochures, and user manuals. In addition, pamphlets and e-filing manuals in regional languages were also created and uploaded.

C. Furthering Online Dispute Resolution (ODR) through the Digitisation of the Indian Judicial System

ODR is a set of dispute resolution techniques using information and communication technology for automating and speeding up the judicial process in the courtroom trials and processing of information using remote communication. The United Nations Commission on International Trade Law ODR Working Group defines ODR as " [...] a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology".[17] In essence, ODR is simply e-ADR where interactions take place online using technology. In practice, ODR offers more advantages than the traditional offline ADR mechanisms as parties do not have to be present together in person and resolution can take place through asynchronous communication.[18]

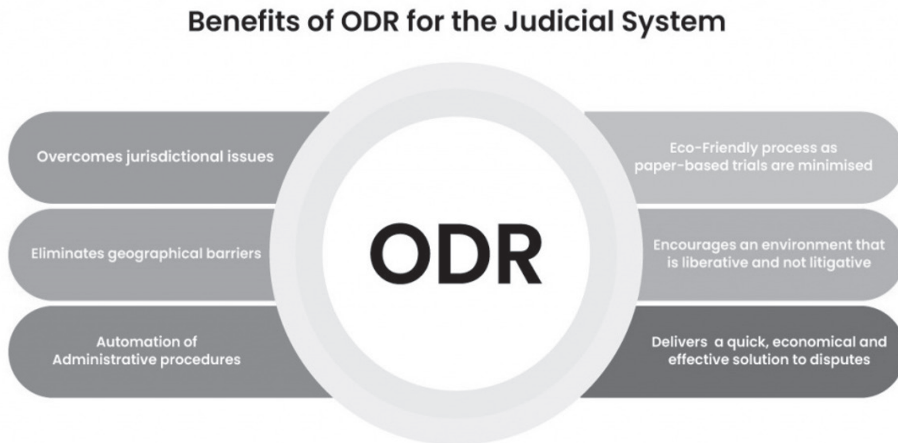
The end of the last millennium saw the emergence of e-commerce thereby giving rise to cross-border disputes. This gave a push to evolve innovative ideas for resolving these disputes. The first instance at hand is the case of eBay which allowed customers to file complaint online and initiate a settlement process. In the event of a failed settlement, the process of online mediation would commence. The problem could be identified on the platform and conduct automated negotiation followed by mediation or arbitration. This has evolved into more sophisticated variants which have come to be termed as ODR.

On perusal of the Arbitration and Conciliation Act, 1996, the Civil Procedure Code, 1908, the Information Technology Act, 2002 and the Indian Evidence Act,

[17] United Nations Commission on International Trade Law, 'UNCITRAL Technical Notes on Online Dispute Resolution' (2017) vii accessed 01 June, 2023.

[18] Susskind (n. 12), 62.

1882, it is evident that use of ADR in an online environment is inevitable to emancipate the Indian Judicial system and make it robust. But, there is no law clearly suggesting the use of ODR as a form of ADR. Needless to mention that to up the efficiency of the ADR system in India, an infusion of technology in the ADR system is unavoidable and in this context ODR plays an important role and has the following benefit:



Source: https://presolv360.com/resources/concept-note-on-odr/.

ODR may take two forms: ODR conducted by private bodies and court annexed ODR. Essentially, ODR originated and evolved in the domain of private organisations to mete out commercial disputes. The success of ODR in private international organisations motivated several governments in various jurisdictions to co-opt ODR into their court systems. Some success stories of ODR in court systems include the New Mexico Courts Online Dispute Resolution Centre in the US for resolving debt and money due cases at district level through negotiation, the United Kingdom's Money Claim Online for settling money claim disputes and Canada's Civil Administrative Tribunal for range of small value disputes.

The usage of ODR is not restricted to e-commerce disputes only; it has now been extended to a variety of disputes across the globe like consumer disputes, insurance claim, intellectual property/domain name disputes, family disputes, e-commerce, small cause and small claims disputes, disputes involving small and medium enterprises.

Position of ODR in India

While addressing release event of a handbook on ODR,[19] developed by Agami and Omidyar India, in association with NITI Aayog and with the support of ICICI Bank, Ashoka Innovators for the Public, Trilegal, Dalberg, Dvara and NIPFP, on 10 April, 2021, Supreme Court Justice D Y Chandrachud, presently the Chief Justice of India, said that Online Dispute Resolution (ODR) has the potential to decentralize, diversify, democratize, and disentangle the justice delivery mechanism. Justice Chandrachud emphasised on the importance ODR in the new normal and transformed world in the post COVID-19 era. "This is not just because of the process being conducted virtually, but also because of its firm willingness to adopt all forms of digital solutions available. In my opinion, one of the most important learnings from the past one year of virtual hearings, has been that the process can often be far more efficient because of very simple changes— the use of digital files by all parties, the ability to make digital notes, and having all documents in one place. Further, conducting all disputes online also helps generate a lot more data, which can provide the necessary groundwork for the process of ODR to improve in the future. In fact, this data can also be meaningfully used to improve the virtual experience of courts. Finally, the effective use of affordable ODR services can bring about a major change in the perception of parties involved in the dispute— by making the process more accessible, affordable and participative. It will make all parties consider it more amicable and solution-oriented. This will ultimately lead to more efficient dispute resolution," he said. [20]

Covid-19 has instilled an urgent need for ODR, with the likelihood of a spurt in disputes before courts— most notably in lending, credit, property, commerce, and retail. For instance, Udaan, India's largest B2B platform for businesses and shopowners, resolved over 1800 disputes in one month using an ODR service provider. Each dispute took an average of 126 minutes. In the coming months, ODR could be the mechanism that helps businesses with achieving expedient resolution. The ODR handbook enables businesses to do so.

The primary consideration for proper working of ODR in India (or in any other country) is accessibility and penetration of internet along with cost effective internet service. With only 46% [21] of the total population uses internet, India is gradually improving on these statistics. There is also a sense of mental barrier and dilemma among the common citizenry in adopting ODR as many may not be comfortable with data driven communication rather than face to face communication. Apart

[19] https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1710900, visited on 02.06.23 at 10 am.
[20] https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1710900, visited on 01.01.2023.
[21] https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=IN, visited on 31.05.2023 at 11 pm.

from this, there are a few principles based on which the implementation of ODR in India would be sustainable. According to VIDHI, the Centre for Legal Policy,[22] the following base principles (though not exhaustive) need to be adopted for implementation of ODR in India:

1. Legal Principles

The major consideration for adopting ODR is extending the right to access to justice to its optimum. Hence, while providing ODR, the principles of natural justice can never be compromised. Timely justice, accessibility and accountability are the other legal principles which are required to reduce delay, increase accessibility to justice and regulate the conduct of ODR institutions while using ICT for negotiations and mediations.

2. Technology and Design Principles

While adapting ODR, it must be remembered that the ICT must be from Open Source, adaptable, observable, secure and interoperable. Use of open source will ensure development of ODR ecosystem in the country. Technology with in-built observability is essential to analyse their functioning and efficiency along with ensuring securing which is essential to increase public trust in the ODR process. Interoperability will allow ODR platforms to engage and cooperate with other systems such as civil courts, tribunals and Lok Adalats to provide secure, seamless and timely communication between the systems.

3. Data Principles

Data principles adopted for ODR must ensure integrity, confidentiality, evolvability and actionability. Integrity of data is critical for any legal process thereby ensuring accuracy and authenticity of data and documents to guarantee fair process and an enforceable outcome. ODR platforms will fail to achieve its goal if confidentiality is compromised as ODR is likely to involve confidential commercial and private data. Measures like data anonymisation can help in protecting the data from being tampered. Analysis of metadata is important for continuous improvement of an ODR platform and to prepare it for the challenges and demands of the future.

[22] https://vidhilegalpolicy.in/research/the-future-of-dispute-resolution-in-india/, visited on 31.05.2023 at 11.15 pm.

IV The Future Of ODR in India

Applying Richard Susskind's analysis of access to justice, in India, access to justice may be looked into from a four dimensional aspect: legal health promotion, dispute avoidance, dispute containment and authoritative dispute resolution.[23] The traditional court system only employs technology for dispute resolution and keeping the court alive virtually, as seen during the COVID-19 period, with no holistic approach. Time has arrived when the focus requires to shift from mere "dispute resolution to dispute avoidance, containment and improving the overall legal health".[24]

Investing in ODR through adoption of more advanced second generation technology, can help India progress towards a futuristic justice system. As has been the case with the evolution of ODR so far, it is likely that these newer technologies, ones which not only employ legal principles but can also expand to better economic principles for settling civil disputes, will in all likelihood originate from the private sector. It will therefore be important for the judiciary and the executive to partner with these capabilities and adopt them for the larger public use

V Conclusion

As discussed above the need of introduction of online dispute resolution in subordinate court is need of the hour. The infrastructure and other facilities have been pushed to its limits in subordinate courts. The online dispute resolution helps to arrest infrastructure issues saving time of both court and litigants. We are in the 75th year of Independence which is one of the major milestones for India: a time to take stock of the developments in various spheres over the last seven decades. Judiciary has worked as a silent revolutionary tool, particularly the Constitutional Courts. India recently on 29 September 2022 roll- out the 5G scheme. On the one hand it is set to enhance efficiency, productivity and security. 5G has high bandwidth and low latency, so its adoption would ensure the best performance. So to take full advantage of the same the Government and the higher judiciary must ensure that the subordinate court must come up with necessary infrastructure. To bridge the technology gap of its judges, staff and other stake holders concerned of the subordinate judiciary investment must be in modern tools, software and infrastructure. There is also a pending recommendation from the Telecom Regulatory Authority of India to the Government of India to develop a national road map for India to implement 5G in the best possible manner which should

[23] Richard Susskind, Online Courts and the Future of Justice (OUP 2019) 61.

[24] Id n. 17.

encompass the technological enablement of Subordinate Judiciary all throughout India. That while we develop scheme mechanism for online dispute resolution we must also see that procedural divergence shall not result in subversion of justice. Subordinate judiciary is sometimes rocked with the allegation of corruption. According to Transparency International (TI 2011), 45% of people who have come in contact with subordinate judiciary between July 2009 and July 2010 had paid a bribe to the judiciary. The most common reason for payment of bribes was to "speed things up". There were fixed rates for quick divorce, bail, and other procedures. The Asian Human Rights Commission (AHRC) (April 2013) estimates that for every Rs 2 in official Court fees, at Rs 10,000 is spent in bribes in bringing a petition to the court. Freedom House's 'Freedom in the World 2016 report for India' states that "lower levels of the judiciary in particular have been rife with corruption" (Freedom House 2016)[25]. The GAN Business Anti-Corruption Portal reports that," {t} here is a high risk of corruption where dealing with India's judiciary, especially at the lower court levels. Bribes and irregular payments are often exchanged in return for favourable Court decisions" (GAN Integrity 2017). The embrace of technology with judicial particularly is to ease the process, where process doesn't become punishment itself. To have trust in its capacities is the hall mark of every institution. While trust in judiciary is to be enforced, collective mechanism can ensure that. With the technological advancement the subordinate judiciary being part of public administration, if one line dispute resolutions can be viewed by the public in general through their smart phones (except in cases of matrimony and offence against women) a proper adjudication being played out in front of common public will instil confidence in the public and the demonstration effect it would create, which in turn would also have a cascading effect on the society. India is poised at a situation where a crisis has left open an opportunity for it to grab, the demographic and technological advancement and access , if used meticulously can make the situation conducive in its favour . The time is ripe for making in a proper process for online dispute resolution system which will not only help in providing justice in a time bound manner , but will also help in weeding out judicial corruption to a satisfactory level. Certainty of justice being delivered is a great virtue. In the words of famous Greek Philosopher Aristotle: "It is in justice that ordering of society is centered."

