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Sumário

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Editorial

Apresentamos o número 7 da *RBADR*, que consideramos especial. O Centro Brasileiro de Mediação e Arbitragem (CBMA) completou 20 anos (Fundado em 3 de abril de 2002). Além disso, o periódico alcançou a indexação na base Scopus, em 13 de abril de 2022, o maior banco de dados de resumos e citações da literatura revisada por pares. Afirmamos com orgulho que somos um dos poucos periódicos relacionados a ADR indexados no banco de dados da Elsevier.

Este número é composto por quatorze artigos: sete de acadêmicos ucranianos, um de acadêmicos vietnamitas, dois de acadêmicos russos e quatro de acadêmicos brasileiros. Doze artigos estão em inglês, e apenas dois em português, e, a partir de agora, daremos preferência a artigos em inglês para aumentar o número de citações da Revista.

Publicamos com alegria sete artigos de acadêmicos ucranianos, porque eles estão passando pelo maior conflito possível na arena internacional: a guerra. A consequência natural da guerra é o nascimento de muitas disputas domésticas e internacionais. Assim, publicar artigos de ADR de pesquisadores ucranianos é crucial para ajudar o país em momentos como este.

Os demais trabalhos internacionais são do Vietnã (ODR no E-commerce) e da Rússia (aplicação de medidas alternativas em processo penal e ADR em Governo Digital), o que demonstra a inserção internacional da Revista.

Em suma, estamos entusiasmados com a publicação desta edição e devemos agradecer a todos os autores deste e dos números anteriores por nos ajudarem a difundir a cultura ADR em todo o mundo.

Gustavo da Rocha Schmidt
Presidente do CBMA

Daniel Brantes Ferreira
Editor-Chefe

Editorial

We bring you a particular and special RBADR issue. The Brazilian Center for Mediation and Arbitration – CBMA completed 20 years (Established on April 3, 2002). Moreover, the Journal achieved Scopus indexation on April 13, 2022, the largest abstract and citation database of peer-reviewed literature. We proudly claim that we are one of the few ADR-related journals indexed in Elsevier's database.

This issue comprises fourteen papers: seven from Ukrainian scholars, one from Vietnamese scholars, two from Russian scholars, and four from Brazilian scholars. Twelve articles are in English and only two in Portuguese, and from now on, we will prefer papers in English to increase the Journal's citation score.

We gladly publish seven papers from Ukrainian scholars because they are going through the ultimate conflict in the international arena: war. The natural war's consequence is the birth of many domestic and international disputes. Thus, publishing ADR papers from fellow Ukrainian researchers is crucial for helping the country in times like this.

The other international papers are from Vietnam (deals with ODR in E-commerce) and Russia (application of alternative measures in criminal proceedings, and ADR in Digital Government), demonstrating the Journal's international insertion.

In a nutshell, we are thrilled to have this issue published, and we must thank all the authors of this and the past numbers for helping us spread the ADR culture across the globe.

Gustavo da Rocha Schmidt
CBMA's President

Daniel Brantes Ferreira
Editor-in-Chief

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Jurisdictional remedies for corporate rights in Ukraine: Sub-standard remedies in corporate disputes

Anatoliy V. Kostruba

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Abstract: In the context of the European integration processes taking place in Ukraine, there is a convergence of the national legal system with the legal principles and provisions of the European Union, including in the field of corporate legal relations. The main purpose of this study was an independent study of problematic issues that arise upon the implementation of sub-standard remedies in corporate disputes to develop author's conclusions and recommendations to ensure sustainable and effective law enforcement practices. The methodological framework of this study included the principles of cognition of social phenomena in their historical development, interrelation, and interdependence, a dialectical approach to the study of theory and practice, the history and current state of law. The leading methods were historical, comparative legal, and dialectical. Based on the results of the investigation, the study covered the leading issues of the state of modern legal regulation of sub-standard remedies in corporate disputes in Ukraine; analysed the main issues of theoretical certainty regarding sub-standard remedies in corporate disputes and suggested new vectors of reforms concerning further improvement of law enforcement practice. The author's conclusion on the need to ensure the unity of law enforcement practice by introducing changes to the legislation of Ukraine towards detailed regulation of sub-standard remedies in corporate disputes, which also correlates with the reformation vectors of development of Ukraine in the context of European integration, will become a stable basis for further scientific research and legislative transformations in the field under study.

Keywords: Remedies for corporate rights; derivative claim; derivative action; weak party; corporate legal relations

1 Introduction

The improvement of international economic integration aims to create regulatory prerequisites based on the harmonisation of corporate law in Ukraine in terms of compliance with the requirements of the European Union legislation. The signed Association Agreement between the European Union and the European

Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part, can be considered a serious step on this path.[1] An important factor of effective cooperation in this aspect is the creation of conditions for remedying participants in corporate legal disputes, which are achieved by testing of effective European legal structures in the Ukrainian legal field.[2] The above, according to A. V. Kostruba[3] also concerns the choice of effective legal means of ensuring not only the rights, but also the interests of participants in corporate legal relations. These include derivative property and non-property claims favouring the corporation among other persons, tort claims of the corporation or claims from other persons to its management body, as well as liability of the participant (founder) of the corporation for obligations to third parties.

Upon interaction of corporate governance bodies with other subjects of corporate relations to ensure their organisational and economic activities, there may be situations when the parties to such interaction pursue multifaceted or mutually exclusive goals, which is conditioned by the polar pursuit of corporate interests. Such idea, according to Professor Yu. M. Zhornokuy,[4] serves as the basis for the emergence of a corporate conflict. The researcher noted that in the conditions of non-transparency of most Ukrainian joint-stock companies, their main advantages are realised through current management and decision-making mainly due to shadow schemes. In such circumstances, it is easy to underestimate profits and not pay dividends or not perform other obligations. Therefore, for a shareholder who has acquired the corresponding corporate rights, but does not have a real opportunity to influence management decisions, investing is a risky business. Pointing out the civil liability of a legal entity, isolating its property from its participants (founders), as well as taking part in civil turnover on its own behalf and interests excludes the possibility of external influence on the adoption of corporate governance acts by a legal entity. This, in fact, creates conditions for possible abuse of the rights of a legal entity by the governing bodies and, as a result, violation of this entity's interests.

In this context, the remedies in corporate disputes and their methods acquire a new dimension of implementation. Thus, the theory of civil procedure uses numerical criteria to classify claims. Each of them has a particular focus and plays its role in ensuring effective legal remedy for the rights and interests of participants in the judicial process. In particular, classification according to the subjective criterion of derivative effect, along with direct effect, allows determining the subject composition of the dispute, its jurisdiction, the matter of the subject

1 The Association Agreement ..., 2014.
2 KATERYNIUK, 2021, p. 54-55.
3 KOSTRUBA, 2019, p. 120-123.
4 ZHORNOKUY, 2015.

of proof, the ownership and admissibility of evidence, the amount of court fees, the form of procedural means of defence, that is, the such classification has not only theoretical, but also practical significance. V. A. Zhurbin[5] believes that the right to file a derivative claim stems from the ownership of shares. The derivative action is applied because a party to corporate relations has the right to a share in the corporation's property. Consequently, their right to file a claim stems from a person's right to defend their interests and the associated right to joint access.

At present, there is a need to strengthen the protection of relevant persons who have independently deprived themselves of such an opportunity by transferring their trust rights to the management body of a corporate entity. Such an action, albeit corresponding to the legal nature of the corporation (theory of interests), substantially weakens the legal status of a person who grants part of their legal personality (legal status and legal capacity) to an artificially created subject of civil law (legal entity).[6] The problem of the need to expand the boundaries and methods of legal remedies of corporate legal relations also has practical nature. Judicial practice in the consideration of corporate disputes has made it possible to identify substantial shortcomings in the legal regulation of corporate relations in Ukraine, which require their urgent solution.

Proceeding from the above, it is quite relevant to consider the main issues related to sub-standard remedies in corporate disputes. To achieve this purpose, the tasks were defined as follows:

1) to consider the main points of the state of modern legal regulation of sub-standard remedies for corporate relations in Ukraine;
2) to analyse issues of theoretical certainty regarding sub-standard remedies in corporate disputes and further improving the practice of law enforcement.

2 Literature Review

In modern civilistics, certain issues of the application of an indirect claim, problems of a material and procedural nature that arise with such application, become, although infrequently, the subject of discussion on the pages of scientific and educational literature, periodicals of legal journals. At the current stage of development of legal science, the nature of corporate rights, its place in the legislative and law enforcement activities of the state, some issues of remedies for corporate relations in the entrepreneurial activity were investigated in the studies of such representatives of the corresponding branches of legal science as A. V.

[5] ZHURBIN, 2012.
[6] KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.

Kostruba,[7] Yu. M. Zhornokuy,[8] V. A. Zhurbin,[9] M. Bekker,[10] O. V. Bihnyak,[11] M. I. Brahinskyy and V. V. Vytryanskyy,[12] S. N. Bratus,[13] L. A. Burtseva,[14] O. O. Volos,[15] V. Volyanskyy and V. Pavlenko,[16] K. Leonov,[17] N. S. Kuznyetsova,[18] I. Lavrinenko,[19] O. S. Listarova,[20] V. V Luts and R. A. Maydanyk,[21] P. Malyshev,[22] H. K. Matveev and K. P. Nykolaev,[23] H. L. Osokina,[24] L. M. Rakitina,[25] N. V. Semenenko,[26] V. V. Yarkov.[27]

Therewith, in the civil legislation of Ukraine, the issues outlined above are investigated fragmentarily and require a more in-depth study. Notably, there are no comprehensive studies of indirect claims as a remedy for business entities, as well as problems arising in connection with its practical application. However, the coverage of the essence of law enforcement, the forms of its implementation in the civil law doctrine can increase the axiological nature of the law, outline its new possibilities, and give an answer to unresolved issues of law enforcement today, namely the effectiveness of law enforcement mechanisms in the legal regulation of corporate relations.

3 Materials and Methods

The methodological framework of this study included the principles of cognition of social phenomena in their historical development, interrelation, and interdependence, a dialectical approach to the study of theory and practice, the history and current state of law. Of great significance in the development of the study subject was the idea of a state governed by the rule of law, wherein an essential place is given to the legal remedies for a person, namely the forms, means, and methods of remedying, which in modern realities of mainstreaming

7 KOSTRUBA, 2019, p. 120-123.
8 ZHORNOKUY, 2015.
9 ZHURBIN, 2012.
10 BECKER, 1997.
11 BIHNYAK, 2018.
12 BRAGINSKY; VITRYANSKY, 2000.
13 BRATUS, 1976.
14 BURTSEVA, 2011.
15 VOLOS, 2016.
16 PAVLENKO; VOLYANSKY, 2015.
17 LEONOV, 2021.
18 KUZNYETSOVA, 2011.
19 LAVRINENKO, 2016.
20 LISTAROVA, 2010, p. 69-75.
21 KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
22 MALYSHEV, 1996, p. 95-112.
23 MATVEEV; NIKOLAEV, 1955.
24 OSOKINA, 1999, p. 18-19.
25 RAKITINA, 2009, p. 49-57.
26 SEMENENKO, 2007, p. 210-215.
27 YARKOV, 2000.

corporate disputes becomes of paramount importance for the essence of a person's existence in society.[28] In addition, this study involved a system of general scientific and private scientific research methods, including analysis, synthesis, induction, deduction, historical method, comparative legal, and formal legal methods.

The dialectical method was used to investigate the doctrinal and legislative sources in the field of corporate rights as an objective social reality, which is inextricably linked with other social phenomena of a political, economic, socio-cultural, and other nature, and constantly and gradually evolves under the influence of various factors in the context of globalisation and transformation of corporate structures.

The logical method, which includes analysis, synthesis, induction and deduction, allowed conducting a meaningful analysis of the legal structures of provisions wherein corporate rights found their consolidation at the international and national levels, and contributed to identifying problems in implementing the remedies in corporate disputes.

The system method, as one of the main methods of streamlining legislation, allowed identifying the issues of statutory regulation of sub-standard remedies for corporate legal disputes in modern conditions and offering scientifically sound ways to solve them.

The system-structural method was used in the classification of subjects of corporate legal relations, corporate interests, classification of claims within the framework of the implementation of the judicial remedy, classification of forms and methods of remedying subjective corporate rights and interests. Using the Aristotelian method, the author established the content of terms in the area under study, namely the term of corporate legal relations, remedies for subjective corporate right and interest, sub-standard remedies, etc.

The forecasting method was used to identify shortcomings in corporate legislation and determine ways to improve it. Using the comparative legal method, the experience of foreign countries and positive developments of representatives of the civil doctrine of other states were studied. The formal legal method was used in the interpretation of legal provisions governing the material and procedural aspects of the implementation of substandard remedies for the rights and interests of subjects of corporate legal relations

The use of these methods allowed performing a comprehensive study of the declared issues and led to a reliable author's scientific result. The empirical basis of this study included the analysed materials of judicial practice, including those relating to the application of the legislative provisions of Ukraine concerning

[28] KOPCHA, 2021.

corporate legal relations, analytical materials on the issues under study. The main methodological principles of the study included the principles of objectivity and historicism, scientific ascent from the abstract to the concrete, organic unity of theory and practice, the principles of synergetics, namely polyvariety, nonlinearity, constructiveness, etc.