[25] Vani S. Kulkarni, Veena S. Kulkarni & Raghav Gaiha, "India's Judiciary and the Slackening Clog of Trust", The Hindu, 9 May, 2022.

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The Impact of Digital Technologies on Alternative Dispute Resolution

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Abstract: Alternative Dispute Resolution (ADR) has emerged as a viable and efficient means of resolving disputes outside of traditional litigation. As digital technologies continue to advance, they have also begun to revolutionize various aspects of ADR processes. This research paper examines the intersection of digital technologies and alternative dispute resolution, exploring their impact on the efficiency, accessibility, and effectiveness of dispute resolution mechanisms. The study investigates the incorporation of digital technologies such as online dispute resolution platforms, virtual hearings, data analytics, and blockchain in ADR processes. Additionally, it discusses the potential benefits and challenges associated with the integration of these technologies and provides insights into the future of ADR in the digital era.

Keyword: ADR. Efficiency Digital. Technology ADR.

Introduction

In today's rapidly evolving technological landscape, digital technologies have permeated various industries, revolutionizing the way business is conducted and fundamentally transforming traditional modes of dispute resolution. The advent of digital technologies has brought about a paradigm shift in the resolution of conflicts, leading to the emergence and growing significance of alternative dispute resolution (ADR) mechanisms. This Paper aims to provide an overview of the background and significance of ADR in the context of the rise of digital technologies and its impact on various industries.[1]

Alternative dispute resolution refers to a range of processes and techniques designed to resolve conflicts outside of traditional litigation. It encompasses

[1] Vladimirovich, M. A., & Sergeevich, E. K. (2022). Alternative dispute resolution in digital government, (2022) (4) 7, 119-146.

methods such as negotiation, mediation, arbitration, and conciliation, providing parties with more flexible and efficient ways to settle disputes. ADR has gained considerable attention and adoption in recent years due to its potential to offer cost-effective, timely, and collaborative solutions, as compared to the lengthy and adversarial nature of traditional court proceedings.

Research Objective and Methodology

The research objective of this study is to examine the rise of digital technologies and their impact on various industries in the context of ADR. The study aims to analyze the extent to which digital technologies have transformed the dispute resolution landscape, exploring the benefits and challenges they present to different sectors. Additionally, it seeks to identify the specific digital tools and platforms that have been employed in ADR processes and assess their effectiveness in achieving fair and efficient outcomes.

To achieve these objectives, a comprehensive methodology will be employed, incorporating both qualitative and quantitative research approaches. The study will involve a literature review to establish a theoretical foundation and understand the existing body of knowledge on digital technologies and ADR. Additionally, primary data will be collected through surveys, interviews, and case studies, allowing for an in-depth exploration of the experiences, perceptions, and outcomes of using digital technologies in ADR across industries.[2]

By investigating the rise of digital technologies and their impact on various industries in the context of ADR, this research endeavors to contribute to the existing body of knowledge in this field. The findings of this study will shed light on the opportunities and challenges presented by digital technologies in enhancing dispute resolution processes and provide valuable insights for businesses, policymakers, and legal professionals. Ultimately, this research aims to facilitate a deeper understanding of the dynamic relationship between digital technologies and ADR, paving the way for more efficient and effective resolution of conflicts in the digital age.

Background and Significance of Alternative Dispute Resolution

Digital technologies encompass a wide range of innovations, including but not limited to the internet, cloud computing, artificial intelligence, blockchain, and the Internet of Things (IoT). These technologies have transformed sectors such

[2] Rule, C. (2017). Online dispute resolution for business: B2B, e-commerce, consumer, employment, insurance, and other commercial conflicts in the digital age. Wolters Kluwer Law & Business.

as finance, healthcare, retail, transportation, and entertainment, among others. Organizations leverage digital technologies to streamline operations, enhance customer experiences, and gain a competitive edge in the market. However, the adoption of digital technologies has also led to an increase in complex disputes, arising from issues such as data breaches, online fraud, intellectual property infringements, privacy concerns, contract disputes, and consumer grievances.

Alternative dispute resolution methods hold significant importance in the digital age due to their ability to address disputes efficiently, flexibly, and confidentially. Traditional litigation processes are often time-consuming, expensive, and complex.

ADR Provides Several Advantages

Efficiency and Speed

ADR processes, such as mediation and arbitration, are designed to expedite dispute resolution, enabling parties to reach mutually acceptable outcomes more swiftly than traditional litigation.

Cost-Effectiveness

ADR methods are generally less expensive than going to court, making them particularly appealing for small businesses and individuals seeking resolution for disputes arising from digital transactions.[3]

Confidentiality

Confidentiality is a crucial aspect of ADR, ensuring that sensitive information discussed during the resolution process remains protected. In digital industries, where data privacy is a significant concern, maintaining confidentiality is vital.[4]

Expertise and Specialization

ADR practitioners often possess specialized knowledge in digital technologies, intellectual property, privacy laws, and related fields.

[3] Lodder, A. R., & Zeleznikow, J. (2009). Enhanced dispute resolution through the use of technology. Law Technology Journal, 3(1), 1-10.

[4] de Silva, C. R. (2019). Artificial Intelligence and Alternative Dispute Resolution. Journal of Dispute Resolution, 2019(2), 25-59.

The Rise of Digital Technologies and Their Impact on Various Industries

The rise of digital technologies has accelerated the adoption and effectiveness of ADR across industries. With the increasing reliance on digital platforms, online transactions, and virtual interactions, disputes arising in digital spaces have become more prevalent and complex. As a result, innovative digital tools and platforms have emerged to address these disputes, facilitating the resolution process in a more streamlined and accessible manner. This convergence of digital technologies and ADR has sparked significant interest among researchers, practitioners, and policymakers, urging them to explore the potential impact, benefits, and challenges associated with this intersection.[5]

Digital Technologies in Alternative Dispute Resolution

Online Dispute Resolution (ODR)

Online Dispute Resolution (ODR) refers to the use of digital technologies to facilitate the resolution of disputes outside of traditional legal proceedings. It leverages the power of the internet and digital platforms to provide efficient, accessible, and cost-effective methods for resolving conflicts. ODR encompasses a range of processes, including negotiation, mediation, arbitration, and adjudication, which are conducted through online platforms and tools.[6]

Definition and Components of ODR

Online Platforms: ODR relies on dedicated online platforms that serve as virtual spaces for parties to communicate, exchange information, and engage in the resolution process. These platforms may include chat rooms, video conferencing tools, document sharing systems, and collaborative workspaces.

Online Communication: ODR enables parties to communicate and interact with each other and the neutral third party (mediator, arbitrator, or judge) through digital channels. This can be in the form of email exchanges, video conferences, or instant messaging.

Data Management: ODR platforms facilitate the secure and efficient management of case-related data, including documents, evidence, and

[5] Katsh, E., & Rifkin, J. (2001). Online dispute resolution: Resolving conflicts in cyberspace. Jossey-Bass.
[6] Menkel-Meadow, C., & Schneider, A. K. (2000). Dispute resolution in the digital age. Negotiation Journal, 16(4), 345-365.

communication records. These systems often employ encryption and other security measures to protect the confidentiality and integrity of the information.[7]

Online Decision-Making: ODR may involve the use of algorithms or artificial intelligence (AI) tools to assist in decision-making processes, particularly in cases of automated arbitration. These technologies analyze the provided information and apply predefined rules or algorithms to render a decision.

Benefits and Challenges of ODR Implementation

ODR breaks down geographical barriers and enhances access to justice by allowing parties to participate in the dispute resolution process from anywhere, using digital devices. This is particularly beneficial for individuals who face physical, financial, or other constraints that make attending in-person proceedings difficult.

Cost-Effectiveness

By eliminating the need for physical infrastructure and reducing travel expenses, ODR can significantly reduce the costs associated with dispute resolution. It can be particularly advantageous for resolving low-value or high-volume disputes that might not be financially viable through traditional legal channels.

Time Efficiency

ODR processes are generally faster compared to traditional legal proceedings, which can be lengthy due to court schedules and administrative delays. ODR platforms enable real-time communication, quick document exchange, and flexible scheduling, allowing for expedited resolution of disputes.[8]

Flexibility and Customization

ODR offers flexibility in terms of choosing the appropriate dispute resolution process and tailoring it to suit the specific needs of the parties involved. It allows for the selection of neutral third parties, scheduling of sessions, and the integration of various communication tools.

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7 Winkler, Matteo and Schinazi, Mikael, 'No Longer "Pale, Male, and Stale"? Approaching Diversity and Inclusiveness in International Arbitration' (January 31, 2021). Forthcoming in Liber Amicorum Guillermo Aguillar Alvarez, Available at SSRN: https://ssrn.com/abstract=3776738 or http://dx.doi.org/10.2139/ssrn.3776738

8 Stranieri, A., & Zeleznikow, J. (2006). From alternative dispute resolution to online dispute resolution: The progression of dispute resolution processes and the impact of the Internet on dispute resolution systems. Journal of Information Technology & Justice, 1(1), 9-24.

Challenges of ODR implementation

Technological Barriers

Widespread implementation of ODR relies on the availability of reliable internet connectivity and digital literacy among the parties involved. In areas with limited internet access or technological infrastructure, ODR may face challenges in ensuring equal participation and access.[9]

Privacy and Security Concerns

ODR platforms handle sensitive personal and legal information, raising concerns about data privacy and security. It is crucial to implement robust security measures, encryption protocols, and data protection frameworks to maintain the confidentiality and integrity of the information shared during the process.

Ethical and Legal Considerations

ODR processes must adhere to ethical standards and legal requirements. Ensuring that the technology used in ODR platforms complies with applicable laws and regulations, particularly regarding privacy, data protection, and jurisdiction, is essential to maintain the integrity and enforceability of the dispute resolution outcomes.

Case Studies and Successful ODR Platforms

The International Chamber of Commerce (ICC) e-ADR Platform: The ICC offers an online dispute resolution platform that facilitates arbitration and mediation proceedings. It allows parties to interact and exchange documents online, streamlining the dispute resolution process and reducing costs and time.[10]

The Singapore Mediation Centre (SMC): SMC successfully implemented an online dispute resolution (ODR) platform that provides parties with virtual mediation services. The platform incorporates video conferencing, secure document sharing, and online communication tools to facilitate effective communication and resolution of disputes.

The United Nations Commission on International Trade Law (UNCITRAL): UNCITRAL has developed an ODR platform called the UNCITRAL Technical Notes on Online Dispute Resolution. It provides practical guidance for the design and

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[9] De Filippi, P., & Wright, A. (2018). Blockchain and the Law: The Rule of Code. Harvard University Press.

[10] *Supra* note 6.

implementation of ODR systems in various jurisdictions, supporting the use of digital technologies for effective dispute resolution.

The American Arbitration Association (AAA): AAA offers its users a virtual hearing platform called AAA Web File. It enables parties to file cases, manage documents, and conduct virtual hearings using a secure online interface. AAA's ODR platform provides parties with a user-friendly and efficient digital environment for resolving disputes.

These case studies and successful ODR platforms demonstrate the growing adoption of virtual hearings and mediation in alternative dispute resolution. They highlight the potential benefits of utilizing digital technologies to enhance accessibility, convenience, and efficiency in resolving disputes while addressing the associated limitations and ensuring procedural integrity.

Virtual Hearings and Mediation

Virtual hearings and mediation have become increasingly prevalent in alternative dispute resolution (ADR) processes, thanks to the advancements in digital technologies. These virtual platforms offer several advantages and conveniences for parties involved in the resolution of disputes. However, they also come with certain limitations that need to be considered. Let's explore the advantages and limitations of virtual hearings and mediation.[11]

Advantages and Limitations of Virtual Hearings and Mediation

Enhanced Accessibility and Convenience for Parties: Virtual hearings and mediation eliminate the need for physical presence, making it more accessible for parties regardless of their location. Participants can join proceedings from anywhere, reducing travel expenses and time constraints. This accessibility improves the inclusivity of ADR processes, enabling individuals who may have faced barriers, such as mobility issues or geographical distances, to participate effectively.[12]

Cost Savings: Virtual hearings and mediation can significantly reduce costs associated with traditional in-person proceedings. Parties save on expenses related to travel, accommodation, venue rentals, and administrative logistics. This

[11] Zeleznikow, J., & Bellucci, E. (2014). Web-based dispute resolution: the potential of technology for resolving legal disputes. International Journal of Law and Information Technology, 22(1), 1-35.

[12] FERREIRA, D. B.; GIOVANNINI, C.; GROMOVA, E.; DA ROCHA SCHMIDT; G. Arbitration chambers and trust to technology provider: Impacts of trust technology intermediated dispute resolution proceedings. Technology in Society, v. 68, 2022. DOI: 10.1016/j.techsoc.2022.101872.

cost-effectiveness makes ADR more affordable and accessible for individuals and organizations.

Time Efficiency: By eliminating the need for travel and allowing for flexible scheduling, virtual hearings and mediation often result in time savings. Parties can avoid delays caused by travel arrangements or scheduling conflicts. This efficiency promotes the timely resolution of disputes and reduces the backlog in court dockets.

Limitations

Technical Challenges: Virtual platforms rely on stable internet connections and appropriate technology. Technical issues such as audio or video disruptions, connectivity problems, or software glitches can disrupt the proceedings and impede effective communication. Parties may require technical support to address these challenges promptly.

Limited Non-Verbal Cues: In virtual settings, the absence of physical presence diminishes the ability to observe non-verbal cues, facial expressions, and body language accurately. This limitation may hinder the parties' understanding of each other's perspectives, emotions, or intentions, potentially affecting the outcome of the dispute resolution process.

Ensuring Fairness and Procedural Integrity: Virtual hearings and mediation must maintain the same standards of fairness, transparency, and procedural integrity as traditional in-person processes. Safeguards should be in place to ensure equal access to information, prevent unauthorized access or tampering, and protect the confidentiality of sensitive data. Careful consideration and implementation of security measures are essential to maintain trust in virtual ADR platforms.[13]

Enhanced Accessibility and Convenience for Parties

In order to promote accessibility and convenience for all parties involved in legal proceedings, it is crucial to leverage technology effectively. Virtual settings have emerged as a powerful tool in this regard, allowing individuals to participate in legal processes from the comfort of their own homes or offices. This is particularly beneficial for individuals with disabilities or those who face geographical or logistical constraints.[14]

[13] Chen, Z., & Rothenberg, J. (2019). Toward fair, efficient, and accountable online dispute resolution. Association for Computing Machinery, 29(3), 70-73.

[14] Rule, C. (2013). The impact of technology on alternative dispute resolution. Ohio State Journal on Dispute Resolution, 28, 547-596.

To ensure fairness and procedural integrity in virtual settings, it is important to establish guidelines and standards. These may include clear instructions for participants, secure and reliable platforms for virtual hearings, and protocols for managing evidence and maintaining confidentiality. Additionally, providing technical support and training to all parties involved can help alleviate any challenges or concerns related to the virtual environment.

Ensuring Fairness and Procedural Integrity in Virtual Settings

Data Analytics and Artificial Intelligence (AI)

The utilization of data analytics in case management and decision-making processes can significantly enhance efficiency and accuracy. By analyzing large volumes of data, legal professionals can gain valuable insights, identify patterns, and make informed decisions. This can expedite the resolution of cases, reduce costs, and improve overall outcomes.

Moreover, AI tools can be employed to predict case outcomes and facilitate settlements. By analyzing historical data and factors specific to each case, AI algorithms can provide probabilistic assessments of potential outcomes. This assists parties in making informed decisions about settlement negotiations, ultimately saving time and resources.

However, it is crucial to address ethical considerations and ensure transparency when adopting AI in the legal domain. This includes issues related to data privacy, algorithmic bias, and accountability. Legal professionals must be mindful of these concerns and take steps to mitigate any potential risks. Transparency in AI adoption involves clearly communicating the use of AI tools, providing explanations for decisions made by AI systems, and allowing for human oversight and intervention when necessary.

By leveraging enhanced accessibility and convenience, coupled with the power of data analytics and AI, the legal system can become more efficient, transparent, and inclusive. These advancements hold the potential to transform the way legal proceedings are conducted, ensuring fairness, procedural integrity, and improved outcomes for all parties involved.

Utilizing Data Analytics for Case Management and Decision-Making

Digital technologies have revolutionized the way data is collected, stored, and analyzed. In the context of alternative dispute resolution, the use of data analytics can be instrumental in enhancing case management and decision-making

processes. By leveraging large datasets, ADR practitioners can identify patterns, trends, and insights that can inform their approach to resolving disputes. Data analytics can help assess the viability of various settlement options, predict potential outcomes, and evaluate the strengths and weaknesses of different arguments. This data-driven approach allows for more informed decision-making, enabling parties involved in a dispute to understand the potential consequences of their choices better. By harnessing the power of data analytics, ADR professionals can optimize the efficiency and effectiveness of their services.[15]

AI Tools for Predicting Outcomes and Facilitating Settlements

Artificial Intelligence (AI) tools have become increasingly prevalent in the field of alternative dispute resolution. These tools utilize machine learning algorithms to analyze past case data, identify relevant precedents, and predict potential outcomes based on the characteristics of a particular dispute. By leveraging AI tools, ADR practitioners can provide parties with more accurate and realistic assessments of their case, empowering them to make informed decisions about settlement options. Furthermore, AI-powered chatbots and virtual assistants can facilitate the negotiation and settlement process by providing real-time feedback, suggesting potential compromises, and assisting in drafting settlement agreements. While AI tools can enhance efficiency and accessibility, it is crucial to strike a balance between technology and human involvement to ensure that the decision-making process remains fair and unbiased.

Ethical Considerations and Transparency in AI Adoption

As digital technologies continue to shape the landscape of alternative dispute resolution; it is essential to address the ethical considerations and ensure transparency in the adoption of AI systems. Transparency entails clearly communicating to parties involved in a dispute, how AI tools are used, what data is being analyzed, and how decisions are made. ADR practitioners should prioritize explainability and accountability when implementing AI technologies, ensuring that parties have a clear understanding of the factors contributing to the AI's recommendations or predictions. Additionally, ethical guidelines and standards should be established to govern the development, deployment, and use of AI tools in ADR. These guidelines should address concerns such as privacy, security, bias mitigation, and the potential impact on disadvantaged or vulnerable populations.

[15] Schmidt, M. (2017). Online Dispute Resolution: A Systematic Review of the Literature. Negotiation Journal, 33(4), 371-395.

By adhering to ethical principles and promoting transparency, the ADR community can foster trust and confidence in the adoption of digital technologies.[16]

In conclusion, the impact of digital technologies on alternative dispute resolution has brought both opportunities and challenges. Ensuring fairness and procedural integrity in virtual settings, utilizing data analytics for case management and decision-making, leveraging AI tools for predicting outcomes and facilitating settlements, and addressing ethical considerations and promoting transparency are all crucial aspects to consider. By embracing these considerations and harnessing the potential of digital technologies responsibly, alternative dispute resolution can evolve to become more efficient, accessible, and effective in resolving conflicts.

Blockchain Technology in Dispute Resolution

Digital technologies have revolutionized various aspects of our lives, including the way disputes are resolved. Alternative Dispute Resolution (ADR) methods, such as negotiation, mediation, and arbitration, have traditionally relied on manual processes and physical documentation. However, the emergence of blockchain technology has introduced new possibilities for enhancing transparency, efficiency, and security in dispute resolution. This paper explores the potential applications of blockchain in ADR and examines how it can improve trust, security, and regulatory compliance.

Blockchain Technology in Dispute Resolution

Blockchain, often associated with cryptocurrencies like Bitcoin, is a decentralized and immutable digital ledger that records transactions across multiple computers. Its core characteristics, including transparency, immutability, and security, make it a promising tool for dispute resolution. By leveraging blockchain, ADR processes can benefit from increased efficiency, reduced costs, and enhanced trust between parties.[17]

Introduction to blockchain and its potential applications in ADR-Blockchain can facilitate various stages of the ADR process. For instance, during negotiation, parties can use blockchain to securely share and validate information without the need for intermediaries. Mediation processes can be improved by using blockchain to create a transparent and auditable record of discussions and agreements. Additionally, blockchain-based smart contracts can automate and enforce the

[16] Cortez, N. G., & Johnston, E. (2016). Can online dispute resolution ever be fair? Evidence from eBay's Online Dispute Resolution system. Journal of Economic Behavior & Organization, 131(Part A), 196-216.

[17] Ben-David Assael, The Impact of Digital Technologies on Dispute Resolution Processes, Negotiation Journal 33, no. 3 (2017), 241-268.

terms of an agreement, reducing the risk of non-compliance. In arbitration, blockchain can ensure the integrity of evidence and provide an immutable record of the proceedings.

Enhancing Trust and Security Through Smart Contracts

One of the significant advantages of blockchain in ADR is the utilization of smart contracts. Smart contracts are self-executing agreements with the terms of the contract directly written into code. They automatically execute actions when predefined conditions are met, eliminating the need for intermediaries. By using smart contracts, ADR parties can streamline their interactions, reduce the risk of fraud, and ensure compliance with agreed-upon terms. This automation increases efficiency and trust between the involved parties.

Challenges and Regulatory Implications of Blockchain Integration

While blockchain presents promising opportunities for ADR, its integration also poses challenges and regulatory considerations. For instance, the complexity of blockchain technology may require specialized knowledge and expertise, potentially creating a digital divide between parties. Additionally, issues related to data privacy, confidentiality, and jurisdictional concerns may arise when using blockchain in cross-border disputes. Regulatory frameworks need to be developed to address these challenges, ensuring fairness, accountability, and the protection of individuals' rights.

Benefits and Challenges of Digital Technologies in ADR

Benefits of Digital Technologies

Increased efficiency and cost-effectiveness-raditional dispute resolution methods, such as litigation, can be expensive and time-consuming. Digital technologies offer cost-effective alternatives by reducing the need for physical spaces, administrative resources, and extensive documentation. ADR processes conducted online can save time and money for both parties, making justice more affordable and accessible.

Efficiency and Speed: Digital technologies streamline ADR processes, making them more efficient and faster. Online platforms enable parties to submit documents, evidence, and relevant information electronically, eliminating the need

for manual paperwork. Additionally, digital tools can facilitate secure communication and collaboration, allowing parties to exchange information and negotiate more effectively. By reducing administrative burdens and expediting communication, digital technologies enhance the efficiency and speed of ADR proceedings.

Preservation of Confidentiality

Confidentiality is a critical aspect of ADR, as parties involved often wish to keep their disputes private. Digital technologies offer secure and encrypted platforms, ensuring the confidentiality of sensitive information shared during the ADR process. Parties can exchange documents, hold discussions, and reach settlements without compromising their privacy.

Challenges of Digital Technologies in ADR

Technical Issues and Digital Divide: One of the primary challenges of integrating digital technologies in ADR is the potential for technical issues. Internet connectivity problems, software glitches, or compatibility issues can disrupt the proceedings and hinder effective communication. Additionally, the digital divide, which refers to the gap in access to and proficiency in technology, may limit the participation of certain individuals or communities who lack the necessary resources or skills to engage in online ADR.