4 Results

The weaker party in corporate legal relations is a shareholder who has a smaller set of legal tools to implement the purpose of their right – to profit and take part in the management of the corporation due to fiduciary trust in his or her confidence in the exercise of such a right by the management body of the legal entity. In other words, fiduciary relations are those where the trust of one party in the other or the mutual trust of both forms the basis for the emergence, amendment, or termination of the relations. The motive of trust in such relations becomes their auxiliary element, emphasising its essence in them. This element underlies certain norms of legal regulation of trust relations, primarily concerning the conditions of liability of the parties. Thus, the trusting nature of the relations between the participant (founder) and the body of a legal entity, despite the mutual respect of these persons, at the same time puts the founder in a difficult position, creating an objective possibility of abuse of such fiduciary trust. In this case, exemption from liability is possible only if corporate damage is caused in a procedural form as a result of economically unforeseen risks of entrepreneurial activity (force majeure, compliance with the boundaries of normal economic risk). Therefore, it is the founder who must provide great legal opportunities to remedy their rights and interests, namely by strengthening the responsibility of their counterparty.

One of the most effective ways to resolve corporate conflicts is to appeal to a beneficiary who has a legitimate interest in the proper exercise of corporate rights, demanding the protection of violated rights.[29] The way to resolve the corresponding corporate conflict is to file a claim to remedy the subjective civil rights of the corporation, thereby remedying the interests of the corporation member (founder). According to the procedural doctrine of the Anglo-American legal system, such a procedural form of corporate legal remedy was embodied in the filing of a “derivative” or “indirect” claim. This claim originated in the countries of the Anglo-Saxon legal family in the middle of the 19th century and is called a derivative suit. The establishment of the institution of derivative suits is associated with the search for a solution to the problem of abuse on the part of management

[29] WÓJTOWIC, 2020.

and majority participants in the context of the dispersion of shares among a considerable number of shareholders, as well as with the need to protect the rights of minority shareholders. Describing the institution of indirect action in US case law, P. Malyshev[30] noted that indirect actions were introduced in US case law to resolve disputes arising from conflicts of interest between corporate owners and their managers. They are filed by shareholders on behalf of the corporation to protect interests that the corporation itself refused to remedy for whatever reason, in other words, when the interests of shareholders were damaged not directly, but indirectly, that is, usually due to a decrease in the value of shares; hence the name of the statement of claim – "derivative". Its emergence is an achievement of US judicial practice and a distinctive feature of the common law legal system. At the same time, the legal geography of the distribution of this construction in the legal system of many countries of the world is quite extensive and today is not an absolute monopoly of the Anglo-Saxon legal system (China, Congo, Singapore, Chile, USA, Italy, Germany, Australia, New Zealand).[31]

In the Black's Law Dictionary,[32] there are several definitions of the concept of "derivative action", but it is not always considered as a type of corporate action. In particular, the nature of the claim in derivative suit demonstrates that this is an action by the beneficiary's trustee aimed at enforcing the right belonging to the trustee (fiduciary); an action brought by a corporation shareholder to remedy the corporation's rights against third parties (usually employees of the corporation), since the corporation itself did not file a corresponding action against third parties; an action arising from claims for damages caused to another person. In Ukrainian sources, the term "derivative" is interpreted as "formed, derived, etc. from something similar (about size, shape, category, etc.). The term "indirect" in the same dictionary is interpreted as not immediately related to something, not related to the essence; not at once. Something that is done not directly, but with intermediate periods, stages. The difference in interpretation of this term explains the difference in the nature of the remedies for subjective civil rights and legitimate interests of a person. The purpose of filing a derivative suit is to protect the derivative right from another fundamental right associated with it. That is, the remedying of corporate rights is provided through the remedying of the rights of a participant in corporate legal disputes, since this is conditioned by the effective remedying of the rights of creation. In turn, the functional division of claims into two types is as follows: derivative action and indirect action make provision for the determination of the subject of the claim in each of them. In the first case,

[30] MALYSHEV, 1996.
[31] GIAMPIERO, 2020.
[32] BLACK, 1968.

these are the requirements that the founder justifies a possible reduction in the capitalisation of his or her assets. His or her satisfaction is ensured by such remedies for rights and interests as invalidation of the transaction, termination of the action that violates the right, enforcement of in-kind obligations, termination of legal relations, etc., and the defendant is a third party, actions affect the property status of the corporation and the corporation itself as a party to the disputed relations.

Otherwise, the protection of the rights and interests of participants in corporate legal relations is ensured in the absence of property damage directly from the founder by restoring situations that existed prior to the violation, terminating the action that violates the right, etc. The occurrence of a derivative (indirect) action is inextricably linked with the activities of companies and, above all, with the joint-stock form of business organisation, when abuse of behaviour by the company's management leads to the need for a comprehensive settlement of liability issues in the joint-stock company. The concept of derivative (indirect) action came from the English practice of trust, that is, trust management of someone else's property. In turn, the duties of corporation directors come from the principle of its activity – management of someone else's property, funds of its owners – participants (founders) of the corporation. Since the trust relationship manager manages someone else's property, he or she undertakes responsibility – he or she must act most effectively in the interests of the corporation and take the undertaken responsibility seriously.[33] Therefore, an indirect or derivative claim is a legal instrument that purposefully works contrary to shareholder democracy, since it can appeal against a decision taken by members of management bodies even unanimously.[34]

Such a legal construction as a derivative action is not limited to the scope of tort of the governing body of a corporate entity. This is a procedural form of remedying real and binding rights in the structure of corporate legal relations, which allows achieving the legitimate interest of a business entity participant. Consequently, a violation of the subjective right of a legal entity leads to a violation of the subjective right of a participant (founder) of a legal entity through close property and other relations between them. If a legal entity does not exercise its right to judicial remedy, the participant acquires the right to claim damages and submits a substantive claim to the court for the judicial remedying of the subjective right of the legal entity, since only in this sequence is it possible to protect its subjective right.[35]

[33] BURTSEVA, 2011.
[34] BIHNYAK, 2018.
[35] GULAC; SHCHERBAK, 2021.

The following main features are inherent in a derivative claim:[36] the plaintiff is a shareholder without a special authority of the joint-stock company, by direct instruction of the law; the plaintiff is obliged to be a shareholder of the joint-stock company in the interests of which the claim is filed, at the time of both the appeal to the court and the court decision; the plaintiff may be only one shareholder because the current economic and procedural legislation does not make provision for the institution of plurality for the plaintiff; the shareholder acts to protect primarily the general corporate interest, which indirectly violates the individual corporate interest of the shareholder, but from a procedural standpoint, the shareholder acts in the interests of the company, as the award in this category of cases favours the legal entity and not its participant; the shareholder files a claim on their own behalf, but in the interests of the joint-stock company; the subject of an indirect claim is a demand for invalidation of an agreement concluded by a joint-stock company with another counterparty and compensation for damages to the interests of the joint-stock company caused by such agreement; the right to an indirect claim is exercised by a shareholder, if the bodies of the joint-stock company authorised by law and (or) the charter have not exercised the right to remedy the rights and relevant interests of the joint-stock company; defendants in this category of cases are officials of the joint-stock company who performed activities on behalf of the joint-stock company upon the conclusion of an agreement, and (or) actual counterparties under the agreement; upon legalising this institution in the current joint-stock to avoid abuse of minority rights by their corporate rights, it is necessary to make provision for the possibility of filing a lawsuit by a shareholder who owns over 10% of ordinary shares of the company.

Shareholder claims serve as a management control tool.[37] The main distinguishing feature of a derivative suit is that the applicant of a derivative suit does not have the right, if satisfied, to demand an award of the amount that the business company will have. For minority shareholders, the effect of indirect benefits occurs in this situation, which lies in cessation of harmful influences of the company's governing bodies and management, which, in most cases, are of a long-term nature. Moreover, the recurrence of such actions is clearly prevented by members of the governing bodies. O. V. Bihnyak[38] noted that this may affect both the dynamics of the company's securities exchange rate and the amount of dividends in the future. Individual shareholders may take legal action either through a derivative right on behalf of the corporation (derivative suit) or in their own rights, if their rights are directly violated (direct claim). Class action lawsuits should also be mentioned,

[36] KUZNYETSOVA, 2011.
[37] BECKER, 1997.
[38] BIHNYAK, 2018.

when an individual shareholder files a claim acting on behalf of a group of persons whose rights have been violated. The derivative suit, in particular, is associated with several details that reinforce the claim. Firstly, the shareholder must contact the board of directors to file a claim. According to the business judgment rule, a claim is usually settled if the board does not approve the decision. Therefore, the business judgment rule restricts the use of derivative suits. If the rights of shareholders are violated, the shareholder has the right to file an application for judicial remedy.

On May 1, 2016, the Law of Ukraine No. 289-VIII "On Amendments to Certain Legislative Acts of Ukraine Concerning the Protection of Investors' Rights" dated April 7, 2015 has entered into force.[39] This regulation amended several articles of the Economic Procedural Code of Ukraine, as well as corporate and labour legislation of Ukraine, according to which the mechanism of "derivative suit" is introduced into Ukrainian legislation. This law also established the responsibility of directors of business entities in case of company losses caused by their illegal actions. Starting from this date, the Ukrainian procedural legislation de jure introduces a remedy for the rights of minority shareholders. The adoption of such an amendment substantially affected the approach of Ukrainian legislation to meeting the requirements of the Association Agreement with the EU.

Despite the lack of legislative regulation of this institution in Ukraine before its introduction based on the law, derivative suits factually took place in the judicial practice of Ukraine. The right of a company member to appeal to the court was justified by the Decision of the Constitutional Court of Ukraine No. 18-RP/2004 of December 1, 2004[40] (the case on legally protected interests), wherein the court stated that the provisions of Part 1, Article 4 of the Civil Procedural Code of Ukraine[41] should be interpreted in such a way that "a shareholder can remedy their rights and legally protected interests by applying to the court in case of their violation, challenge, or non-recognition by the joint-stock company of which they are a member, bodies, or other shareholders of this company". At the same time, in 2008, the Supreme Court of Ukraine attempted to terminate the practice of applying derivative suits. Thus, in the resolution of the Plenum of October 24, 2008 No. 13 "On the Practice of Consideration of Corporate Disputes by Courts",[42] the Court stated that "the law does not make provision for the right of a shareholder (participant) of a business company to apply to the court for remedying the rights of a shareholder (participant) of the company outside agency". However, it was

[39] Law of Ukraine No. 289-VIII ..., 2015.
[40] Decision of the Constitutional Court of Ukraine ..., 2004.
[41] Civil Procedure Code of Ukraine, 2004.
[42] Resolution of the Plenum of the Supreme Court of Ukraine ..., 2008.

not possible to finally ensure the unity of judicial practice in the application of derivative suits. Rather, on the contrary, in some cases, the courts still consider claims of shareholders that are not related to corporate rights, referring to the "legally protected interest" (Decision of the Economic Court of the city of Kyiv in the case No. 910/3845/15-g of March 25, 2015),[43] and in others – refuse to accept or satisfy them, referring to the decision of the Plenum of the Supreme Court of Ukraine No. 13 of October 24, 2008 (Resolution of the Supreme Economic Court of Ukraine of May 22, 2013 in case No. 5010/1465/2012-18/60).[44] At the same time, notwithstanding Article 17 of the Law of Ukraine "On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights", according to which courts use the Convention and practice of the European Court of Human Rights as a source of law upon considering cases, the highest instance ignored the decision in the cases No.33202/96 "Beyeler v. Italy" of January 5, 2000 and No. 42527/98 "Prince Hans-Adam Ii of Liechtenstein v. Germany" of July 12, 2001, which emphasised that the right of ownership under court decisions is not limited to the right of ownership of physical things and provides that the right of claim, legitimate interest, and legitimate expectation of a person, which include, for example, interests conditioned by the corporate rights of a shareholder, must also be effectively remedied.[45] Currently, judicial practice in Ukraine is gradually moving beyond the narrow regulatory understanding of the essence of a derivative suit, stipulated by the Law of Ukraine "On the Protection of Investors' Rights". Thus, the Supreme Court of Ukraine in its Decision on Case No. 3-327gs15 of 01.07.2015[46] recognised the right of a company participant to file a claim to the court for invalidation of agreements concluded between this company and the counterparty, having satisfied the claims in full.

It can be concluded that the scope of application, as well as the procedural features of this institution, have special features in each country, but in the general sense, derivative (indirect) suits imply the claim of a participant (shareholder) of the company (sometimes even a creditor), filed on behalf of and in the interests of the company itself to the management of the enterprise for damages or recognition of the transaction as invalid. That is, in fact, a person who owns a share of the enterprise, the minimum size of which is usually regulated, gets the right to appear in court and defend not their own interests as the owner, but the interests of the enterprise directly outside the agency. Thus, the list of measures to protect corporate rights has been expanded by law, but, considering the specific features,

[43] OSOKINA, 1999.
[44] Resolution of the Supreme Commercial Court of Ukraine ..., 2015.
[45] PAVLENKO; VOLYANSKY, 2015.
[46] Resolution of the Supreme Commercial Court ..., 2015.

the mechanism of the right to a derivative claim is still limited to the scope of applicants – shareholders (participants) of companies to an official of the company who caused the company the corresponding losses.