Security and Privacy Concerns: While digital platforms provide convenience and confidentiality, they also introduce security and privacy risks. Cybersecurity threats, such as hacking or data breaches, can compromise the confidentiality of sensitive information exchanged during ADR. Parties must ensure that appropriate security measures are in place to protect their data and maintain the integrity of the process.[18]

Lack of Human Interaction: ADR traditionally relies on face-to-face interaction, which allows parties to build rapport, read body language, and foster trust. The use of digital technologies may limit these interpersonal dynamics and make it challenging to establish a personal connection between the parties and the mediator or arbitrator. The absence of physical presence can sometimes hinder effective communication and hinder the resolution process.

[18] Susskind, Richard. Online Dispute Resolution: Theory and Practice. Journal of Information, Law & Technology 1 (2003), 1-17.

Enhanced Access to Justice and Inclusivity

Digital technologies have had a profound impact on alternative dispute resolution (ADR), revolutionizing the way conflicts are resolved outside of traditional courtrooms. One notable benefit is the enhanced access to justice and inclusivity that digital tools bring to the ADR process. This is particularly evident in the greater flexibility and convenience they provide to parties involved in disputes.[19]

One key aspect of enhanced access to justice is the removal of geographical barriers. In the past, parties had to physically attend mediation or arbitration sessions, which could be challenging for individuals who lived far away or faced mobility issues. With the advent of digital technologies, such as video conferencing and online platforms, parties can now participate in ADR proceedings from the comfort of their own homes or offices. This not only saves time and resources but also ensures that individuals who previously had limited access to justice due to distance or physical limitations can now fully engage in the dispute resolution process.[20]

Furthermore, digital technologies enable a more inclusive and diverse participation in ADR. Traditionally, certain groups, such as those with lower socio-economic status or marginalized communities, might have faced barriers to accessing justice due to financial constraints or systemic biases. However, digital platforms can reduce these barriers by offering cost-effective solutions and increasing the representation of diverse voices. Parties can choose from a wide range of qualified mediators or arbitrators from different locations, thereby enhancing the chances of finding a neutral and unbiased facilitator for the resolution process.

Greater Flexibility and Convenience for Parties

Moreover, digital tools provide greater flexibility and convenience for parties involved in ADR. Scheduling conflicts and logistical challenges often impede the progress of dispute resolution. By leveraging digital technologies, parties can arrange virtual meetings at mutually convenient times, eliminating the need for everyone to be physically present in the same location. This flexibility accommodates individuals with busy schedules, international parties, or those juggling multiple commitments, ensuring their meaningful participation in the ADR process.[21]

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[19] Rule, Colin. Technology and Mediation. Australasian Dispute Resolution Journal 26, no. 4 (2015), 236-248.

[20] Barton, Debra, and Alanah Wotton. Online Dispute Resolution: The Way Forward? The Alternative Law Journal 40, no. 3 (2015), 57-163.

[21] Cortes, Pablo, and Ethan Katsh. The Impact of Information Technology on the Dispute Resolution Process. Fordham Law Review 79, no. 3 (2010), 1021-1069.

In addition, digital platforms can offer secure and confidential communication channels, fostering trust and encouraging open dialogue between the parties. This helps create an environment conducive to resolving conflicts more effectively and efficiently. Parties can exchange relevant documents, review evidence, and present their arguments in a structured manner, all within the digital framework. This streamlined approach saves time and reduces costs, making ADR more accessible to a wider range of individuals and organizations.

While the impact of digital technologies on ADR is undeniable, it is important to acknowledge that not all disputes can be effectively resolved through virtual means. Some complex cases or those involving sensitive matters may require face-to-face interactions or a more nuanced approach. Nevertheless, the integration of digital tools into ADR processes has undoubtedly expanded access to justice, promoted inclusivity, and improved the overall efficiency and effectiveness of alternative dispute resolution.[22]

In conclusion, the impact of digital technologies on alternative dispute resolution has resulted in enhanced access to justice and inclusivity. The removal of geographical barriers, increased diversity in participation, greater flexibility, and improved convenience for parties all contribute to a more inclusive and accessible ADR process. As we continue to embrace and adapt to digital advancements, it is crucial to ensure that the benefits they bring are harnessed while still addressing the unique needs and considerations of different individuals and disputes.[23]

Challenges and Considerations

Technological Barriers and Access to Digital Infrastructure

The Impact of Digital Technologies on Alternative Dispute Resolution (ADR) has brought about numerous benefits, including increased efficiency, accessibility, and cost-effectiveness. However, it is not without its challenges and considerations. In this context, three significant aspects deserve attention: technological barriers and access to digital infrastructure, privacy and security concerns in digital dispute resolution, and ensuring procedural fairness while maintaining the human touch.[24]

Technological barriers and access to digital infrastructure pose significant challenges in leveraging digital technologies for ADR. While digital platforms and

[22] Schmitz, Amy J., and Colin Rule. "The New Handshake: Where We Are Now. Ohio State Journal on Dispute Resolution 29, no. 3 (2014): 619-628.

[23] Rule, Colin. Technology and Mediation. Australasian Dispute Resolution Journal 26, no. 4 (2015): 236-248.

[24] Yang, Kuo-Chang, and Su-Feng Chen. The Development and Future Trends of Online Dispute Resolution: A Socio-Legal Perspective. Information & Communications Technology Law 24, no. 3 (2015), 258-279.

tools have the potential to streamline the dispute resolution process, they require a certain level of technological literacy and access to reliable internet connectivity. Not all parties involved in a dispute may have the necessary resources or knowledge to navigate these digital platforms effectively. This inequality in access could potentially exclude certain individuals or communities from benefiting from digital ADR, exacerbating existing power imbalances.[25]

Privacy and Security Concerns in Digital Dispute Resolution

Privacy and security concerns are another crucial consideration in digital dispute resolution. Confidentiality and data protection are fundamental to the success and integrity of the ADR process. As dispute resolution increasingly relies on digital platforms, there is a need to ensure robust safeguards are in place to protect sensitive information. This includes securing communication channels, implementing strong encryption measures, and establishing clear data protection protocols. Failure to address privacy and security concerns can undermine trust in digital ADR and hinder its adoption.

Ensuring Procedural Fairness and Maintaining Human Touch

While digital technologies offer efficiency gains, it is important to strike a balance between procedural fairness and maintaining the human touch in dispute resolution. ADR traditionally involves face-to-face interactions, which allow parties to express themselves, build rapport, and engage in meaningful dialogue. The shift to digital platforms can potentially erode these aspects, leading to a loss of trust and connection between parties. It is essential to incorporate mechanisms that preserve the human element, such as video conferencing or hybrid approaches that combine online and offline interactions. Maintaining procedural fairness, including the opportunity for parties to present their cases, respond to arguments, and receive impartial decisions, remains crucial in the digital realm.

To address these challenges and considerations, several steps can be taken. First, efforts should be made to bridge the digital divide by promoting digital literacy and providing access to reliable internet infrastructure, especially in underserved areas. Additionally, the development and implementation of robust privacy and security measures are vital to protect the integrity and confidentiality of digital ADR processes. This may involve the adoption of standardized protocols, encryption technologies, and regular security audits.

[25] Feeney, Mary K. Online Dispute Resolution, and the Future of Consumer Protection. Dispute Resolution Journal 65, no. 1 (2010), 12-18.

Moreover, it is crucial to invest in the design and development of user-friendly digital platforms that prioritize user experience and facilitate effective communication and collaboration. These platforms should support both synchronous and asynchronous interactions, allowing parties to engage in real-time discussions or exchange information at their convenience. Furthermore, the incorporation of video conferencing or other technologies that enable visual cues and non-verbal communication can help maintain the human touch in the digital ADR environment.

The impact of digital technologies on alternative dispute resolution is substantial, but it is not without challenges and considerations. Overcoming technological barriers and ensuring equal access to digital infrastructure, addressing privacy and security concerns, and maintaining procedural fairness while preserving the human touch are essential for the successful integration of digital technologies in ADR. By actively addressing these challenges, digital ADR can unlock its full potential and provide a more efficient and accessible means of resolving disputes in the digital age.[26]

Future Directions and Recommendations

As digital technologies continue to advance at a rapid pace, their impact on various industries, including Alternative Dispute Resolution (ADR), becomes increasingly apparent. The integration of digital tools and platforms in ADR processes has the potential to revolutionize the way disputes are resolved, offering more efficient, accessible, and cost-effective solutions. To fully harness the benefits of digital technologies in ADR and ensure their responsible and effective implementation, several future directions and recommendations should be considered.[27]

Potential Advancements and Innovations in Digital ADR

To leverage the full potential of digital technologies, continuous research and development efforts should focus on advancing and refining existing digital ADR tools, as well as exploring new innovations. Some potential advancements include:

a) **Artificial Intelligence (AI) in ADR**: The integration of AI technologies can enhance the efficiency and accuracy of dispute resolution processes. AI-powered algorithms can analyze large volumes of data, identify patterns, and provide predictive insights, aiding in case assessment, negotiation, and decision-making.

[26] Rule, Colin, and Ethan Katsh. E-Commerce and Online Dispute Resolution: Beyond eBay. Negotiation Journal 23, no. 4 (2007), 431-452.

[27] Zeleznikow, John. Online Dispute Resolution: Theoretical and Practical Issues. Journal of Information, Law & Technology 1 (2003), 1-26.

b) **Online Dispute Resolution (ODR) Platforms**: ODR platforms can provide secure and user-friendly environments for parties to engage in dispute resolution remotely. These platforms can offer features such as video conferencing, secure document sharing, and real-time communication, facilitating effective communication and collaboration between parties and neutral third parties.[28]

c) **Blockchain for Smart Contracts and Evidence Management**: Blockchain technology can ensure transparency, immutability, and traceability in ADR processes. It can be used to create smart contracts that automate the execution and enforcement of dispute resolutions, as well as securely store and manage evidence.

Regulatory Frameworks and Standardization Efforts

To promote trust, consistency, and interoperability in digital ADR, regulatory frameworks and standardization efforts are crucial. Some recommendations in this regard include:

a) **Establishing Clear Guidelines**: Regulatory bodies and policymakers should collaborate with ADR practitioners, technology experts, and legal professionals to develop clear guidelines and standards for the use of digital technologies in ADR. These guidelines should address issues such as data privacy, security, authentication, and the admissibility of digital evidence.

b) **Ensuring Ethical and Responsible Use**: It is essential to establish ethical guidelines and codes of conduct for ADR professionals utilizing digital technologies. This includes addressing potential biases in AI algorithms, ensuring the privacy and confidentiality of parties involved, and maintaining a fair and neutral process.[29]

c) **International Collaboration**: Collaboration among international organizations, governments, and industry stakeholders can help harmonize regulatory frameworks and standards across jurisdictions, promoting consistency and facilitating cross-border digital dispute resolution.

[28] Berti, A. M., & Hanzaee, K. H. (2020). The Role of Artificial Intelligence in Online Dispute Resolution. In Proceedings of the 12th International Conference on Theory and Practice of Electronic Governance.

[29] Bravo, M. C., & Kim, B. J. (2020). Online Dispute Resolution: From Theory to Practice. European Business Organization Law Review, 21(1), 21-52.