5 Discussion

The author's conclusions formulated based on the results of the study necessitate the reference to the controversial positions of researchers expressed on this matter. Thus, O. S. Listarova[47] considers indirect action as "a claim of a corporation participant to protect the interests of other members of the corporation and the corporation in general, proposed for compensation for damage caused to a legal entity in the event of illegal actions of its managers, officials, and bodies". According to Yu. M. Zhornokuy,[48] the derivative nature of this claim makes provision for the satisfaction of such a claim in favour of the joint-stock company, and not the shareholder, that is, the company acts as a direct beneficiary. Respecting the interests of a company also means ensuring the interests of its members.

The construction of the derivative suit is described by H. L. Osokina. In her opinion, "…an indirect (derivative) suit is an abstract, purely speculative construction that does not have a solid theoretical basis and does not go into the field of practical law enforcement. In this regard, it represents a dead end in the development concerning the theory of the claim form of remedying the rights and legitimate interests…".[49] Criticising the existence of this form of requirements, the author simultaneously classifies derivative suits as a form of corporate requirements. V. V. Yarkov[50] does not agree with this position, considering that corporate requirements are distinguished upon classifying requirements by essential features. At the same time, derivative suits are defined within a fundamentally different classification – depending on the nature of the protected interest, as well as on the identity of the beneficiary. Thus, according to the researcher, in an indirect form, the beneficiary is the company itself, in favour of which the bonus is awarded. The benefit of the shareholders themselves is indirect, since personally they receive nothing.

The effectiveness of the remedies for the rights of participants in corporate legal relations is achieved by theoretical definition and legislative consolidation of the basics of civil liability of a corporate governance body. Civil liability is based on a set of its mandatory elements (features). Today, it is doctrinally defined that such a set of elements forms the composition of a civil offence. At the same time,

47 LISTAROVA, 2010.
48 ZHORNOKUY, 2015.
49 OSOKINA, 1999.
50 YARKOV, 2000, p. 6-12.

from the standpoint of A. V. Kostruba, R. A. Maydanyk and V. V. Luts,[51] conclusion of H. K. Matveev and K. P. Nykolev[52] that the common basis of civil liability is the unity of subjective and objective elements of a civil offence is doubtful. For the most part, it is appropriate to argue the primacy of objective elements of a set of offences, pertinence to which has a subjective meaning. Therewith, it is advisable to pay attention to their dialectical relations.

Proponents of the theory of causation recognise the fact of causing harm as the basis of civil liability. However, the subjective grounds for such damage do not matter for the legal qualification of the responsible person's actions. The main thing is that there should be a causality between a person's behaviour and the fact of harm. Exceptions to the principle of presumption of guilt in the civil legislation of Ukraine have socio-economic conditions. Each of them, as noted by H. K. Matveev and K. P. Nykolaev,[53] should be considered as a sanction against the debtor, which establishes an increased amount of liability for violation of obligations. The attempt to justify the existence of "innocent responsibility" and extend its boundaries to corporate relations has a clear legal tradition. Its application in legal regulation of corporate relations, as well as in the civil legislation of Ukraine in general, as mentioned by S. N. Bratus,[54] only increases the requirements for due diligence to the mandatory party in corporate legal relations. These requirements are also related to the weakness of a business entity participant in relation to a corporate governance body as a result of trust in its activities. These requirements include the ability to maintain secrecy of information about the subject of management of the corporation's body; limiting the scope of remedies for the interests of a business entity participant, which makes the relevant mechanism for its implementation flawed, and the presence of a lower status opportunity relating to the counterparty.

In support of the legal position regarding the establishment of the presumption of guilt of the corporation's governing body in the event of negative consequences, the adoption and implementation of corresponding management decisions is advisable, as suggested by A. V. Kostruba, R. A. Maydanyk and V. V. Luts,[55] to determine the criteria of the "weak party" in corporate legal relations. Thus, the essence of weakness in corporate relations is determined by establishing the signs of the latter. The corresponding classification was provided by O. O. Volos[56] in the dissertation research "Principles of the Law of Obligations". The author noted that the weaker party is a participant with a smaller economic base, which has status

[51] KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
[52] MATVEEV, NIKOLAEV, 1955.
[53] MATVEEV; NIKOLAEV, 1955.
[54] BRATUS, 1976.
[55] KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
[56] VOLOS, 2016.

opportunities compared to the counterparty. Furthermore, the obligated weaker party is a person who has a subjective civil right, but the forms and methods of its implementation are imperfect, while regulations establish a mechanism for exercising such a right in particular legal relations.[57] The opinion of M. I. Brahinskyy and V. V. Vytryanskyy[58] is that the main objective of civil legislation is to equalise the rights of participants in legal relations by establishing special rights for one of them. The above is achieved either by recognising additional rights for the weaker party, or by establishing additional obligations for the stronger party. N. V. Semenenko[59] noted that "the development of a market economy has led to the consolidation and emergence of numerous new concepts, such as "corporate law", "corporate disputes" and, accordingly, the remedies for the rights of participants in various associations, including indirect actions. As noted by L. M. Rakitina,[60] "... during the improvement of the civil legislation on business entities in the science of civil procedural law, attempts are being made to distinguish claims relating to the activities of such organisations. Such claims are proposed to be called indirect, derivative, or corporate...".

Derivative suit, as noted by A. V. Kostruba, R. A. Maydanyk and V. V. Luts[61] is not only a form of remedying the rights and interests of participants in corporate legal relations, through which the participant's claims to the corporation's governing body for compensation of losses caused by management decisions are represented and satisfied. Using this procedural model of law, the interests of any person are protected in another way that guarantees their restoration as a participant in corporate legal relations. In the opinion of lawyers, to determine the legal nature of a derivative suit, the understanding of these requirements should be clarified. Remedying subjective civil rights and interests of participants (founders) of a corporation by means of a derivative suit should be considered in the context of not only corporate, but also other substantive relations.[62] And this approach is not new for the civil legislation of Ukraine. Thus, for example, in accordance with Article 47 of the Law of Ukraine "On Copyright and Related Rights",[63] the copyright and related rights of their subjects are protected by collective management organisations, which also grant non-exclusive rights to use copyright objects to any persons by entering into agreements with them on the use of copyright objects and/or related rights. In other words, the subject of a derivative suit is

57 BIELOV, 2020.
58 BRAGINSKY; VITRYANSKY, 2000.
59 SEMENENKO, 2007, p. 210-215.
60 RAKITINA, 2009, p. 49-57.
61 KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
62 BONDARENKO; PUSTOVA, 2021.
63 Law of Ukraine ..., 1993.

a secondary claim of a person who has an indirect interest in it. This involves choosing remedies for legitimate interests identical to the remedies for a person's rights. Thus, legal experts conclude that the derivative suit is applied when in the presence of an interrelation and interdependence of one substantive relations with other substantive relations, when the rights and interests of one person cannot be remedied without remedying the rights of another person. When filing a derivative suit for remedying the rights of another person, the purpose of filing a derivative suit is achieved – to remedy the rights and interests of the participant (founder) of the enterprise. The above gives grounds for researchers to conclude on the streamlining of legal procedural terminology. Thus, the above considerations indicate the use of the terms "derivative" and "indirect" action in the academia as a procedural form of jurisdictional remedy for participants in corporate relations. In this regard, O. V. Bihnyak[64] noted that the term "derivative" means that the person filing the claim has only corporate rights to the company, whose rights are violated by illegal behaviour on the part of the management bodies. As for the use of the term "indirect", this refers to the fact that the participant (shareholder) who initiated the legal process does not act as a direct beneficiary in the dispute, such a person is the company itself. In this case, the legitimate interests of the participant are remedied by remedying the interests of the company itself. Therewith, in the vast majority of cases, these terms are identical.[65]

Based on the results of the discussion, it can be concluded that the doctrine of civil law is dominated by the understanding of derivative suits exclusively as a procedural remedy for participants in corporate relations. The use of this remedy is limited to the sphere of corporate law. Derivative actions are performed exclusively as a request of the founder (shareholder) in the interests of a corporate entity. Thus, a derivative action is considered as an effective remedy for the interests of minority shareholders.

6 Conclusions

Apart from the form of doctrinal proof of the validity of expanding the limits of liability of the governing body of the corporation for causing harm to the latter, the principle of protecting the weak party in corporate relations determines the possibility of ensuring not only the subjective civil right of the participant (shareholder), but also its legitimate interest. The above makes provision for expanding the range of jurisdictional remedies for the subjective civil rights and interests of a corporation participant (founder) and other persons for resolving corporate disputes by also using

[64] BIHNYAK, 2018.
[65] LAVRINENKO, 2016.

a derivative procedural form. At present, there are not only doctrinal prerequisites for changing the extent of liability of the corporation's governing body, but also clear rules concerning the legal grounds and procedure for applying a derivative action. In modern realities, it is important to provide participants of corporate entities in Ukraine with a real and effective opportunity to apply to the court under a derivative suit. Thus, the alternative sub-standard remedies for resolving corporate disputes were presented. An alternative to a reasonable balance in ensuring the interests of company participants and exercising the professional competence of the management body of a business entity can be the principle of presumption, when the management body is responsible for causing harm to a corporate entity, and, moreover, is obliged to prove that its decisions comply with the business standard of a "smart" manager.

According to the principle of "innocent (objective) liability" of the corporation's governing body for damage caused upon the adoption and implementation of management decisions, the corporate rights of a shareholder (participant) are filled with real content. In turn, the principle of protecting the weak party in corporate law of Ukraine lies in the general idea of providing remedies for a party to legal relations, which is limited by the appropriate possibility due to self-regulated and purposeful legal actions (creation of a legal entity) as a form of compensation for the same level of legal capacity of participants in civil law relations.

The debatable scientific opinions allowed establishing that the doctrine of civil law of Ukraine is dominated by the understanding of derivative actions exclusively as a procedural remedy for participants in corporate disputes. The use of this remedy is limited to the sphere of corporate law. At the same time, the author's conclusion on the necessity of ensuring the unity of law enforcement practice by introducing changes to Ukrainian legislation towards detailed regulation of sub-standard remedies for corporate legal relations is quite reasonable and urgent, which also correlates with the reformation vectors of Ukraine's development in the context of European integration.

Remédios abaixo do padrão para relações corporativas

Resumo: No contexto dos processos de integração europeia em curso na Ucrânia, verifica-se uma convergência do ordenamento jurídico nacional com os princípios e disposições jurídicos da União Europeia, inclusive no domínio das relações jurídicas societárias. A dinâmica das mudanças legislativas na Ucrânia indica a transformação da regulamentação jurídica das relações corporativas e as características específicas de sua reparação. A aspiração para a integração europeia da Ucrânia, por um lado, é economicamente determinada pelas necessidades atuais do empreendedorismo ucraniano, por outro lado, eles são os componentes através dos quais novos remédios abaixo do padrão para direitos e interesses corporativos são implementados no estrutura da Ucrânia, que actualizou o tema escolhido para este estudo. O objetivo principal deste estudo foi um estudo independente de questões problemáticas que surgem na implementação de remédios abaixo do padrão para relações

corporativas para desenvolver conclusões e recomendações do autor para garantir práticas de aplicação da lei sustentáveis e eficazes. O referencial metodológico deste estudo incluiu os princípios de cognição dos fenômenos sociais em seu desenvolvimento histórico, inter-relação e interdependência, uma abordagem dialética do estudo da teoria e da prática, da história e do estado atual do direito. Os métodos principais eram históricos, jurídicos comparativos e dialéticos. Com base nos resultados da investigação, o estudo cobriu as principais questões do estado da regulamentação legal moderna de remédios abaixo do padrão para relações corporativas na Ucrânia; analisou as principais questões de certeza teórica sobre remédios abaixo do padrão para relações corporativas e sugeriu novos vetores de reformas para melhorar ainda mais a prática de aplicação da lei. A conclusão do autor sobre a necessidade de garantir a unidade da prática de aplicação da lei, introduzindo mudanças na legislação da Ucrânia para uma regulamentação detalhada de remédios abaixo do padrão para relações jurídicas corporativas, que também se correlaciona com os vetores de reforma do desenvolvimento da Ucrânia no contexto da integração europeia, tornar-se-á uma base estável para mais investigação científica e transformações legislativas no domínio em estudo.

Palavras-chave: Recursos de direito empresarial; pretensão derivada; ação derivativa; parte fraca; relações jurídicas societárias

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The Singapore Convention in the Framework of the Investor-State Dispute Settlement System

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Abstract: The aim of the present contribution is to analyse the plausibility of the extension of the scope of the Singapore Convention on Mediation to include settlement agreements arising out of investor-State mediation. To this end, the paper firstly approaches the ISDS crisis jointly with the UNCITRAL Working Group III reform proposals. Secondly, analyses the use of mediation in the scope of investor-State disputes and the rise of the Singapore Convention on mediation. Finally, argues for the applicability of the Convention to the context of ISDS. In addition, this work comprises the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments.

Keywords: Investor-State Mediation; Singapore Convention; Investor-State Dispute Settlement

Introduction

"Mientras ciertos países latino-americanos están adoptando instrumentos que contemplan el arbitraje internacional como un medio para

> resolver litigios inversor-Estado, otros se han embarcado en una tendencia opuesta de terminar o disminuir el ámbito de aplicación de los compromisos existentes..." Emmanuel Gaillard.[1]

One amidst the remarkable characteristics of a globalised society is the constant flow of foreign investment, channelled through the strong presence of transnational enterprises and their contractual network in different state economies. The regulatory webs that build up the international investment law are characterised by their complexity and mutability, traditionally considering two main assumptions: (i) the existence of Bilateral Investment Treaties, the BITs, systematising general practises and conducts between investors and host States; and (ii) the regulatory complementarity built through the practice of investment arbitration.

The tension between the two poles – host State and foreign investor – had a pendulum effect on the regulation of foreign investments. In the current century, recent developments, particularly related to the high political and financial cost of investment arbitration, have brought as a result the questioning of the very legitimacy of the existing and traditional model of conflict resolution between investors and States and of the foreign investment law itself.

The intense arbitration activity, particularly those arising from the institutional system established by the World Bank in 1965 – through the Washington Convention, specialised in the settlement of investment disputes –, has been the source of significant criticism. The extensive interpretation of the standards of treatment of foreign investors by arbitration tribunals, calling into question the regulatory capacity of national States – as exemplified by the cases "Magyar Farming and others v. Hungary",[2] "ESPF and others v. Italy",[3] "9REN Holding v. Spain"[4] and "CEF Energia v. Italy"[5] – has led to the perception that this system is highly protective of foreign investors to the detriment of the sovereign rights of the host State.

This perspective, together with the investment arbitration crisis, led the United Nations Commission on International Trade Law (UNCITRAL) to deepen studies in

1 GAILLARD, Emmanuel. *Tendencias anti-arbitraje en América Latina. Contratos Internacionales*. Coord. Diego P. Fernández Arroyo/Adriana Dreyzing de Klor, Asunción: CEDEP, 2008, p. 311-315.

2 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 set. 2021.

3 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 set. 2021.

4 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 set. 2021.

5 UNITED NATIONS. *United Nations Conference on Trade and Development*.Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 set. 2021.

the reform of the Investor-State Dispute Settlement which, since 2017, has offered advances in the area – although nothing definitive or concrete has been signed, which leaves relative autonomy to States, through Bilateral Investment Treaties, Free Trade Agreements, Cooperation and Facilitation of Investment Agreements or similar instruments to regulate the matter of foreign investments and dispute resolution. Moreover, initiatives on the use of mediation have been increasingly perceived, albeit they are not that widespread. This is justified by the lack of guarantees that the parties have in relation to the enforcement of international agreements arising from mediation, even though these are characterised by a high degree of enforceability motivated by the voluntariness. As mentioned by Schneider[6] "to talk about mediation and its various modalities is to talk about a multidisciplinary structure of approach to conflict, which requires a comprehensive and systemic look at the conflict, the parties and their interactions".

However, when it comes to public interest – here considered by the participation of a State entity – the guarantees are even narrower. This is where the performance of the Singapore Convention would appear, in case its scope also allows the execution of agreements arising from investment relations, which is the problem that permeates this work. This paper applies the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments.

Firstly, it addresses the crisis of the system of Investor-State dispute settlement, followed by the reform of the UNCITRAL system. Secondly, it proposes the mediation as a suitable proposal for Investor-State dispute settlement. Finally, it traces notes on the Singapore Convention and the application of the Singapore Convention to the Investor-State Dispute Settlement.

1 The Crisis of the Investor-State Dispute Settlement System

The International Investment Law, although highly controversial, is amongst the oldest fields of public international law. Considering the investor-State dispute settlement, the first known investment claims dispute mechanism was the one established by the Jay Treaty (1794) between the United States and Great Britain – which had the aim at maintaining peace among those two States through economic and commercial cooperation. Regarding international investment law, this treaty is particularly relevant because of its dispute resolution system characterised by

[6] SCHNEIDER, Patricia Dornelles. Uma visão sistêmica do procedimento de mediação – As lições do pensamento de Maturana. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 03, n. 06, p. 193-200, jul./dez. 2021. DOI: 10.52028/rbadr.v3i6.11.

mixed-claims tribunals or commissions with sitting arbitrators. That was the United States' primary method of settling international claims.[7]

In the 19th century, the method of gunboat diplomacy arose as a vent of imperialism. Albeit the use of the expression "diplomacy", this dispute settlement mechanism was not in essence peaceful or amicable. In other words, the outcome was based on the nations' power and influence. This way of dispute resolution is based on the demonstration, threat, or use of limited naval force for political objectives.[8]

In the late 19th century, with the advent of the Permanent Court of Arbitration, investors used to request the diplomatic protection of their own countries in order to litigate in the State-to-State Arbitration. Diplomatic protection is considered to be the main procedural mechanism against the lack of compliance in international public law – since it allows the individual to request that his State represent him in judicial or arbitral proceedings in such a way that the two parties are sovereign States. This has proven not to be the best resource because of the likely political and economic disturbances between the host-State and the State giving its diplomatic protection to the domestic investor.

As for Latin America, the Calvo Doctrine is cited – a doctrine manifested by a resistance to the internationalisation of disputes, giving rise to the investor's renunciation of diplomatic protection and its subjection to the domestic regime through the Calvo Clause.[9] According to Moreno Rodríguez,[10] in his private international law course in the Hague Academy, the Calvo Doctrine can be referenced in three main aspects: (i) since sovereign States are free and independent, they cannot suffer interference of any sort by other States, either by force or diplomatically; (ii) foreign investors should receive no better treatment than that accorded to the host States' own nationals. Each State could establish its own standard of treatment, which had to be accepted by foreigners conducting business there; and (iii) settlement should be achieved by the domestic courts of the host State alone.

And furthermore, investors could choose to submit disputes to the domestic courts of the countries receiving investment. But, precisely because of their State nature, those courts offered resistance to condemning the State itself for the benefit of the foreign investor. In this meanwhile, in 1965, within the framework of the World Bank's activities, the Washington Convention took place, establishing the International Centre for Settlement of Investment Disputes (ICSID). The Convention,

7 LILLICH, Richard B. The Jay Treaty Commissions. 37 *St. John's L. Rev.*, n. 260, 1962-1963.

8 MANDEL, Robert. The Effectiveness of Gunboat Diplomacy. *International Studies Quarterly*, v. 30, ed. 1, , p. 59-76, mar. 1986.

9 CAETANO, F. A. K. Direito Internacional dos Investimentos na atualidade: uma análise da posição brasileira, in *Revista Científica do Departamento de Ciências Jurídicas, Políticas e Gerenciais do Uni-BH*, Belo Horizonte, v. III, n. 1, jul. 2010. Disponível em: www.unibh.br/revistas/ecivitas/. Acesso em: 07 fev. 2021.

10 RODRIGUEZ, Jose Antonio Moreno. *The Hague Academy of International Law*. Summer Courses on Private International Law. Private International Law and Investment Arbitration, 2021.

ratified by 156 countries, waives the requirement of diplomatic protection and therefore allows investors direct access (mixed arbitration).

However, recent complaints about the lack of neutrality, impartiality and transparency of the decisions, as well as the simple repetition of judgements, have caused several countries to withdraw from the Washington Convention and to question the legitimacy of investment arbitration – for example Venezuela and Bolivia. According to Sornarajah it is a consequence of the "allegations that investment arbitration is dominated by a select group of arbitrators who usually decide in favour of foreign investors and create expansive law".[11]

Specifically with regard to transparency in investment arbitration, which seems to be one of the main current challenges, it is important to note that some argue that the lack of transparency gives rise to a violation of constitutional principles, such as the right of access to information and documents of public interest, the publicity of decisions and hearings and, outside the constitutional sphere, the requirements for admission of amicus curiae, their respective access to documents and the effectiveness of their participation.[12]

Whereas one of the biggest drivers of the investment arbitration crisis is the transparency factor, UNCITRAL developed in 2014 the "United Nations Convention on Transparency in Treaty-based Investor-State Arbitration" or "Mauritius Convention on Transparency". To date, only 9 countries are party to the Convention, although it has 23 signatures. The main criticism of the Convention, and what helps to justify its very low adherence, is that the provisions are very open and vague so that it is left to the State Party to apply it as it sees fit.

Thus, it is not farfetched to argue that the advocacy and civil society movement has played a much greater and more relevant role in publicising procedures and decisions. This is because it is a matter of public interest, regulatory autonomy and public budget. Foreign direct investment, in its most classic model, has been subject to great criticism by these groups, since it is not uncommon for companies established in the host States to infringe labour or environmental laws in favour of economic improvement.

2 The Reform of the Uncitral System

In 2017, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III brought up the possible reform of investor-State

[11] SORNARAJAH, M. *The international law on foreign investment*. Fourth edition. Cambridge, United Kingdom; New York, USA: Cambridge University Press, 2017.

[12] SCHLEE, Paula. Transparência em arbitragens internacionais investidor-Estado. *Rev. secr. Trib. perm. revis*. ano 3, n. 5, p. 95-113, mar. 2015. Disponível em: http://www.revistastpr.com/index.php/rstpr/article/download/130/122. Acesso em: 12 maio 2021.

dispute settlement (ISDS) mainly based on the aforementioned crisis of ISDS. Among the main concerns at this early stage were: (i) the arbitral process and outcomes; (ii) arbitrators and decision-makers; and (iii) perceptions of States, investors and the public. According to the report[13] for the 34th session, concerns expressed regarding procedural aspects of ISDS include: (i) lengthy duration and extensive cost of ISDS; (ii) lack of transparency in the proceedings; (iii) lack of an early dismissal mechanism to address unfounded claims; and (iv) lack of a mechanism to address counterclaims by respondent States.

In addition, concerns about the outcomes were also perceived, such as relating to the coherence and consistency in topics with respect to investment protection standards, lack of harmonisation in awards – for instance cases relate to a single measure by a State or a similar fact pattern or are based on identical or similar treaty provisions, divergent outcomes have been observed[14] – and finality of the award and review mechanisms. Furthermore, the arbitrators and decision-makers were not left out. The appointment and ethical requirements of those were also pointed out, arguing that:

> Party-appointment of arbitration has, however, been one of the focuses of criticism expressed about ISDS, which relate to the following aspects: (i) Lack of sufficient guarantee of independence and impartiality on the part of the individual arbitrators; (ii) Limited number of individuals repeatedly appointed as arbitrators in ISDS cases; (iii) Absence of transparency in the appointment process; (iv) Some individuals act as counsel and as arbitrators in different ISDS proceedings, with the possibility of ensuing conflicts of interest and/or so-called issue conflicts; (v) Perception that arbitrators are less cognizant of public interest concerns than judges holding a public office; and (vi) Development of third-party funding giving rise to ethical issues (such as possible conflicts of interest between the arbitrators and the funders and confidentiality duties of the funder), as well as procedural concerns (such as the possible control or influence of the funder on the arbitration process, and the allocation of costs).[15]

The 41st session, which happened in November 2021, aimed to discuss the draft[16] of the Code of Conduct and its means of implementation and enforcement.

[13] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 set. 2021.

[14] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 set. 2021.

[15] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 set. 2021.

[16] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Forty-one session. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/a_cn_9_1086_advance.pdf. Acesso em: 31 jan. 2021.

In this sense, the status of work of UNCITRAL Working Group III comprises the initial drafts for comments and preparation and workplan for 2021 and 2022. The initial drafts for comments[17] are made of three main topics, which are the "assessment of damages and compensation", "mediation and other forms of alternative dispute resolution (ADR)" and, finally, the "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters".

Moreover, the list of initial drafts in preparation[18] comprises the "appellate mechanism", the "cost of establishing a permanent body", the "dispute prevention and mitigation", the "enforcement of decisions by a court or appellate body", the "procedural rules reform and cross-cutting issues", the "selection and appointment of arbitrators" and "treaty interpretation". Although these are early stage initiatives and the final project will take years to come out, this demonstrates a concern and an awareness of the status quo regarding ISDS.

3 Mediation as a Suitable Solution for Investor-State Dispute Settlement

Mediation, despite the specific characteristics applied to each different concept and kind of mediation procedure, is generally described as a process of dispute resolution involving a third, neutral and impartial party. This amicable method has been used since ancient times – even before the creation of the law and of the States. For instance, "mediation existed in the Middle East hundreds of years ago. In fact, the notion of deferring to a neutral and objective third-party for a decision towards the resolution of a dispute is well steeped in Arabic/Islamic traditions".[19]

Likewise, peace mediation or facilitation is well known as a means of conflict resolution in the context of wars. Richmond[20] highlights that "during the Cold War, and since, international mediation has become a well-recognised tool of conflict management and diplomacy, used by the US [...], the UN, a range of international

17 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Disponível em: https://uncitral.un.org/en/working_groups/3/investor-state. Acesso em: 04 set. 2021.

18 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Working Group III (Investor-State Dispute Settlement Reform). Disponível em: https://uncitral.un.org/en/working_groups/3/investor-state. Acesso em: 04 set. 2021.

19 FATAHI, Negin. The History of Mediation in The Middle East and Its Prospects for the Future. *Kluwer Mediation Blog*. Disponível em: http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/. Acesso em: 01 jan. 2022.