Collaborative Approaches and Multi-Stakeholder Engagement

The successful implementation of digital technologies in ADR requires collaboration and engagement from multiple stakeholders. Recommendations in this area include:

a) **Public-Private Partnerships**: Governments and public institutions should collaborate with private sector entities and technology providers to foster innovation and develop effective digital ADR solutions. Public-private partnerships can facilitate the sharing of expertise, resources, and best practices, ensuring the development of user-centric and accessible platforms.[30]

b) **Training and Capacity Building**: ADR practitioners and legal professionals should receive adequate training and education on digital technologies and their application in dispute resolution. Capacity-building initiatives can enhance their digital literacy, enabling them to effectively navigate and leverage digital tools and platforms.[31]

c) **User Feedback and Continuous Improvement**: Regular feedback from ADR users and stakeholders is crucial for the continuous improvement of digital ADR solutions. Platforms should incorporate mechanisms to gather user feedback, address concerns, and adapt to evolving needs, ensuring user satisfaction and trust.[32]

Conclusion

In conclusion, the impact of digital technologies on ADR is poised to transform dispute resolution processes. The impact of digital technologies on alternative dispute resolution (ADR) has been transformative, revolutionizing the way conflicts are resolved outside of traditional courts. The integration of digital technologies has brought numerous benefits to the field of ADR, enhancing efficiency, accessibility, and effectiveness.[33]

Firstly, digital technologies have significantly improved the efficiency of ADR processes. Online platforms and tools have made it possible for parties involved

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[30] Vladimirovich, M. A., & Sergeevich, E. K. (2022). Alternative dispute resolution in digital government, (2022) (4) 7, 119-146.

[31] Catá Backer, L. (2018). Online Dispute Resolution and the Development of Digital Business Communities. Maryl.

[32] Gospodinov, G., & Anoyrkati, E. (2019). Blockchain-based Online Dispute Resolution System for Trustless and Trnsparent E-commerce Transactions. In Proceedings of the 10th International Conference on Information, Intelligence, Systems and Applications (pp. 1-6).

[33] Klippel, A., Thomas, J., & Vila, M. (2018). 3D Models and Virtual Reality as Tools for Online Dispute Resolution. Journal of Dispute Resolution, 2018(2), 289-308.

in a dispute to communicate and collaborate remotely, reducing the need for physical meetings and travel. This has not only saved time and resources but also accelerated the resolution of disputes. The use of digital documentation, electronic signatures, and cloud-based storage systems has streamlined the exchange and storage of relevant information, making the ADR process faster and more convenient for all parties involved.[34]

Secondly, the impact of digital technologies on ADR has greatly increased accessibility. Traditional dispute resolution methods often require individuals to navigate complex legal systems, hire legal representation, and physically attend hearings. However, with the advent of digital technologies, ADR has become more accessible to a broader range of people. Online platforms have provided a convenient and cost-effective alternative, enabling parties to engage in ADR from the comfort of their own homes or offices. This accessibility has particularly benefited individuals who may face barriers such as geographical distance, mobility constraints, or financial limitations.[35]

Moreover, digital technologies have enhanced the effectiveness of ADR by providing innovative tools and techniques. For instance, online mediation platforms offer features such as video conferencing, chat functions, and virtual breakout rooms, facilitating communication and fostering constructive dialogue between disputing parties. Artificial intelligence (AI) technologies have also been utilized to assist in the analysis of large volumes of data, aiding in the identification of patterns and potential resolutions.[36] These advancements have improved the quality of ADR outcomes and increased the chances of achieving mutually satisfactory agreements.[37]

However, it is important to acknowledge that the impact of digital technologies on ADR is not without challenges. Privacy and security concerns surrounding the exchange of sensitive information online, as well as the potential for technological glitches or biases, need to be addressed to maintain trust and credibility in digital ADR processes. Additionally, it is crucial to ensure that access to digital ADR platforms is equitable and inclusive, taking into account factors such as digital literacy, language barriers, and affordability.

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[34] Katsh, E., & Rabinovich-Einy, O. (2017). Digital Justice: Technology and the Internet of Disputes. Oxford University Press.

[35] Zeleznikow, John. Online Dispute Resolution: Theoretical and Practical Issues. Journal of Information, Law & Technology 1 (2003): 1-26.

[36] Yang, Kuo-Chang, and Su-Feng Chen. The Development and Future Trends of Online Dispute Resolution: A Socio-Legal Perspective. Information & Communications Technology Law 24, no. 3 (2015): 258-279.

[37] FISS, Owen. Against Settlement. Yale Law Journal, v.93, n.1073, 1983-1984

In conclusion, the integration of digital technologies has revolutionized alternative dispute resolution, bringing about increased efficiency, accessibility, and effectiveness. While challenges exist, the continued development and responsible implementation of digital technologies in ADR have the potential to further enhance the resolution of conflicts and improve access to justice for individuals and businesses around the world. Embracing these technologies while addressing the associated concerns will be key to unlocking the full potential of digital ADR in the future.[38]

Implications for the Future of Alternative Dispute Resolution

By examining the integration of digital technologies in alternative dispute resolution, this research paper contributes to the growing body of knowledge on the intersection of law, technology, and justice. The findings shed light on the potential benefits and challenges associated with digital ADR, informing policymakers, practitioners, and researchers about the evolving landscape of dispute resolution in the digital era.[39] Ultimately, harnessing the power of digital technologies in ADR can lead to more accessible, efficient, and equitable outcomes for[40] disputing parties.[41]

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[38] Zeleznikow, J., & Bellucci, E. (2014). Web-based dispute resolution: the potential of technology for resolving legal disputes. International Journal of Law and Information Technology, 22(1), 1-35.

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[40] Naval Sharma & Shriya Luke, Mandatory Mediation Prescribed Before Filing of Commercial Suits, Mondaq (available at https://www.mondaq.com/india/arbitration-disputeresolution/729584/mandatorymediation-prescribed-prior-to-filing-of-commercial-suits).

[41] Stephen B. Goldberg, Frank E.A. Sander, et.al., Dispute Resolution: Negotiation, Mediation and Other Processes (Aspen Law and Business, New York, 3rd edn., 1999)

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42. Naval Sharma & Shriya Luke, Mandatory Mediation Prescribed Before Filing of Commercial Suits, Mondaq (available at https://www.mondaq.com/india/arbitration-disputeresolution/729584/mandatorymediation-prescribed-prior-to-filing-of-commercial-suits).

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Arbitration Agreement in the Digital Environment: Issues of Written Form and Expression of Consent of the Parties

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Abstract: The article seeks to evaluate the present legal framework for arbitration on the international and national levels (on the example of the countries of the Eurasian Economic Union) with respect to concluding arbitration agreements in writing with the use of informational technologies. It is argued that such a use is admissible as a whole and it is necessary to distinguish three main requirements to arbitration agreements, such as to be valid, operative and enforceable (capable of being performed), that reflect different legal grounds for their challenge. Particular attention is paid to the specifics of the conclusion and performance of arbitration agreements in investment disputes with the participation of host states related to their consent given in international investment treaties and national legislation, as well as the application of the most favored nation treatment in jurisdictional issues.

Keywords: Arbitration Agreement. Written Form. Exchange of Electronic Documents. Informational Technologies. Arbitration. Parties' Consent. Investment Dispute with a State. Most Favored Nation Treatment. International Centre for Settlement of Investment Disputes. Eurasian Economic Union.

Summary: Introduction – **1** International Legal Regulation of Arbitration – **2** National Legal Regulation of Arbitration – **2.1** Russia – **2.2** The Other Countries of the Eurasian Economic Union – **3** Legal Problems of Expressing the Parties' Consent – **3.1** Invalid and Unenforceable Arbitration Agreements – **3.2** Inoperative Arbitration Agreements – **3.3** The Scope of Arbitration Agreements – **3.4** Application of the Most Favored Nation Treatment in Jurisdictional Matters – Conclusion – References

Introduction

As it is well known, legal disputes arising from contractual and other civil legal relations can be resolved not only in courts, but also arbitral tribunals.[1] Arbitration has some advantages (such as the autonomy of the will of the parties, the confidentiality of the procedure and the possibility of determining its rules

[1] KELLY, D.; HAMMER, R.; HENDY, J. *Business Law*. London; New York: Routledge, 2018, p. 72-73.

by the parties to the dispute themselves, the impartiality and independence of arbitrators, the inadmissibility of reviewing the decision on the merits by courts, compliance with the public order,[2] etc.), thanks to which it has become an effective and a widely spread method of dispute resolution. Legally, it is based on an arbitration agreement where parties of a dispute agree to submit it to arbitration according to the applicable rules of international and national law.[3]

As arbitration is usually performed under a non-governmental organization that is not included in the state judicial system, it is recognized as a form of dispute resolution alternative to litigation[4] where an arbitral tribunal is endowed with such a publicly significant function as the implementation of a judgment.[5] The legal framework for its establishment and functioning is presented on both international and national levels, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of December 29, 1958 (the New York Convention)[6] and the European Convention on Foreign Trade Arbitration of April 21, 1961 (the European Convention).[7]

It is worth noting that these legal instruments have been adopted lately before emerging new informational technologies currently applied in different spheres.[8] They all require a written form for an arbitration agreement, which is usually a document signed by the parties. It might also be an arbitration clause embodied in the text of a principal contract. From this regard, it is interesting to estimate the admissibility to use different informational technologies while making an arbitration agreement under international and national law.[9] In addition, the

[2] RUSSIAN FEDERATION. The Resolution of the Plenum of the Supreme Court of the Russian Federation of December 10, 2019 No. 53 “On the Performance by the Courts of the Russian Federation of the Functions of Assistance and Control Concerning Arbitration Proceedings, International Commercial Arbitration”, para. 1. *Bulletin of the Supreme Court of the Russian Federation*, n. 3, 2020.

[3] KANASHEVSKII, V.A. *Private International Law.* Moscow, 2019, p. 980-1004 (in Russian).

[4] GOODE, R.; KRONKE, H.; McKENDRICK, E. *Transnational Commercial Law: Text, Cases, and Materials.* Oxford, 2011, p. 622-627.

[5] RUSSIAN FEDERATION. The Resolution of the Constitutional Court of the Russian Federation of May 26, 2011 No. 10-P. *The Collection of Legislation of the Russian Federation*, n. 23, art. 3356, 2011.

[6] UNITED NATIONS. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of December 29, 1958. URL: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (accessed August 12, 2023).

[7] UNITED NATIONS. The European Convention on International Commercial Arbitration of April 21, 1961. URL: https://www.trans-lex.org/501600/_/european-convention-on-international-commercial-arbitration-of-1961-european-commission-for-europe/ (accessed August 12, 2023).

[8] MINBALEEV, A.V.; EVSIKOV, K.S. Alternative Dispute Resolution in Digital Government. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 4, n. 7, p. 119-146, 2022.

[9] On the use of videoconference in arbitration hearings see FERREIRA, D. B.; GIOVANNINI, C.; GROMOVA, E.; DA ROCHA SCHMIDT; G. *Arbitration chambers and trust to technology provider: Impacts of trust technology intermediated dispute resolution proceedings*. Technology in Society, v. 68, 2022. DOI: 10.1016/j.techsoc.2022.101872. On the use of digital evidence in arbitration proceedings see: FERREIRA, Daniel B.; GROMOVA, Elizaveta A. *Electronic evidence in arbitration proceedings: empirical analysis and recommendations*. Digital Evidence and Electronic Signature Law Review, v. 20, p. 30-39, 2023. DOI: https://doi.org/10.14296/deeslr.v20i.5608. FERREIRA, Daniel B.; GROMOVA, Elizaveta A. Digital Evidence: *The Admissibility of Leaked and Hacked Evidence in Arbitration Proceedings.* International

determination of the expression of the will of the parties in the absence of a particular signed document has remained a significant legal issue arising before arbitral tribunals and then courts under arbitration and further litigation on the recognition and enforcement of rendered arbitral awards.