20 BERCOVITCH, 1992 *apud* RICHMOND, Oliver P. A genealogy of mediation in international relations: From 'analogue' to 'digital' forms of global justice or managed war? *Cooperation and Conflict Journal*. v. 53, n. 3, p. 301-319, set. 2018. Disponível em: https://www.jstor.org/stable/48512978?read-now=1&refreqid=excelsior%3A5daff20f7dd5083afac126b49fb6ddce&seq=1#page_scan_tab_contents. Acesso em: 04 fev. 2022.

non-governmental organisations (INGOs) and private actors". As noted by Mansur[21] "as peacemakers, mediators have abundant opportunities to face and embrace the suffering of other people", especially relevant for peace mediation. Although mediation had undergone transmutations, especially when referring to the rediscovery and exploration of alternative dispute resolution in the USA in the early 1970s, today, more than ever, mediation is seen as an effective method to solve international conflicts.

The founding instrument of the United Nations, namely, the UN Charter, an instrument of soft law globally binding, provides, and encourages, in its article 33, the peaceful mechanisms, as well as self-composition, as appropriate means in the resolution of international conflicts. Therefore, mediation, as an extrajudicial mechanism, self-compositive and based on the interests of the parties emerges as a consensual method of dispute resolution very effective.

Marieke Koekkoek, explains that

> Mediation is a purely consensual process; parties are free to withdraw themselves from the process at any time. A mediation settlement is voluntarily reached. It is likely that an agreement constructed by the parties themselves in which they have been given the flexibility to defend all their interests, will be perceived as fair.[22]

This is an expression of voluntariness – a core principle of mediation – and signifies that the parties are free to withdraw from the procedure at any time and the agreement, which is designed by them, tends to be considered fair as it is made on the basis of their interests. Thus, the sealed agreements largely embrace creative and durable solutions. Furthermore, mediation tends to be faster and less costly than arbitration, which is why it has been a widely used option for sealing international commercial disputes. In this sense, based on data from the Global Pound Conference,[23] J. Stipanowich reports that efficiency, given by the ratio of time and cost, is the most influential factor in the choice between dispute resolution processes.

In the scope of international commerce, mediation has been a strong tool towards the preservation of the commercial partnership alongside the personal relationship between the parties, besides being cost and time efficient. It is surely a

[21] MANSUR, Maria Luisa. Viktor Frankl and the Art of Mediation. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 02, n. 04, p. 133-143, jul./dez. 2020.

[22] KOEKKOEK, Marieke. *Mediation of investor - State disputes in China: Mediation as complementary method of dispute settlement to arbitration in investor - State disputes*. Thesis (L.L.M. em Direito Internacional do Comércio e Direito Internacional dos Investimentos) – University of Amsterdam. Amsterdã, 2012.

[23] STIPANOWICH, T. J. What Have We Learned from the Global Pound Conferences? *Kluwer Arbitration Blog*, Wolters Kluver. 2017. Disponível em: http://arbitrationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/. Acesso em: 19 jun. 2021.

practice that has great space in the bigger international ADR chambers, such as the International Chamber of Commerce (ICC) and the Vienna International Arbitration Centre (VIAC). Moreover, the United Nations Commission on International Trade Law (UNCITRAL) developed its Model Law on International Commercial Mediation – that amended the past model law on conciliation – in 2002.

According to Nadja Alexander,

> UNCITRAL model laws are legislative texts which have been adopted by resolution of the UN General Assembly as a model for members and other states to adopt as part of domestic legislation. Model laws may be adopted without amendment by enacting states. Alternatively, enacting states may elect to amend parts of a model law so that it better suits local substantive and procedural legal requirements.[24]

This law "has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement".[25] The Commission also structured its mediation rules (updated in 2021)[26] and released the UNCITRAL Notes on Mediation (2021).[27] Finally, in order to establish the maestro of the orchestra, responsible for guiding its practical effectiveness, UNCITRAL developed the Singapore Convention on Mediation (2019) – which is responsible for guiding the enforcement of settlement agreements arising out of international mediation.

The ICC statistics have shown that, in 2020, its International Centre for ADR "received a total of 77 new cases registered under the Mediation Rules, Expert Rules, Dispute Board Rules and DOCDEX Rules – the largest number of cases registered in a year".[28] As of mediation itself, there were a record number of 45 new requests[29] involving 112 parties from 39 countries.

[24] ALEXANDER, Nadja. UNCITRAL and International Mediation. International and Comparative Mediation, *Global Trends in Dispute Resolution*, Holanda: Kluwer Law International, v. 4, p. 337-384, 2009.

[25] UNITED NATIONS. *United Nations Commission on International Trade Law*. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018. Disponível em: https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation. Acesso em: 04 fev. 2022.

[26] UNITED NATIONS. *United Nations Commission on International Trade Law*. UNCITRAL Mediation Rules. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_mediation_rules_advance_copy.pdf. Acesso em: 04 fev. 2022.

[27] UNITED NATIONS. *United Nations Commission on International Trade Law.* UNCITRAL Notes on Mediation (2021). Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2107071_mediation_notes.pdf. Acesso em: 04 fev. 2022.

[28] INTERNATIONAL CHAMBER OF COMMERCE. *ICC Dispute Resolution 2020 Statistics*. Disponível em: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf. Acesso em: 04 fev. 2022.

[29] INTERNATIONAL CHAMBER OF COMMERCE. *ICC Dispute Resolution 2020 Statistics*. Disponível em: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf. Acesso em: 04 fev. 2022.

Specifically regarding investment relations, it is well known that investment treaties often provide for trying amicable solutions, whether in the cooling-off period or not, before going to adjudication. For instance, the US model of bilateral investment agreements[30] has shown a tendency of adopting third party consultations before entering into an arbitration procedure – this can also be seen as a type of combined dispute board, which is also considered a peaceful method of conflict prevention.

It is also a common practice, mainly when it comes to commercial contracts, the establishment of an escalation ADR clause that includes a series of steps the parties should follow when a conflict arises – usually negotiation and mediation are the first steps, while arbitration or judicial litigation are the last ones. In investment agreements, especially those that are newer, one can foresee a strong tendency towards the use of mediation. The European Union – setting aside its initiative on the Multilateral Investment Court and its reluctance to the Singapore Convention – has been including investor-State mediation in all agreements comprising the new generation of free trade agreements.

The United States-Mexico-Canada Agreement (USMCA), that replaced the NAFTA, also has provisions on the use of mediation in the article 31.5:

> 1. Parties may decide at any time to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation, or mediation.
>
> 2. Proceedings that involve good offices, conciliation, or mediation shall be confidential and without prejudice to the rights of the Parties in another Proceeding.[31]

The Energy Charter Secretariat has evolved, in 2016, its guide on investment mediation[32] and in there highlighted the feasibility of mediation to be applied as a part of the Energy Charter Treaty (ECT) dispute settlement mechanism. In relation to procedural rules, the International Bar Association (IBA) designed in

[30] Rwanda - United States of America BIT (2008), United States of America - Uruguay BIT (2005), Bahrain - United States of America BIT (1999), Mozambique - United States of America BIT (1998), Lithuania - United States of America BIT (1998), Azerbaijan - United States of America BIT (1997), Jordan - United States of America BIT (1997), Croatia - United States of America BIT (1996), Honduras - United States of America BIT (1995) and Latvia - United States of America BIT (1995).

[31] USMCA. *Chapter 31: Dispute Settlement. Section A: Dispute Settlement*. Disponível em: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31%20Dispute%20Settlement.pdf. Acesso em: 04 fev. 2022.

[32] ENERGY CHARTER SECRETARIAT. *Guide on Investment Mediation*. 2016. Disponível em: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf. Acesso em: 04 fev. 2022.

2012 the first initiative: The IBA 2012 Rules on Investor-State Mediation.[33] These rules "establish clear guidelines for the commencement of mediation and for the appointment of a mediator in absence of party agreement".[34] Rafael Morek, being positive about it, argued that the Rules contain "many standard clauses seen also in other institutional mediation rules, the Rules provide also for some innovative regulations, including the rule on 'Mediation Management Conference' (Article 9)".[35]

In 2018, the International Centre for Settlement of Investment Disputes (ICSID), being aware of the ISDS crisis and the success of international commercial mediation, developed its own investor-State mediation institutional rules.[36] These rules, however, are the object of the working papers on amendment of ICSID rules – for example with regard to the registration of requests and the resignation and replacement of mediators.

It is noteworthy to mention that the Centre has taken many initiatives to promote the practice through training and partnerships. Recently, in March 2021, ICSID and the Singapore International Mediation Centre entered into a cooperation agreement, the first for ICSID with a centre that is exclusively focused on mediation.[37] Purposely, ICSID in its 2021 Annual Report also recognizes that there is a "growing number of international investment agreements that specifically refer to mediation in their dispute settlement provisions to resolve investor-State disputes".[38]

Nonetheless, as far as known, there is a lack of investment mediation cases. This situation can be motivated by (i) the utilisation of ad hoc procedures based on strict confidentiality between the State and the investor; (ii) the use of institutional commercial mediation to settle investment disputes; and (iii) the difficulty to enforce international negotiated agreements that came out of a mediation process.

The most famous case of investor-State mediation is a result of the aforementioned second reason. In 2016, the ICC administered between a french investor and the State of Philippines – where the investor called the application of the

[33] INTERNATIONAL BAR ASSOCIATION. *IBA Rules for Investor-State Mediation*. 2012. Disponível em: https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C. Acesso em: 04 fev. 2022.

[34] ALI, Shahla F.; REPOUSIS, Odysseas G. Investor-State mediation and the rise of transparency in international investment law: opportunity or threat? *Denver Journal of International Law and Policy*, v. 45, n. 2, 2018. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216254. Acesso em: 04 fev. 2022.

[35] MOREK, Rafael. Investor-State Mediation: New IBA Rules. *Kluwer Mediation Blog*. 2012. Disponível em: http://mediationblog.kluwerarbitration.com/2012/11/09/investor-state-mediation-new-iba-rules/. Acesso em: 04 fev. 2022.

[36] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *Investor-State Mediation*. Disponível em: https://icsid.worldbank.org/services-arbitration-investor-state-mediation. Acesso em: 24 abr. 2021.

[37] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *2021 Annual Report*. Disponível em: https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR21_CRA_bl1_web.pdf. Acesso em: 26 out. 2021.

[38] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *2021 Annual Report*. *Idem*.

ICC Mediation Rules and the IBA Investor-State Mediation Rules.[39] Unfortunately, the mediation did not terminated in an agreement and, despite the difficulty faced by the case managers to contact a State and its right representative in a mediation, scholars have defended that this process helped the parties to further their communication and relationship.[40] In addition to this first known case, there were a few more like Olyana Holdings v. Rwanda, Pan African Burkina v. Burkina Faso, Odebrecht-Tecnimont-Estrella Consortium and the Dominican Republic and its state-owned electricity company, Corporación de Empresas Eléctricas Estatales (CDEEE)[41] – but as Andrea Kupfer Schneider and Nancy Welsh stated it is still not clear if the parties involved reached an agreement and if the mediation was a formal investor-State mediation.[42]

Furthermore, Frauke Nitschke referred to seven considerations that the parties should consider when thinking of investment mediation:[43] (i) willingness to engage in negotiations; (ii) comprehensive assessment of the dispute; (iii) analysis of the stakeholders in relation to the dispute and stakeholders for a possible solution; (iv) desired structure/design/form of the dispute resolution process; (v) desire to maintain control of the outcome; (vi) financial resources to cover the costs of the dispute resolution process; and finally (vii) desired time frame to resolve the dispute.

And, although arbitration is currently the main method of dispute resolution in the investment field, it tends to be closer and closer to the ordinary judicial procedure. This is so true that, as Julien Cazala teaches, the desire of States to regain control of arbitral tribunals was reflected by the development of investment arbitration, which directly impacted the provisions present in treaties, especially BITs:

> le développement de l'arbitrage en matière d'investissement a incontestablement rendu nécessaire un raffinement progressif des

[39] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 fev. 2022.

[40] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 fev. 2022.

[41] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 fev. 2022.

[42] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 fev. 2022.

[43] NITSCHKE, Frauke. Part I – How to Assess the Suitability of Mediation for Investment Disputes. 2021. *Kluwer Mediation Blog*. Disponível em: http://mediationblog.kluwerarbitration.com/2021/10/06/part-i-how-to-assess-the-suitability-of-mediation-for-investment-disputes/. Acesso em: 04 fev. 2022.

> énoncés conventionnels, traduisant une volonté de reprise en main par les États face à des tribunaux arbitraux dont certaines audaces ont parfois réussi à inquiéter tant les gouvernements que les investisseurs et plus largement la société civile.[44]

Certainly the objective of this contribution is not to defend the inadequacy of arbitration to disputes between investors and the State, on the contrary, by the classical theory of Frank Sander, the so-called "multidoor courthouse", it is possible that, by the characteristics and distinctions of each dispute, the most appropriate method is arbitration. Likewise, it is plausible that it is mediation or even hybrid methods – those that integrate mediation and arbitration. Therefore, it is well known that mediation enjoys disrepute in international society since agreements, although with high compliance rates, were not enforceable when one party refused to comply with it. With the advent of the Singapore Convention, this panorama tends to change as the Convention offers mechanisms that aim to facilitate such enforcement.

4 First Lines on the Singapore Convention

The Singapore Convention, which, after 46 signatures, entered into force on 12 September 2020, aims to intensify the progressive harmonisation and unification of international trade law, observing the interests of all international players, especially developing countries. The adoption of this tool is aimed at complementing the existing legal panorama regarding international mediation and seeks to harmonically develop international economic relations.

According to Manson,[45]

> The Convention will reduce/remove trade disputes as obstacles to trade flows by encouraging companies engaged in international trade to use mediation to resolve them – mediation whose outcomes will be enforceable across borders. Without the Convention, the terms of agreements, even mediated ones, between parties in different countries are treated as mere domestic contracts that are rarely enforceable across borders.

For such, its main characteristics are: i) in principle, it applies only to international commercial agreements resulting from mediation (art. 1, 1); ii) it does

[44] CAZALA, Julien. La réforme de l'arbitrage d'investissement dans l'Accord Canada – États-Unis – Mexique devant se substituer à l'Accord de libre-échange nord-américain. *Cahiers de l'arbitrage - Paris Journal of International Arbitration*, n. 4, p. 782-790, 2019.

[45] MASON, Paul Eric. A Convenção de Cingapura e seus benefícios para o Brasil. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 02, n. 04, p. 181-193, jul./dez. 2020.

not apply to agreements that are enforceable as judgements or arbitral awards (art. 1, 3); and iii) it also does not apply to settlement agreements concluded for personal, family or domestic purposes, as well as agreements arising from family, inheritance or labour law (art. 1, 2).

According to Butlien, the Convention "is best viewed as a solution to the main barrier that hampered the use of mediation in settling international disputes",[46] that is, the possible failure to comply with the mediated settlement agreement. And failing such compliance or a mechanism that enforces this compliance, the parties would rely on arbitration or court proceedings anyway. It is also noteworthy to mention that, despite the mediation is characterised by voluntariness and, therefore, the agreements are more likely to be complied upon, in the international context the situation changes – especially when it comes to the presence of a State.

Moreover, the scope of the Singapore Convention is to become an essential instrument in the facilitation of international trade and the promotion of mediation as an appropriate and effective method of resolving commercial disputes. The Convention meets the main concern of the parties with regard to international mediation, which is the difficulty of enforceability when the parties disagree on this issue. Thus, in order to make the agreement binding and enforceable, in a simplified manner, it intends to be for mediation what the 1958 New York Convention is for arbitration: a catalyst effect for change and promotion of acceptance.

A research conducted by the professor S. I. Strong, in 2014, with many practitioners, suggested that

> international commercial mediation and conciliation may be developing along the same path as international commercial arbitration. At one time, international commercial arbitration was extremely rare, with a significant expansion in the number of proceedings only occurring after the adoption of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958.[47]

Hioureas goes in the same direction and argues that "international arbitration has been preferred over international mediation. This is in part because the widely adopted New York Convention provides a predictable framework for the

[46] BUTLIEN, Robert. The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation. *Brooklyn Journal of International Law.* 46. n. 1, p. 183-214, 2020.

[47] STRONG, S. I. Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation. *Legal Studies Research Paper Series Research Paper.* n. 2014-28. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. Acesso em: 04 fev. 2022.

recognition and enforcement of arbitral agreements and awards".[48] Furthermore, senior contracting parties consider using mediation since, on the verge of a dispute, parties tend to terminate the business relationship. However, mediation, for all its attributes, provides a forward-looking view aimed at maintaining these relationships.

5 The Singapore Convention and the Investor-State Dispute Settlement

The Singapore Convention, despite expressly providing that it only applies to disputes arising from international trade, may mean a paradigm shift in the resolution of disputes between investors and states. This is because these disciplines tend to come closer together, given the fine line between international investment law and international trade law. This scenario is, in fact, what happens in practice.

Although, due to the World Trade Organisation crisis and the need for structural reforms, Free Trade Agreements are losing some space in international society, they still make up a significant portion of the world economy. And, due to the challenges brought about by digitalisation, the new face of geopolitical conflicts and the pressing need for a more sustainable trade, the largest trade agreements also bring in their scope the matter of direct foreign investments.

The main examples are the Mercosur-European Union Agreement – which, despite not being in force, has been negotiated for over 20 years, which is the reason why the interconnection between the matters in time is proven, the European Union and China Agreement, the European Union and Canada Agreement and the European Union and the Association of Southeast Asian Nations (ASEAN) Agreement. All examples deal with commercial treaties that bring among their main objectives the increase of the flow of investments.

Thus, at least half of the aforementioned agreements expressly provide for investment mediation as an appropriate means for resolving such disputes. And those that do not bring it directly, defend the use of consensual means even before the instauration of the arbitration or judicial procedure. In light of the urgency for a concise international investment law and the rise and greater acceptability of international mediation, the International Bar Association and the ICSID, the international centre for investment dispute resolution, have coined their own investor-state mediation rules – as mentioned before in the text.

[48] HIOUREAS, Christina. The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward. *Berkeley Journal of International Law*, v. 37, n. 2, p. 215-224, 2019.

That is, States have increasingly sought to develop this practice so as to require the ICSID, the main investment dispute resolution centre in the world, to create new rules on investor-State mediation. In response, ICSID has announced that it is developing a completely new set of mediation rules, which take investor and state proposals into account and are designed to expand mediation capacity. Moreover, the already existing rules define a complementary relationship to the existing rules of institutional arbitration in this Centre. It is extremely valid to point out that the IBA rules differ from the ICSID rules since the former, soft law, may be applied to institutional or ad hoc procedures.

Meanwhile, in her doctoral defence at the University of Paris Ouest, Olivia Danic points out that "le droit international général a montré son inefficacité à protéger les investissements étrangers. Même si certains standards et normes existaient, ils n'ont pu empêcher la vague de nationalisation qui a suivi la décolonisation". In other words, it appears that even with the existence of standards and principles that guide this branch, international law is inefficient in protecting foreign direct investments.

Thus, with the help of the Singapore Convention and considering the crisis in the system of investment dispute resolution and, above all, arbitration, the protection of the rights of investors and receiving States can be carried out in a less costly, timely manner, without putting an end to the existing long-term commercial relationship, as the Convention facilitates and simplifies the enforcement procedure of agreements arising from mediation.

The cited research conducted by professor Strong also points out that disputes involving an ongoing relationship are definitely amenable to mediation,[49] especially considering the opinion of the great majority (74%) of the participants in his survey. Also, one can also argue that disputes involving parties from two different countries or cultures can be better settled through mediation or conciliation. That is because the process of communication – which could have been prejudiced by the cultural differences – is facilitated by the acting of an expert mediator.

Joséphine Hage et al. have spoken about how "the missing third piece in the international dispute resolution enforcement framework", here the Singapore Convention, can promote the international economic relations[50] – stating also that "three specific regions could benefit from the entry into force of the Singapore

[49] STRONG, S. I. Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation. *Legal Studies Research Paper Series Research Paper*, n. 2014-28. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. Acesso em: 04 fev. 2022.

[50] CHAHINE, Joséphine Hage; LOMBARDI, Ettore M.; LUTRAN, David; PEULVÉL, Catherine. The Acceleration of the Development of International Business Mediation after the Singapore Convention. *European Business Law Review*, v. 32. n. 4. 2021. p. 769-800.

Convention: the Asia-Pacific are, the region covered by the BRI [Belt and Road Initiative] and Europe facing Brexit".[51]

The World Investment Report 2021, provided by the United Nations Conference on Trade and Development (UNCTAD) states that the top 10 host economies of FDI inflows are the United States, China, Hong Kong (China), Singapore, India, Luxembourg, Germany, Ireland, Mexico and Sweden. This data shows that all the specific regions cited by the aforesaid research comprise, precisely, those 10 countries (and also the others pointed by the UNCTAD report).

In conclusion, likewise as argued by Hage et al., the Singapore Convention was the missing piece of the puzzle. Investment disputes usually involve long relationships, with culturally different parties, a number of stakeholders and tends to be time and cost consuming, mainly with regards to international investment arbitration. Therefore, if the application of the Convention to negotiated investment agreements arising out of an investment mediation is feasible, then it is reasonable to expect an improvement in the ISDS crisis and also in the investment and economic relations worldwide.

Conclusion

A highly controversial shaping factor of the international economy has been the foreign investment. Yet, data from the United Nations Conference on Trade and Development elucidates that there are more than 2200 Bilateral Investment Treaties in force and more than 300 treaties with investment provisions also in force.[52] Those comprises likewise the new generation of free trade agreements, including the new treaties signed by the European Union with the world's leading economic powers. It is not reasonable to expect that the conflicts arising out of these treaties would be perfectly settled by the means of investment arbitration considering its so-called lack of legitimacy and that many countries have withdrawn from the ICSID Convention.

It is not by chance that the UNCITRAL and the ICSID are working together in promoting the reform of the ISDS system and in bringing out alternatives to those who are not willing to settle their disputes using investment arbitration. The international society is aware of the fact that mediation is increasingly gaining relevance through trade relations but not limited to. ICSID is working hard to foster

[51] CHAHINE, Joséphine Hage; LOMBARDI, Ettore M.; LUTRAN, David; PEULVÉL, Catherine. The Acceleration of the Development of International Business Mediation after the Singapore Convention. *European Business Law Review*, v 32, n. 4, 2021. p. 769-800.

[52] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Investment Policy Hub*. International Investment Agreements. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 set. 2021.

investor-State mediation and is taking into account the recent developments in international mediation favoured by the Singapore Convention on mediation.

Nonetheless, the scope of application of this Convention is adamant that it will only apply to commercial disputes. This is the focus of this paper. That is, this paper addresses the fact that currently the practical distinctions between trade and investment international relations are faint. It is not rare to find trade agreements with chapters on foreign investment. And it is virtually not rare to find trade relations within investment relations (or related to). The web of legal relations that comprise these two subjects forms what is called international economic law, one of the most relevant areas in the international context.

Thus, the spread of mediation among investment disputes would be easier and faster if the enforcement of these agreements could rely on the Singapore Convention. In this sense, it is worth noting that mediation proposes to be a less time-consuming and less costly dispute resolution technique than arbitration – which increases its practical efficiency. All this, in line with recent ICSID initiatives, helps to prove the necessary relationship between the factors.

Finally, this article uses the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments, and firstly has approached the ISDS crisis and the subsequent reform of the UNCITRAL investment system. This contribution has also addressed the use of mediation in investment disputes and has traced out the Singapore Convention on mediation and its applicability to investor-State dispute settlement.

Resumo: O intuito da presente contribuição é analisar a plausibilidade da extensão do escopo da Convenção de Cingapura sobre Mediação para incluir acordos decorrentes da mediação investidor-Estado. Para este fim, o documento aborda primeiramente a crise do sistema de resolução de controvérsias entre investidores e Estados, em conjunto com as propostas de reforma do Grupo de Trabalho III da UNCITRAL. Em segundo lugar, analisa o uso da mediação no âmbito das disputas investidor-Estado e o surgimento da Convenção de Cingapura sobre Mediação. Finalmente, argumenta a aplicabilidade da Convenção ao contexto das disputas de investimento, considerando sua complexidade. Ademais, este trabalho compreende a metodologia hipotético-dedutiva, através da análise de textos normativos, casos e instrumentos internacionais.

Palavras-chave: Mediação investidor-Estado; Convenção de Singapura; Sistema de Resolução de Controvérsias entre Investidores e Estado

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Alternative ways of resolving shareholder disputes in property relations in Ukraine and the EU

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Abstract: In the conditions of a war caused by the invasion of Russian troops on the territory of Ukraine in February 2022, an unstable exchange rate of the dollar and euro, the suspension of various structures. After such a full-scale invasion, Ukraine will need more than a decade to restore the economy. All business entities must work and ensure economic recovery. For the proper functioning of joint-stock companies, it is necessary that their activities are not hindered by the delayed resolution of disputes in court. It is necessary to settle disputes that arise in joint-stock companies using alternative

methods. The purpose of this study is to determine the relevance of alternative ways of resolving shareholder disputes in property relations in Ukraine and the European Union, to introduce in Ukraine a positive European Union practice of resolving disputes by alternative methods, and to provide proposals for the regulation of this institution at the legislative level by adopting the relevant law. The study uses the following methods of scientific cognition in a complex: historical, legal, hermeneutical-semantic, system-structural, structural-functional, complex analysis, modelling. In particular, alternative ways to resolve disputes are reconciliation, negotiations, mediation, arbitration. The study of alternative ways of resolving shareholder disputes in property relations in Ukraine and the European Union is economically related, as resolving disputes without recourse to the courts would save the company's finances and allow the dispute to be resolved faster. This would allow the joint-stock companies to work properly and invest in the Ukrainian economy.