The article aims to evaluate the present legal framework for arbitration on the international and national levels with respect to concluding arbitration agreements in writing with the use of informational technologies. It implies the application of legal methods of research, including the critical analysis and doctrinal interpretation of different universal and other international treaties (the New York Convention, the European Convention, the ICSID Convention, etc.), UNCITRAL model laws and other similar international law instruments, national legislation of the countries of the Eurasian Economic Union (such as the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, and the Russian Federation), as well as the international commercial arbitration and judicial practice of their enforcement. Based on the comparative legal research, the paper examines the international and national legal regulation of the use of informational technologies under concluding arbitration agreements and scrutinizes different legal problems of expressing the parties' consent in case of invalid, unenforceable and inoperative arbitration agreements, as well as the excess of scope of arbitration agreements and the application of the most favored nation treatment in jurisdictional matters.

1 International Legal Regulation of Arbitration

The New York Convention is a universal international treaty, in which 172 states currently participate.[10] According to the Convention, each contracting state shall, *firstly*, recognize an "*agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration*" (Article II (1)). It might be an arbitral clause in a contract or any agreement signed by the parties or contained in an exchange of letters or telegrams (Article II (2)). If an arbitration agreement is valid, operative and capable of being performed, a court is obliged, at the request of one of the parties, to refer the parties to arbitration (Article II (3)) and to not settle the case between them on its merits. *Secondly*, each contracting

Journal for the Semiotics of Law, 2023. DOI: https://doi.org/10.1007/s11196-023-10014-1. On Online Dispute Resolution in Latin America see ELISAVETSKY, Alberto; MARUN, María V. *La tecnología aplicada a la resolución de conflictos. Su comprensión para la eficiencia de las ODR y para su proyección en Latinoamérica.* Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 3, p. 51-69, 2020.

[10] UNITED NATIONS. URL: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (accessed August 12, 2023).

state of the Convention shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention (Article III).

Similar provisions can be found in the European Convention. It applies to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons as well as to arbitral procedures and awards based on such agreements (Article I (1)). It also defines an arbitration agreement as either an arbitral clause in a contract or an agreement signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter. In contrast to the New York Convention, it additionally provides that an arbitration agreement might be concluded in the form authorized by laws of states which do not require that an arbitration agreement be made in writing (Article I (2 (a))).

Thus, as it can be seen, both the New York Convention and the European Convention usually imply any document or an exchange of documents signed by the parties regarding the form of an arbitration agreement. However, the use of informational technologies, such as telegraph, is also admissible. Such a broad interpretation may be met in legal literature.[11] Mainly it is true when specific additional provisions on such issues are directly enshrined in the UNCITRAL Model Law on International Commercial Arbitration[12] adopted on June 21, 1985 at the 18th session of UNCITRAL and recommended by the UN General Assembly for use by states as a national law. In particular, Article 7 (3-6) specifies that, *firstly*, an arbitration agreement is recognized to be in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. *Secondly*, the requirement of the written form is met by an electronic communication if the information contained therein is accessible to be useable for subsequent reference. In the given provision, such an electronic communication means any communication that the parties make by means of data messages which imply the information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy. *Thirdly*, an arbitration agreement is recognized to be in writing if it is contained in the exchange of statements of claim and defense in which the existence of such an agreement is alleged by one party and not denied by the other. *Fourthly*, the reference in a contract to any document containing an arbitration clause constitutes

[11] KAZACHENOK, S.Y. Development of Lex Electronica as the Background for Inclusion of the Online Arbitration Terms into the Arbitration Agreement. *Vestnik of Volgograd State University: Jurisprudence*, n. 4 (25), p. 104-107, 2014 ((in Russian).

[12] UNITED NATIONS. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (accessed August 12, 2023).

an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

It is interesting to note that the mentioned list of making an arbitration agreement in writing is not exhaustive. It can be added under the practice of settlement of investment disputes with the participation of a state under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of October 14, 1966 (the ICSID Convention).[13] It provides facilities for conciliation and arbitration of such investment disputes under the International Centre for Settlement of Investment Disputes (the ICSID) if the parties *inter alia* have the consent to submit their dispute to the ICSID in writing (Article 25 (1)). Although it is not directly named as an arbitration agreement, it is such that it is correctly emphasized in legal literature.[14]

The ICSID practice recognizes an arbitration agreement concluded in writing if a foreign investor applies to the ICSID for the settlement of an investment dispute and the host state has earlier expressed its consent to this by including the relevant provision on the jurisdiction of the ICSID in the text of an international treaty or an act of national legislation. This way of reaching an agreement resembles the acceptance of an offer where the offer to submit a case to a particular arbitral tribunal is granted by the host state to a foreign investor, and the acceptance of such an offer is performed by filing a claim before the ICSID.

For example, in *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2),[15] the Government of the Republic of Albania challenged the jurisdiction of the ICSID because there was no written agreement between the Government of Albania and the claimant Tradex Hellas S.A. on the submission of their investment dispute to the ICSID. It noted that, *firstly*, the ICSID Convention does not require that the parties' consent be expressed in any separate document. *Secondly*, the inclusion in the text of an international treaty or national legislation of a provision on the ICSID jurisdiction indicates the state's consent to submit possible investment disputes to the ICSID. Nevertheless, in that case, the ICSID denied its competence by virtue of another legal ground. It referred to the fact that the request for consideration of the dispute at the ICSID was received before the entry into force of the bilateral international agreement between Greece and Albania on the promotion and mutual protection of investments, which enshrined

[13] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of October 14, 1966. URL: https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview (accessed August 12, 2023).

[14] LAMM, C.B.; SMUTNY, A.C. The Implementation of ICSID Arbitration Agreements. *ICSID Review – Foreign Investment Law Journal*, v. 11, n. 1, p. 64–85, 1996.

[15] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 14, n. 1, p. 197–249, 1999.

the competence of the ICSID. Such jurisdictional provisions contained in bilateral investment treaties or national legislation providing for the ICSID jurisdiction were applied in many cases, such as *Asian Agricultural Products Limited v. the Republic of Sri Lanka* (ICSID Case No. ARB/87/3),[16] *Ceskoslavenska Obchodni Banka, A.S. v. Slovak Republic* (ICSID Case No. ARB/97/4),[17] etc.

Special rules on admissibility to use informational technologies in different spheres, including arbitration, can be found in other international treaties and instruments, for instance, the United Nations Convention on the Use of Electronic Communications in International Contracts of November 23, 2005[18] in which so far only 18 states, including the Russian Federation, participate. It aims to facilitate the use of electronic communications in international trade by assuring that contracts concluded, and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. There are also some more international legal instruments adopted under UNCITRAL. They are the UNCITRAL Model Law on Electronic Commerce of June 12, 1996,[19] the UNCITRAL Model Law on Electronic Signatures of July 5, 2001,[20] the UNCITRAL Model Law on Electronic Transferable Records of July 13, 2017,[21] etc.

On the regional international level, for instance, under the Eurasian Economic Union uniting the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, and the Russian Federation, the Treaty on the Eurasian Economic Union of May 5, 2014[22] contains Protocol on Information and Communication Technologies and Information Interaction within the Framework of the Eurasian Economic Union which also implies the use of different informational technologies and means, such as an electronic document (a document in the electronic form certified by an electronic digital signature and meeting the requirements of the general infrastructure for documenting information in the electronic form) and electronic type of document (information or data presented in a format suitable for human perception using electronic computers as well as

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[16] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Reports*. Cambridge, v. 4, p. 246–251, 1997.

[17] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 14, n. 1, p. 251–283, 1999; v. 15, n. 2, p. 544–557, 2000.

[18] UNITED NATIONS. The UN Convention on the Use of Electronic Communications in International Contracts of November 23, 2005. URL: https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications (accessed August 12, 2023).

[19] UNITED NATIONS. URL: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (accessed August 12, 2023).

[20] UNITED NATIONS. URL: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures (accessed August 12, 2023).

[21] UNITED NATIONS. URL: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records.

[22] EURASIAN ECONOMIC UNION. URL: https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014 (accessed August 12, 2023).

for transmission and processing with the use information and communication technologies in compliance with the established requirements for its format and structure).

2 National Legal Regulation of Arbitration

2.1 Russia

In Russia the legal framework on arbitration[23] includes two special legislative acts, such as Federal Law of December 29, 2015 No. 382-FZ "On Arbitration (Arbitration Proceedings) in the Russian Federation" (the Federal Law on Arbitration),[24] and the Law of the Russian Federation of July 7, 1993 No. 5338-1 "On International Commercial Arbitration" (the Law of Russia on International Commercial Arbitration)[25] which are based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration.

The Federal Law on Arbitration regulates the procedure for the formation and operation of arbitral tribunals and permanent arbitration institutions on the territory of the Russian Federation, as well as arbitration proceedings. It applies not only to the arbitration of internal disputes but, to some extent, also to international commercial arbitration, the seat of which is the Russian Federation (Article 1 (1, 2)). This Federal Law directly enshrines that an arbitration agreement can be concluded as an arbitration clause in a contract or a separate agreement. Still, in any case it shall be in writing (Article 7 (1, 2)).

Unlike the New York Convention and the European Convention, the Federal Law on Arbitration in Article 7 (3-7) stipulates other ways to make an arbitration agreement in writing. *Firstly*, it may be concluded by exchanging letters, telegrams, telexes, telefaxes and other documents, including electronic documents transmitted through communication channels, if it can be reliably established that the document originates from the other party (Article 7 (3)). Such documents are considered the information prepared, sent, received or stored by electronic, magnetic, optical or similar means, including electronic data exchange and e-mail.

In addition, it is worth noting that the Civil Code of the Russian Federation[26] in Articles 160 (1) and 434 (2) also enables the conclusion of a contract in writing by not only drawing up one document (including electronic) signed by the parties, but

[23] It is necessary to note that Russia has the system of state arbitration courts, which are embodied in the judicial system of the Russian Federation. They should be distinguished from arbitral tribunals, which perform arbitration in its usual understanding.

[24] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 1, art. 2, 2016.

[25] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 32, art. 1240, 1993; n. 49, art. 5748, 2008.

[26] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 32, art. 3301, 1994.

also exchanging letters, telegrams, electronic documents, or other data where the commitment of a transaction with the use of electronic or other technical means allows the content of the transaction to be reproduced unchanged on a tangible medium. In such a case, the requirement for a signature is deemed to be fulfilled if any used method enables to identify the person who expressed the will reliably.

For instance, under the settlement of one case, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation found that the contract sent by the plaintiff was signed by the defendant and then sent to the plaintiff by e-mail. Having applied the mentioned legislative provisions, it recognized such a contract and the arbitration clause contained therein concluded.[27]

Secondly, an arbitration agreement is recognized to be made in writing if it is concluded by exchanging procedural documents (including a statement of claim and a response to it) in which one of the parties declares the existence of an agreement, and the other does not object to it (Article 7 (4)).

Thirdly, a reference in the contract to a document containing an arbitration clause can be considered an arbitration agreement in writing, provided that the specified reference allows such a clause to be considered part of the contract (Article 7 (5)).

Fourthly, an arbitration agreement may be concluded by including it in the rules of organized trading or clearing rules, which are registered in accordance with the legislation of the Russian Federation. Such an agreement is deemed an arbitration agreement of the participants of the organized trades, the parties to the contract concluded at the organized exchanges under their rules, or participants of clearing (Article 7 (6)).

Fifthly, an agreement to submit to arbitration of all or part of the disputes of participants of a legal entity established in the Russian Federation and the legal entity itself for which the rules of arbitration of corporate disputes apply may be concluded by including it in the charter of the legal entity. However, this provision does not apply to joint-stock companies with one thousand or more shareholders and public joint-stock companies (except for an international company if its charter provides for the application of foreign law to such an international company as well as the rules of foreign exchanges) (Article 7 (7)).