Keywords: Alternative ways of dispute resolution; reconciliation; negotiations; mediation; arbitration

1 Introduction

As a result of the hybrid (and since February 24, unfortunately, full-scale) war, which has been going on for a long time, business in Ukraine suffers from an unstable economic situation, which contributes to the unstable exchange rate of the hryvnia against the dollar and euro, the inability to develop and conclude international agreements on the export of goods, and this also negatively affects the attraction of funds to the Ukrainian economy since investors do not want to invest in a country that is threatened by Russian aggression. Russia, as an occupier, has been threatening a hybrid war for a long time, so today the business of Ukraine is in poor condition. With the beginning of a full-scale war and the occupation of certain territories belonging to Ukraine, the economy was dealt a crushing blow. In addition, the COVID-19 pandemic had a negative impact on the economic situation in the country and on business entities, during which the latter were forced to suspend their activities. It is necessary to make Ukraine attractive for investment by adopting relevant regulations aimed at quickly restoring the activities of business entities, expanding their areas of activity, and properly protecting the interests of Ukrainian investors and investors from other countries to revive the country and maintain its economy.[1] The above allows investors to invest in joint-stock companies and be sure of the proper protection of their investments.[2] It is also necessary to pay attention to the effectiveness of dispute resolution between business entities.[3] It is important to disseminate dispute resolution through

1 SILVESTRI, 2017, p. 77-90.
2 BIELOV; HROMOVCHUK, 2021.
3 KARPENKO, 2020, p. 28-36.

alternative means, which would save time that can be used for the development and implementation of activities to generate additional profits.[4]

Worldwide, disputes that arise in joint-stock companies are often settled using alternative methods, without resorting to judicial instances. Such methods contribute not only to dispute resolution but also to saving money that must be spent when applying to the judicial authorities (court fees and legal support costs) and time spent on passing court procedures. During the trial, at least one of the parties to the dispute remains dissatisfied with the result. When resolving disputes through alternative means of settlement, the interests of all parties to the case can be fully satisfied and businesses are able to save time and money. Alternative dispute resolution methods have already become popular in the European Union (EU) Member States. In this regard, the parties are increasingly turning to alternative methods. Ukraine has not adopted a comprehensive regulation on the use of alternative dispute resolution methods. Nevertheless, there are separate regulations that partially define the specific features of certain alternative dispute resolution methods.[5] Despite this, in Ukraine, alternative ways of resolving disputes have not gained popularity, the parties are wary of them.[6]

The purpose of this study is to determine the relevance of alternative ways of resolving shareholder disputes in property relations in Ukraine and the EU, to introduce in Ukraine a positive EU practice of resolving disputes by alternative methods, and to provide proposals for the regulation of this institution at the legislative level by adopting the relevant law.

2 Analysis of Previous Studies

Alternative methods of resolving disputes between shareholders in Ukraine are being explored by a large number of Ukrainian researchers, including R. Karpenko,[7] Yu. O. Kotvyakovsky,[8] I. V. Novoselska and K. R. Dobkina,[9] O. Shevchuk and I. Teslyuk,[10] O. Yu. Minyu and V. O. Sokol,[11] N. V. Shishka,[12] O. Karmaza,[13] M. Arakelian, O. Ivanchenko, O. Todoshchak,[14] *et al*. Alternative ways of resolving disputes between shareholders in EU member states are being explored by such

4 KOTVYAKOVSKY, 2021.
5 NOVOSELSKA; DOBKINA, 2020, p. 9-15.
6 SHEVCHUK; TESLYUK, 2018.
7 KARPENKO, 2020, p. 28-36.
8 KOTVYAKOVSKY, 2021.
9 NOVOSELSKA; DOBKINA, 2020, p. 9-15.
10 SHEVCHUK; TESLYUK, 2018.
11 MINYUK SOKOL, 2021, 195-200.
12 SHISHKA, 2021, p. 297-301.
13 KARMAZA, 2020, p. 13-18.
14 ARAKELIAN; IVANCHENKO; TODOSHCHAK, 2020, p. 60-67.

researchers as O. Th. Johnson,[15] F. A. Cona,[16] M. McManus and B. Silverstein,[17] E. Silvestri,[18] W. H. Rechberger,[19] I. Palaikė,[20] T. Gábriš,[21] K. Ervasti,[22] *et al*.

R. Karpenko[23] examines the chronological stages of mediation development in Ukraine and Europe and explains the positive aspects of dispute resolution using such an alternative method as mediation. Yu. O. Kotvyakovsky,[24] investigating the settlement of disputes between business entities, notes that not all disputes need to be considered in court. Such consideration causes additional difficulties for the parties in the form of time, money. The researcher explores such alternative ways of dispute resolution as arbitration and mediation. The author notes that with the active use of these procedures, representatives of business entities will file fewer lawsuits in commercial courts. I. V. Novoselska and K. R. Dobkina[25] explore alternative ways of dispute resolution in Ukraine, consider the experience of other countries and the positive aspects of using these methods. O. Shevchuk and I. Teslyuk[26] note that the judicial system is gradually becoming unpopular. In turn, alternative ways of dispute resolution are gaining popularity. Researchers consider their positive, negative aspects, and note that alternative methods are a relevant dispute resolution both at present and in the future. Minyu and V. O. Sokol[27] investigate such an alternative method of dispute resolution between business entities as the mediation, in particular, they consider positive aspects in the case of using this procedure.

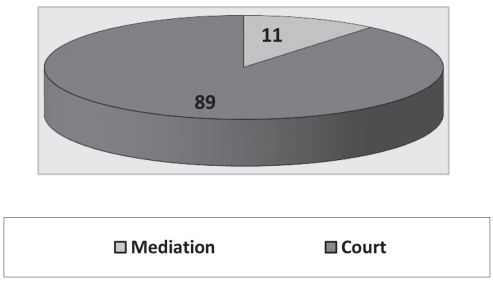
N. V. Shishka[28] explores alternative ways of resolving disputes, including mediation, and determines what is included in the concept. The author notes that mediation can be applied by contacting a mediator, without going to court, and by filing a claim in court directly. O. Karmaza[29] considers such alternative ways of dispute resolution as the mediation and the negotiation, in particular, the aspects in which these procedures may differ and be similar to each other. M. Arakelian, O. Ivanchenko, O. Todoshchak[30] indicate that the world is increasingly resorting

15 JOHNSON, 1993.
16 CONA, 1997.
17 MCMANUS; SILVERSTEIN, 2011, p. 100-105.
18 SILVESTRI, 2017, p. 77-90.
19 RECHBERGER, 2015, p. 61-70.
20 PALAIKĖ, 2014.
21 GÁBRIŠ, 2018, p. 74-94.
22 ERVASTI, 2018, p. 20-30.
23 KARPENKO, 2020, p. 28-36.
24 KOTVYAKOVSKY, 2021.
25 NOVOSELSKA; DOBKINA, 2020, p. 9-15.
26 SHEVCHUK; TESLYUK, 2018, p. 77-81.
27 MINYUK; SOKOL, 2021, p. 195-200.
28 SHISHKA, 2021, p. 297-301.
29 KARMAZA, 2020, p. 13-18.
30 ARAKELIAN; IVANCHENKO;TODOSHCHAK, 2020, p. 60-67.

to dispute resolution through alternative means, using the Internet. Disputes are settled through alternative procedures online in the shortest terms. Accordingly, the parties do not need to spend extra time resolving inconsistencies that arise, the procedure takes place promptly.

O.Th. Johnson[31] notes that the parties apply to the court if there is no general agreement to resolve disputes using alternative methods. This agreement is mandatory for the settlement of disputes in a pre-trial procedure. Both parties must provide their agreement to resolve the dispute using one of the alternative methods. Moreover, the consent of the parties is required to resolve an international dispute in court. The researcher specifies that if a certain category of cases does not require consent to resolve the dispute in court, the parties do not always seek to resolve the dispute in this way. F. A. Cona[32] considers the Internet to be one of the most important achievements in the world because it allows not only communicating with other people but also resolving disputes despite borders. In particular, disputes can be resolved using alternative online settlement methods. This is extremely important for international disputes and in cases where it is necessary to travel a long distance to get to the place of dispute resolution. Worldwide, the Internet is often used to resolve disputes by alternative methods, since it is extremely convenient to resolve disputes online. M. McManus and B. Silverstein[33] investigated alternative dispute resolution methods in the United States. Researchers established that in the United States such methods are mediation and arbitration. These procedures are widely used. They are being resorted to more often because the results of dispute resolution are positive and the procedure itself has been improved and is constantly evolving. In particular, these alternative methods are used to resolve international cases that must be resolved in the shortest possible time (Figures 1-3).

Fig. 1 – Dispute resolution in California in 2011



[31] JOHNSON, 1993.
[32] CONA, 1997.
[33] MCMANUS; SILVERSTEIN, 2011, p. 100-105.

Fig. 2 – Dispute resolution in New York in 2011

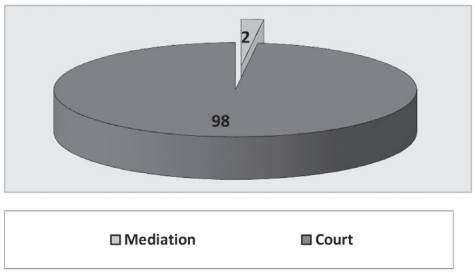
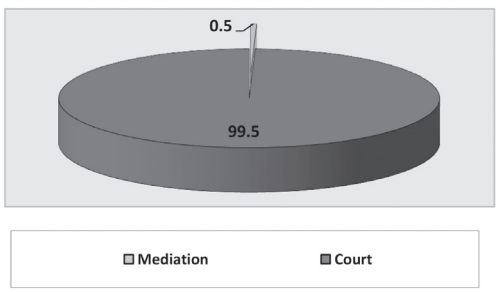


Fig. 3 – Dispute resolution in Europe in 2011

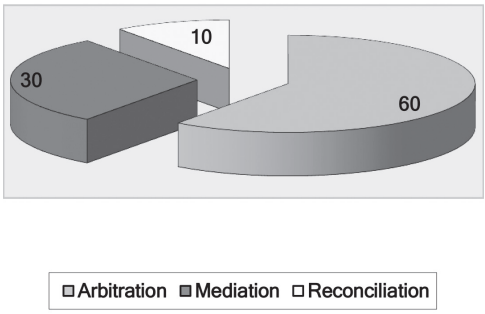


E. Silvestri[34] explores alternative dispute resolution in Italy and notes that the parties to the dispute choose the method they trust the most. However, in Italy, a small part of enterprises uses alternative methods to resolve disputes, since most of them simply do not understand these dispute resolution procedures and have a negative attitude towards them. The author determines the following procedures for the settlement of disputes in Italy: mediation, negotiations, and reconciliation. These dispute resolution procedures can be either compulsory or applied with the consent of the parties. W. H. Rechberger[35] explores alternative dispute resolution methods in Austria, such as mediation, arbitration, and reconciliation. In Austria, preference for dispute resolution is given to arbitration, which is most often applied. The mediation procedure takes the second place. The reconciliation procedure is the least popular. The mediation procedure is approved at the legislative level. To resolve the dispute, the parties must provide their consent to the settlement of the dispute using the specified method. The mediation procedure is managed by a mediator who must be impartial. There are lists that contain data about mediators. The Austrian Ministry of Justice has this information about mediators.

[34] SILVESTRI, 2017, p. 77-90.
[35] RECHBERGER, 2015, p. 61-70.

For international disputes between EU countries, a mediator from the specified list can be chosen and the dispute can be resolved using the mediation procedure (Figure 4).

Fig. 4 – Dispute resolution in Austria in 2015



In Lithuania, judicial proceedings are lengthy. Therefore, the parties do not always have the desire to settle disputes in the courts. Lithuania has introduced alternative methods of dispute resolution to consider the dispute as soon as possible. I. Palaikė[36] explores the specific features of applying alternative dispute settlement methods in Lithuania. In particular, the settlement of disputes through mediation is considered. The researcher explains that mediation allows the parties to settle the dispute as soon as possible through a mediator, without going to court and spending money on court fees and lawyers. However, Lithuania does not sufficiently spread the information about the possibility of resolving disputes through mediation to the parties. Moreover, the author considers the application of arbitration in economic and other disputes. The above-listed methods of alternative dispute resolution are popular in Lithuania.

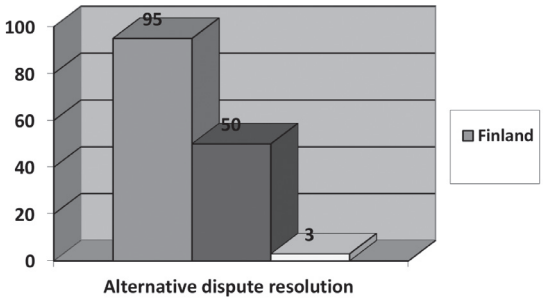
T. Gábriš[37] investigates dispute resolution in Slovakia. The author considers such alternative ways of dispute resolution as arbitration and mediation. The researcher notes that the introduction of new ideas to technological progress and the improvement of all processes in it necessitate new opportunities in dispute resolution involving alternative methods. The digitalisation of many processes necessitated the consideration of disputes using alternative methods online. Arbitration of commercial disputes and others can be settled online on the Internet. However, the researcher notes that even though arbitration can take place online, the adoption of an appropriate decision, which was made by the parties, must be formalised only in writing. The possibility of dispute resolution through mediation

[36] PALAIKĖ, 2014.
[37] GÁBRIŠ, 2018, p. 74-94.

was legally established in Slovakia in 2016. Thus, international disputes can be considered through an appropriate platform, using the mediation procedure, and online.

K. Ervasti[38] indicates that in Finland, disputes are resolved through mediation. Mediation is common because the settlement of any dispute requires parties to negotiate, listen to each side, and make a decision that satisfies the interests of all parties to the conflict. In Sweden, disputes are mostly not resolved through mediation. However, other alternative ways to resolve disputes are present there. In Denmark, disputes are resolved both by alternative means and by other means. Finland has been working for a long time to find a way to resolve the dispute so that the parties are satisfied with this decision. In this regard, it is important to achieve a state in which the interests of each party are properly protected. One of these pre-trial alternative methods of dispute resolution is mediation (Figure 5).