[27] INTERNATIONAL COMMERCIAL ARBITRATION COURT AT THE CHAMBER OF COMMERCE AND INDUSTRY OF THE RUSSIAN FEDERATION. The Decision of the Board of Arbitrators of the ICAC at the CCI of the Russian Federation of April 22, 2021 in Case No. M-66/2020. URL: https://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=A61D713EE9B08972EBBCE4D56F4F159A&mode=backrefs&SORTTYPE=0&BASENODE=ARB002-5&ts=3124169177389617535&base=ARB&n=720383&rnd=CCnq-g#TAa7emTGukyj7xcm (accessed August 12, 2023).

The Law of Russia on International Commercial Arbitration applies to international commercial arbitration if, as a rule, the place of arbitration is located on the territory of the Russian Federation. It has similar provisions about the written form of an arbitration agreement. Moreover, it specifies that such a form is deemed to have been complied with if the arbitration agreement is concluded in a format that allows for the fixation of the information contained therein or the availability of such information for subsequent use (Article 7 (3)). An arbitration agreement can also be recognized in writing in the form of an electronic message if the information contained therein is available for subsequent use and the arbitration agreement is concluded in accordance with the requirements of the law provided for a contract concluded by exchanging documents via electronic communication (Article 7 (4)).

In addition, there are a number of legislative acts that provide the use of different informational technologies, such as Federal Law of July 27, 2006 No. 149-FZ "On Information, Information Technologies and Information Protection",[28] Federal Law of April 6, 2011 No. 63-FZ "On Electronic Signature",[29] etc. In particular, they deal with an electronic document as documented information presented in the electronic form (i.e., a form suitable for human perception using electronic computers as well as for transmission over information and telecommunication networks or processing in information systems) and an electronic signature used to identify the person signing the information under making transactions, rendering state and municipal services, performing other legally significant actions.

Thus, in comparison with the New York Convention and the European Convention, the Russian legislation stipulates some specific provisions developing the requirement of the written form of an arbitration agreement regarding the use of informational technologies. It is concluded that such a form can be achieved by electronic documents and other information if it is fixed on a tangible medium and available for later use.

2.2 The Other Countries of the Eurasian Economic Union

The Eurasian Economic Union is an international organization of regional economic integration established under the Treaty on the Eurasian Economic Union of May 5, 2014. The members of the Eurasian Economic Union are the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation. They have special legislation on arbitration, which is mainly based on the UNCITRAL Model Law on International Commercial Arbitration, and have a lot of similar provisions.

[28] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 31, art. 3448, 2006.
[29] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 15, art. 2036, 2011.

In particular, like the Russian Federation, the Republic of Belarus has two legislative acts on arbitration. They are the Law of the Republic of Belarus of July 18, 2011 No. 301-Z "On Arbitral Tribunals"[30] and the Law of the Republic of Belarus of July 9, 1999 No. 279-Z "On International Arbitral Tribunal".[31] The first law in Article 8 stipulates that an arbitration agreement shall be in writing, and it may be in the form of an independent agreement of the parties to submit the resolution of all or individual disputes that have arisen or may arise from the legal relationship binding the parties to the selected arbitral tribunal, or in the form of an arbitration clause – a separate provision contained in the contract. It is also considered concluded by exchanging messages using postal communication or other types of communication that provide a written record of the will of the parties, including sending a statement of claim and a response to it, in which, respectively, one party proposes to resolve the dispute in the arbitral tribunal, and the other one does not object to it. A reference in a contract to a document containing an arbitration clause is also to be an arbitration agreement, provided that this contract is concluded in writing and the content of the reference makes such a clause part of the concluded contract. Similar provisions are embodied in Article 11 of the Law of the Republic of Belarus of July 9, 1999 No. 279-Z "On International Arbitral Tribunal".

Compared with the Republic of Belarus and the Russian Federation, the other countries of the Eurasian Economic Union – Armenia, Kazakhstan and Kyrgyzstan have one special legislative act on arbitration. For instance, the Republic of Kazakhstan enacted the Law of the Republic of Kazakhstan of April 8, 2016 No. 488-V of April 8, 2016 "On Arbitration".[32] In Article 9 it provides that an arbitration agreement shall be concluded in writing. It may be an arbitration clause in a document signed by the parties or concluded by exchanging letters, telegrams, telephone messages, faxes, electronic documents or other documents defining the subjects and the content of their will. An arbitration agreement is also considered concluded in writing if it is made by exchanging a statement of claim and a response to it in which one of the parties claims the existence of an agreement and the other does not object to it. A reference in the contract to a document containing a condition for the submission of a dispute to arbitration is also an arbitration agreement if the contract is concluded in writing, and this reference is such that it makes the arbitration agreement part of the contract.

[30] REPUBLIC OF BELARUS. URL: https://pravo.by/document /?guid=3871&p0=H11100301 (accessed August 12, 2023).
[31] REPUBLIC OF BELARUS. URL: https://pravo.by/document/?guid=3871&p0=h19900279 (accessed August 12, 2023).
[32] REPUBLIC OF KAZAKHSTAN. URL: https://online.zakon.kz/Document/?doc_id=35110250 (accessed August 12, 2023).

Such provisions are enshrined in the Law of the Republic of Armenia of January 22, 2007 No. ZR-55 “On Commercial Arbitration”[33] (Article 7) and the Law of the Kyrgyz Republic of July 30, 2002 No. 135 “On Arbitral Tribunals in the Kyrgyz Republic”[34] (Article 7). After comparing them, it is interesting to note that the latter law does not stipulate that an arbitration agreement may be concluded by exchanging messages or statements of the plaintiff and respondent of a dispute in which one party testifies the existence of an arbitration agreement and the other party does not object to it. Meanwhile, it directly specifies the essential terms of an arbitration agreement. It must contain provisions that any dispute, disagreement or claim arising from a dispute between the parties is subject to settlement by an arbitral tribunal, and clearly define the name of such an arbitral tribunal as well.

The special national legislation on the use of informational technologies in transactions and other activities is also adopted in the countries under consideration. For instance, they are the Law of the Republic of Armenia of August 13, 2005 No. ZR-176 “On Electronic Communications”,[35] the Law of the Republic of Belarus of December 28, 2009 No. 113-Z “On Electronic Document and Electronic Digital Signature”,[36] the Law of the Republic of Kazakhstan of January 7, 2003 No. 370-II “On Electronic Document and Electronic Digital Signature”,[37] The Law of the Republic of Kazakhstan of November 24, 2015 No. 418-V “On Informatization”,[38] the Law of the Kyrgyz Republic of December 22, 2021 No. 154 “On Electronic Commerce”,[39] etc.

3 Legal Problems of Expressing the Parties’ Consent

The parties’ consent to arbitration is the essential element of an arbitration agreement. It should have no legal defects that can make such an agreement invalid, inoperative or unenforceable (incapable of being performed) and, therefore, remove the necessary legal ground for arbitration. Thus, an arbitration agreement shall be valid, operative and enforceable.

[33] REPUBLIC OF ARMENIA. URL: http://parliament.am/legislation.php?sel=show&ID=2887&lang=rus (accessed August 12, 2023).

[34] KYRGYZ REPUBLIC. URL: http://cbd.minjust.gov.kg/act/view/ru-ru/1092?ysclid=lkzjj3nccc102188015 (accessed August 12, 2023).

[35] REPUBLIC OF ARMENIA. URL: http://parliament.am/legislation.php?sel=show&ID=2385&lang=rus (accessed August 12, 2023).

[36] REPUBLIC OF BELARUS. URL: https://pravo.by/document/?guid=3961&p0=H10900113 (accessed August 12, 2023).

[37] REPUBLIC OF KAZAKHSTAN. URL: https://online.zakon.kz/Document/?doc_id=1035484 (accessed August 12, 2023).

[38] REPUBLIC OF KAZAKHSTAN. URL: https://online.zakon.kz/Document/?doc_id=33885902 (accessed August 12, 2023).

[39] KYRGYZ REPUBLIC. URL: http://cbd.minjust.gov.kg/act/view/ru-ru/112333?ysclid=ll3lmmn7bz205262027 (accessed August 12, 2023).

3.1 Invalid and Unenforceable Arbitration Agreements

The difference between invalid and unenforceable agreements was well shown by, for instance, the Supreme Court of the Russian Federation. It noted that an invalid arbitration agreement is concluded in case of a defect of the will of the parties (deception, threat, violence) and with non-compliance with the form or contrary to other mandatory requirements of applicable law. An unenforceable arbitration agreement does not allow determining the will of the parties to the arbitration procedure chosen by them (for example, it is impossible to determine whether a specific institutional arbitration or *ad hoc* arbitration has been selected) or cannot be executed in accordance with the will of the parties (for example, an agreed arbitration institution does not have the right to administer arbitration under the requirements of applicable law). In particular, under interpreting an arbitration agreement that contains an inaccurate name of an arbitration institution or applicable arbitration rules, such an arbitration agreement may be deemed unenforceable only if it is impossible to establish the true will of the parties, for example, if there are two or more arbitration institutions whose names are very similar to the name indicated by the parties, provided that such a shortage in the arbitration agreement cannot be eliminated using appropriate legal mechanisms. If there are doubts about the validity and enforceability of an arbitration agreement, not only the text of the arbitration agreement should be evaluated, but also any other evidence that allows to establish the true will of the parties (including negotiations and correspondence preceding the arbitration agreement, subsequent behavior of the parties).[40]

It is worth noting that the mere mention of arbitration as a possible mechanism for resolving a legal dispute (especially along with litigation) does not mean the parties' consent to arbitration. Specifically, it is truthful for investment disputes with a state that can enshrine its consent to arbitration in international treaties or national legislation, as it was shown *supra*. If a text suggests the conclusion of an agreement between the parties on the choice of a competent court or arbitral tribunal, it shall not be considered as the state's consent to arbitration.[41] Therefore, it is extremely significant to carefully analyze and duly interpret a particular legislative or contractual provision to determine the presence or absence of the state's and the other party's consent to be bound by their arbitration agreement.

For example, according to Article 10 of the Federal Law of the Russian Federation of July 9, 1999 No. 160-FZ "On Foreign Investments in the Russian

[40] RUSSIAN FEDERATION. The Resolution of the Plenum of the Supreme Court of the Russian Federation of December 10, 2019 No. 53 "On the Performance by the Courts of the Russian Federation of the Functions of Assistance and Control Concerning Arbitration Proceedings, International Commercial Arbitration", para. 26, 29. 30. *Bulletin of the Supreme Court of the Russian Federation*, n. 3, 2020.

[41] SCHREUER, C.H. *The ICSID Convention: A Commentary*. Cambridge, 2001, p. 204-205.

Federation",[42] "*a dispute of a foreign investor that has arisen in connection with the implementation of investments and business activities on the territory of the Russian Federation is resolved in accordance with international treaties of the Russian Federation and federal laws in a court or arbitral tribunal or international arbitration (arbitral tribunal).*" A similar statement is also enshrined in Article 22 of the Federal Law of the Russian Federation of December 30, 1995 No. 225-FZ "On Production Sharing Agreements":[43] "*Disputes between the state and the investor related to the execution, termination and invalidity of agreements are resolved under the terms of the agreement in court, arbitration court, or arbitral tribunal (including international arbitration institutions).*" These provisions do not mention the ICSID or any other specific arbitral tribunal, so they do not mean the consent of the Russian Federation to submit an investment dispute to arbitration.

The judicial and arbitration practice usually confirms such a conclusion. For instance, in one case, a claimant applied to a state arbitration court in Russia. However, the contract for the international sale of goods between the parties contained an arbitration clause stating that "*all disagreements arising from obligations under this agreement would be settled at the Paris Institute*". During the proceedings, the court determined that the plaintiff and defendant could not specify the content of this clause. In particular, they did not name the exact name of the international arbitration institution or give any explanations about it. As a result, the court found the arbitration clause unenforceable and declared itself competent to hear the case.[44]

A completely different wording is set out in Article 1120 of the North American Free Trade Agreement of December 17, 1992 (the NAFTA)[45] or Article 26 (3a) of the Energy Charter Treaty of December 16-17, 1994.[46] The latter expressly provides that each state of the Treaty "... *gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article*". In such a case, if any investor prefers to submit a dispute for resolution in this way, he shall further provide its consent in writing for the dispute to be submitted to ICSID, a sole arbitrator or *ad hoc* arbitration tribunal

[42] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 28, art. 3493, 1994.

[43] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 1, art. 18, 1996.

[44] RUSSIAN FEDERATION. The Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of February 16, 1998 No. 29 "Review of Judicial Practice of Dispute Resolution in Cases Involving Foreign Persons", para. 13. *The Herald of the Supreme Arbitration Court of the Russian Federation*, n. 4, p. 38–56, 1998.

[45] NORTH AMERICAN FREE TRADE AGREEMENT in JACKSON, J.H.; DAVEY, W.J.; SYKES, A.O. (ed.) *Legal Problems of International Economic Relations: 2002 Documents Supplement*. St. Paul, 2002, p. 512-734.

[46] ENERGY CHARTER TREATY. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download (accessed August 12, 2023).

established under the UNCITRAL Arbitration Rules,[47] or an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (Article 26 (4)).

It is deemed that in these cases, the state's consent required was given that is confirmed, for example, in *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2)[48] where the ICSID appointed out that in virtue of Article 1122 of the NAFTA, any contracting state agreed to submit investment disputes to ICSID. However, in the given case, the plaintiff did not fully comply with the requirement of Article 1121 of the NAFTA; in particular, he did not fully express his consent to arbitration in the ICSID in writing and did not waive his right to protection in other judicial and arbitration institutions. On this ground, the ICSID found itself incompetent to resolve the dispute.

Under Article 26 of the Energy Charter Treaty in famous investment disputes, such as *Hulley Enterprises Limited v. the Russian Federation,*[49] *Yukos Universal Limited v. the Russian Federation*[50] *and Veteran Petroleum Limited v. the Russian Federation,*[51] *three shareholders of the Russian Yukos Oil Company initiated arbitration proceedings against the Russian Federation. The ad hoc* arbitral tribunal established under the auspices of the Permanent Court of Arbitration in the Hague on November 30, 2009 recognized itself competent to settle such cases and subsequently awarded a significant compensation to foreign investors in the amount of about US $ 50 billion, despite the objections of the Russian Federation which signed, but not ratified the Energy Charter Treaty. They have been challenged before appropriate state courts in the Netherlands since their adoption, but the final decision has not been made yet.

3.2 Inoperative Arbitration Agreements

The existence of an arbitration agreement does not mean an irrevocable refusal of the parties to submit a dispute for resolution to another jurisdictional body. The matter is that an arbitration agreement can be amended or terminated later by the parties, including in court, where one party applies to it, and the other party does not object to it. So, it can be declared inoperative or ineffective (having no more legal effect) during the time by a court under applicable law.

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[47] UNITED NATIONS. UNCITRAL Arbitration Rules. URL: https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[48] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 15, n. 1, p. 214–240, 2000.

[49] PERMANENT COURT OF ARBITRATION. URL: https://italaw.com/cases/544 (accessed August 12, 2023).

[50] PERMANENT COURT OF ARBITRATION. URL: https://italaw.com/cases/1175 (accessed August 12, 2023).

[51] PERMANENT COURT OF ARBITRATION. URL: https://italaw.com/cases/1151 (accessed August 12, 2023).

On the whole, the judicial practice confirms such a provision. For example, the Russian customer and the Japanese contractor concluded a contract that provided that all disputes and disagreements of the parties were subject to arbitration in Stockholm without the intervention of general courts. Later, the parties made an amendment to it according to which their disputes arising from the contract were subject to resolution in the Arbitration Court of Primorskiy Krai under the procedures established by the legislation of the Russian Federation. In this case, the Presidium of the Supreme Arbitration Court of the Russian Federation concluded that if there is an agreement between the disputing parties on the submission of disagreements to a Russian arbitration court, the latter has the right to settle a dispute under its jurisdiction, if the claim is filed with the appropriate arbitration court of the Russian Federation and the defendant does not challenge it before its first statement on the merits of the dispute. After his first statement on the merits of the dispute, the defendant can no longer refer to the existence of an arbitration clause.[52]

3.3 The Scope of Arbitration Agreements

The scope of an arbitration agreement should be clearly defined by indicating a particular dispute to be submitted to arbitration. The matter is that there can be a lot of claims arising from a contractual or another legal relationship. It is especially important to distinguish claims related to the violation of rules of international investment law from contractual ones. Both of them might be between the same parties and be connected to the fulfillment of the same economic activity. However, the contents and nature of such cases are deemed not to be the same.[53] For instance, in *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2)[54] Desechos Solidos de Naucalpan S.A. de C.V. (DESONA) concluded a concession agreement for the collection and disposal of waste with the municipality of Naucalpan in the area of Mexico City. It stipulated the jurisdiction of the Mexican courts concerning disputes between the parties. In this case, it is interesting to note that the ICSID found that the choice of a competent court in the concession agreement did not mean that a dispute could not be subject to other institutions on a different legal basis (in particular, the

[52] RUSSIAN FEDERATION. The Resolution of the Presidium of the Supreme Arbitration Court of March 21, 2000 No. 6084/99. URL: https://sudbiblioteka.ru/as/text1/vassud_big_3746.htm?ysclid=ll196q2thk554980940 (accessed August 12, 2023).

[53] LISITSA, V. Responsibility of a Host State in Transnational Investment Disputes. *Journal of Advanced Research in Law and Economics*, v. 31, n. 1, p. 139-146, 2018.

[54] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 14, n. 2, p. 1–36, 1999.

provisions of the NAFTA, rather than the contract under consideration). Since the plaintiff filed claims against the violation by the municipality of Naucalpan of the terms of the concession agreement, which were under the scope of the arbitration clause to be considered by the Mexican courts and not on the recognition of court decisions contrary to international law, the ICSID rejected its jurisdiction. Hence, it can be concluded that if a foreign investor had claimed a violation by a state of the provisions of an international treaty, the ICSID could have recognized its competence to hear the case.

3.4 Application of the Most Favored Nation Treatment in Jurisdictional Matters

It is investment law where there are a massive number of international treaties stipulating, *firstly*, the most favored nation treatment to foreign investors and, *secondly*, jurisdictional provisions on the settlement of investment disputes. Many current international investment treaties do provide the right of a foreign investor to apply to the ICSID and other international commercial arbitral tribunals that, as shown *supra*, amount to the state's consent to arbitration. That is why the question of extending the most favored nation treatment to jurisdictional issues and the problem of "treaty shopping"[55] lead to legal uncertainty and instability in investment disputes.[56]

In legal literature, one can find a critical attitude to applying such a regime to procedural relations,[57] while arbitration practice differs on this issue. In some decisions, for example, in *Vladimir Berschader and Moïse Berschader v. the Russian Federation,*[58] *the arbitral tribunal of the Stockholm Chamber of Commerce concluded that the most favored nation treatment does not apply to jurisdictional issues. However, in others, for instance, in RosInvestCo UK Ltd. v. the Russian Federation,*[59] *it declared itself competent to settle an investment dispute involving an English company by virtue of the most favored nation treatment, having applied the provisions of Article 8 of the Agreement between the Government of the Russian Federation and the Government of the Kingdom of Denmark on the*

[55] DOLZER, R.; KRIEBAUM, U.; SCHREUER, CH. *Principles of International Investment Law*. Oxford, 2022, p. 390.

[56] COLETO, I.L. Most-Favoured-Nation Clauses and Pre-Conditions for ISDS: the Argentinian Experience. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 1, n. 2, p. 159-178, 2019.

[57] ZYKIN, I.S. Investment Arbitration: Problems and Prospects. *The Arbitral Tribunal,* n. 6, p. 10-13, 2010 (in Russian).

[58] STOCKHOLM CHAMBER OF COMMERCE. URL: https://italaw.com/cases/140 (accessed August 12, 2023).

[59] STOCKHOLM CHAMBER OF COMMERCE. URL: https://italaw.com/cases/923 (accessed August 12, 2023).

Promotion and Mutual Protection of Investments of November 4, 1993[60] *on the investor's right to apply to arbitration under the Stockholm Chamber of Commerce. In Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7),[61] the ICSID also concluded that the plaintiff, an Argentine investor, when carrying out his investment activities in Spain, had the right to use the provisions on the most favorable jurisdiction provided for in the international investment treaty between Spain and Chile. Nevertheless, it was noted that the operation of the most favored nation clause does, however, have some crucial limits arising from public policy considerations.

Therefore, in order to avoid such legal uncertainty, it is extremely vital for any host state to directly resolve it while concluding international investment and other treaties, especially if they contain their consent to be bound by the jurisdiction of the ICSID or other arbitration institutions. In this situation, it is advised for them to expressly exclude the jurisdictional issues from the scope of the most favored nation treatment. Otherwise, such legal vagueness increases the legal risks related to improperly imposing not only private but also public law responsibility on the participants of economic activities and, as a result, restrains the economic development.[62]

Conclusion

At present, the necessary legal framework for arbitration, including the issues of the use of informational technologies, has been developed as a whole. It includes universal and regional international treaties (such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the European Convention on Foreign Trade Arbitration (1961)), the UNCITRAL model laws as well as national legislation. In particular, the countries of the Eurasian Economic Union have special legislative acts on arbitration and application of informational technologies, which are mostly similar and based on the UNCITRAL Model Law on International Commercial Arbitration. Moreover, they further develop it and specify the ways how to recognize an arbitration agreement in writing.

An arbitration agreement, as the necessary legal ground for arbitration, shall contain the consent of the parties to be appropriately expressed in respect of its contents and in writing. This form of the agreement can be achieved not

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60 RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 14, art. 1604, 1997.

61 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 16, n. 1, p. 1–32, 2001.

62 LISITSA, V.N.; PARKHOMENKO, S.V. Some Aspects of Improving the Efficiency of Criminal Law in the Sphere of Economy: Developing the Categories. *Russian Journal of Criminology*, v. 12, n. 2, p. 190-198, 2018 (in Russian).

only by signing or exchanging relevant paper documents between the parties but also with the use of electronic documents and other digital instruments (letters, messages, any other information by teletype, telegraph or using other means of telecommunication, ensuring the fixation of such information on a tangible medium and available for the later use). Moreover, especially in investment disputes under international investment law, it is also recognized to be concluded when a foreign investor applies for settlement of an investment dispute involving a host state in a specific arbitral tribunal and the host state has earlier expressed its consent to it by including the provision on the jurisdiction of the ICSID or another arbitral tribunal into the text of an international treaty or an act of national legislation.

There are three main requirements for arbitration agreements. They should not be invalid, inoperative, and unenforceable (incapable of being performed), reflecting their possible different legal defects. In particular, an invalid arbitration agreement is concluded in case of a defect of the will of the parties (deception, threat, violence), non-compliance with the form or contrary to other mandatory requirements of applicable law. An inoperative arbitration agreement has no more legal effect by the moment in virtue of its termination on different grounds. An unenforceable arbitration agreement does not allow determining correctly the will of the parties concerning arbitration chosen by them or cannot be executed under the will of the parties.

It is also important to clearly define the scope of arbitration agreements and to differentiate claims arising from violation of rules of international law and contractual obligations, especially under international investment law. The issue of extending the most favored nation treatment to jurisdictional issues in multilateral and bilateral investment international treaties continues to be controversial, so it is strongly recommended for host states to exclude it there directly.

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