Figure 5 – Dispute resolution using alternative methods



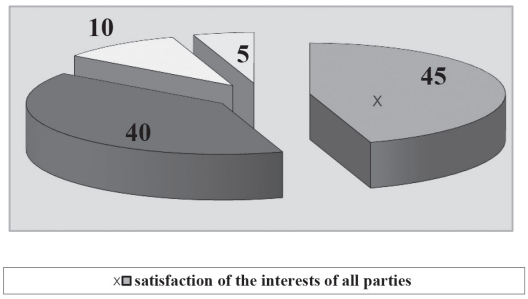
3 Features of Dispute Resolution Within Joint-Stock Companies at the Legislative Level in Ukraine and the EU

To join the EU, Ukraine is required to harmonise the legislation in accordance with the legislation of the EU and some member states. Legislation needs to be improved by bringing it into line with EU standards or adopting laws to properly regulate relations in various sectors of the economy. Dispute resolution within joint-stock companies through alternative means has been applied in the EU for a long time. In Ukraine, there are separate regulations, based on the provisions of which disputes are settled in a pre-trial manner. However, there is no single regulation in Ukraine that would combine all possible alternative ways of resolving disputes. Notably, the positive aspects of resolving disputes through alternative means in Ukraine and the EU are the full satisfaction of the interests of all parties,

[38] ERVASTI, 2018, p. 20-30.

saving time and money, etc. The ratio of aspects as a percentage in accordance with the demand for the use of alternative dispute resolution methods can be viewed in the diagram (Figure 6).

Fig. 6 – The reasons for which alternative dispute resolution methods are used in Ukraine and the EU



Alternative ways of resolving disputes are the consideration and resolution of disagreements in the case with the involvement of a mediator, non-governmental bodies, or without them.[39] The parties fully coordinate their interests, making a decision that is mutually beneficial for everyone and saving time and money. Alternative ways to resolve disputes between shareholders in property relations in Ukraine are reconciliation, negotiations, mediation, arbitration, etc.[40] Similar alternative dispute resolution methods are available in EU member states, in particular in such countries as Austria, Denmark, Spain, Italy, Lithuania, Slovakia, France, Sweden, etc.[41] In the EU member states, alternative methods of protection have been used for a long time, as these methods are better than litigation. These methods are considered positive, since the consideration of disputes and their settlement is conducted in the shortest terms, the parties achieve mutual benefits and thus everyone remains satisfied, there is no need to spend extra money on a lawyer and court fees, etc.

V. P. Kozyreva and A. P. Gavrilishin[42] note that the parties to the dispute can choose the appropriate procedure among alternative dispute resolution methods. In addition, various contracts may specify the procedure using which the dispute must be resolved. Such an alternative method of dispute resolution as reconciliation does not involve state institutions. The reconciliation procedure is relevant for companies since it is used by the parties to resolve disputes promptly, without

[39] BALASSIANO, 2021, p. 201-237.
[40] ILKIV, 2021.
[41] KRAUSOVÁ; LÁNÍKOVÁ, 2021, p. 203-229.
[42] KOZYREVA; GAVRILISHIN, 2018, p. 129-133.

wasting extra time. A. Sgubini, A. Marighetto, M. Prieditis[43] indicate that during reconciliation the parties must reach a mutual agreement and settle the dispute by discussing all issues. The person in charge of the reconciliation can provide some advice, help the parties to find the best solution that would settle the dispute in full, and consider and satisfy the interests of the parties. The reconciliation procedure does not have a specific structure, that is, it is not conducted in certain stages. The authors specify that the reconciliation process is preventive. It does not allow a dispute to arise, that is, if there are misunderstandings, the specified procedure is used immediately.

The reconciliation procedure is similar to the mediation, so it is possible to settle the disputable questions by means of Law of Ukraine No. 1875-IX "On Mediation".[44] To regulate the reconciliation procedure at the legislative level, so that there are no questions about the inconsistency of this procedure in the legislation, it is necessary to prescribe provisions for reconciliation of the parties in the Law of Ukraine No. 1875-IX "On Mediation".[45] Negotiations are a procedure by which the parties resolve disputes in a pre-trial manner, discussing solutions and coming to a mutually beneficial solution. Negotiations in Ukraine are a pre-trial settlement of a dispute, during which the parties can meet, discuss the situation, and ensure the interests of each party by reaching an appropriate compromise solution.

The world is developing every day. Dispute settlement procedures are also being improved, contrasting pre-trial settlement methods with court decisions. In particular, such methods are the settlement of disputes through negotiations. Thus, in France, such a pre-trial procedure as negotiations allows a dispute to be resolved in the shortest time and the parties to discuss all the issues that interest them and ensure the interests of everyone. In other words, the interests of the parties are better protected in a pre-trial procedure than in a judicial one. The parties to the negotiations can understand each other's problems and find a way to resolve the dispute by making an appropriate solutio.[46]

The procedure for negotiations is not defined at the legislative level in Ukraine. There is no law that regulates the procedure for conducting negotiations. An option to eliminate gaps in the legal regulation of the negotiation procedure is to develop and adopt the Law of Ukraine "On the Procedure for Negotiations" and make appropriate amendments to the Commercial Procedural Code of Ukraine.[47] The legislation defines the principles of mediation. Before choosing mediation as an alternative means of resolving disputes, the parties must agree to the selection

[43] SGUBINI; MARIGHETTO; PRIEDITIS, 2004.
[44] Law of Ukraine ..., 2021.
[45] Law of Ukraine ..., 2021.
[46] LEMPEREUR, 1998, p. 129-133.
[47] Commercial Procedural Code of Ukraine, 1991.

and consideration of the dispute through this procedure.[48] Neither party can be forced to choose mediation as a way to resolve the dispute. Information that became known to the parties or the mediator during mediation may not be disclosed in any way. Various bodies, enterprises, etc. are prohibited from influencing the mediator. A mediator has no right to depend on a certain party and side with anyone. Mediation parties can choose a mediator who is suitable for them and has relevant experience in solving certain issues. Participants have the same rights during the mediation procedure.

Mediation has a certain structure of conduct, which is prescribed at the legislative level. In particular, when choosing mediation as a way to resolve a dispute, the parties must sign an appropriate agreement. The mediator can act as an intermediary in the dispute only based on a contract. The law defines the provisions that must be set in the contract, such as information about the parties and the mediator, the timing and address of the mediation, the rights, duties, and responsibilities of the participants, etc. When finding ways to resolve the dispute, the parties must enter into an agreement in writing, which defines the conditions that were discussed and agreed upon. The legislation also defines the provisions that should be specified in the agreement: information about the participants, conditions that the parties must comply with, the consequences of non-compliance with them, etc.

A. Sgubini, A. Marighetto, M. Prieditis[49] note that during mediation, the parties reach a settlement of the dispute with the help of an independent mediator. Such a person can use the appropriate skills to discuss the problem and to help make the decision desired by the parties. During the mediation, the parties must go through all the stages of this procedure. The parties shall discuss in detail the issues of interest to them and agree on each other's interests to reach a settlement of the dispute by a mutually agreed decision. Disputes can be settled through mediation only if the parties reach a mutual agreement. F. J. Aranda-Serna[50] notes that during the COVID-19 pandemic, mediation became a relevant and necessary way of alternative dispute resolution in Spain, as the courts suspended their activities and did not hear disputes. Dispute resolution through mediation was conducted online, which allowed considering cases in a short time. Dispute resolution through arbitration courts is a pre-trial settlement of disputes by a non-governmental body with judges. The parties to the dispute shall apply to the specified body in case of indication in the relevant contractual (binding) documents of the provisions on dispute resolution in arbitration courts (Figures 7; 8).

[48] CHYZHOV, 2021.
[49] SGUBINI; MARIGHETTO; PRIEDITIS, 2004.
[50] ARANDA-SERNA, 2021, p. 6-10.

Fig. 7 – Cases in American Arbitration Association in 2022

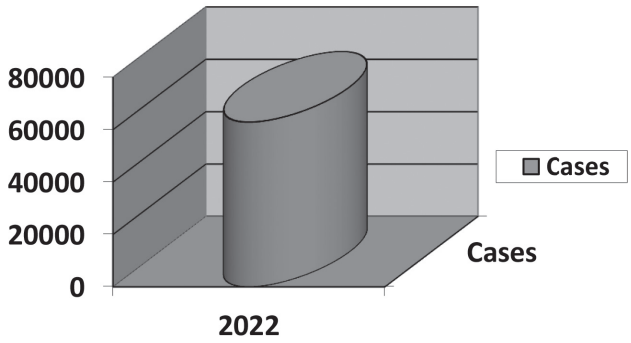
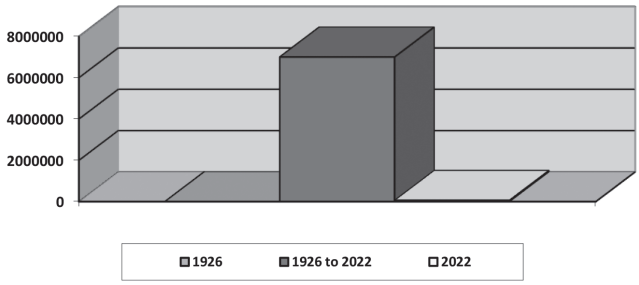


Fig. 8 – Cases in American Arbitration Association



A. Sgubini, A. Marighetto, M. Prieditis[51] note that dispute resolution through arbitration is the consideration of a case using an arbitrator (s) and without the involvement of the parties. The arbitration process is much cheaper for the parties since there is no need to spend additional funds on paying court costs. The arbitrator (s) makes the decision. The parties are not asked about their views on how to resolve the case, so they cannot influence the decision of the arbitrator. There are also no established rules that would prescribe the procedure for arbitration and the procedure for submission and acceptance of relevant documents and other matters to confirm the position of each party to the dispute. Negotiation is a procedure by which the parties settle disputes by making an appropriate decision that is mutually beneficial to all and by discussing possible ways to resolve the dispute. Negotiations do not take long to discuss and adopt appropriate ways to resolve disputes. Mediation is conducted by involving a mediator in reaching a mutual agreement on the dispute. The parties discuss the problems that have

[51] SGUBINI; MARIGHETTO; PRIEDITIS, 2004.

arisen and look for ways to resolve disputes. After the discussion, the parties enter into an agreement that regulates the terms discussed by the parties. The procedure is conducted in a much shorter period than the trial. The parties can discuss the dispute and make a mutually beneficial decision.

Arbitration is an alternative method of dispute resolution used by non-governmental judges. Arbitration of disputes ends with the adoption of a decision. The main alternative ways to resolve disputes in Ukraine and the EU are reconciliation, negotiations, mediation, dispute resolution in arbitration courts, etc. Arbitration of disputes is conducted in the arbitral tribunal by the relevant judge (s), with the prior conclusion of the arbitration agreement on the settlement of disputes through arbitration. It should be noted that in case of amendments to the Law of Ukraine No. 1875-IX "On Mediation"[52] to introduce conciliation, adoption of the Law of Ukraine "On the Procedure for Negotiations", and amendments to the Commercial Procedural Code of Ukraine,[53] the parties will be able to use alternative dispute resolution much more often since such settlement takes place at the legislative level. It is advisable to adopt the Law of Ukraine "On Alternative Methods of Dispute Resolution" with prescribing methods that can be used to resolve disputes. The Commercial Procedural Code of Ukraine[54] and other procedural codes should identify alternative ways of resolving disputes.

4 Conclusions

Thus, during the war period and in subsequent periods of Ukraine's revival, it is necessary to accumulate funds and increase revenues from economic activities by business entities, and not waste time on saving and resolving disputes through judicial procedures. If disputes arise, they should be resolved through alternative methods. For a long time, the world has been considering disputes using alternative methods of conflict resolution, since they are convenient, fast, and inexpensive. Alternative methods for resolving disputes allow business entities to save money and time and protect the interests of all participants in the dispute, since the parties can consider the wishes of each other. Alternative ways of resolving disputes are the consideration and resolution of disagreements in the case with the involvement of a mediator, non-governmental bodies, or without them. The parties fully coordinate their interests, making a decision that is mutually beneficial for everyone while saving time and money. Reconciliation is an alternative way to resolve disputes, through which the parties can resolve disputes that arise

[52] Law of Ukraine ..., 2021.
[53] Commercial Procedural Code of Ukraine, 1991.
[54] Commercial Procedural Code of Ukraine, 1991.

immediately. This procedure does not take much time and is conducted in the shortest possible time.

Today, it is advisable to expand the list of alternative ways to resolve economic disputes. For that purpose, it is necessary to propose legitimising reconciliation of the parties by amending the Law of Ukraine No. 1875-IX "On Mediation", developing and adopting the Law of Ukraine "On the Procedure for Negotiations", and making appropriate amendments to the Commercial Procedural Code of Ukraine, which would allow the parties to use alternative means of dispute resolution much more often. The need to develop and adopt the Law of Ukraine "On Alternative Methods of Dispute Resolution", which should prescribe ways that can be used by the parties, is equally important for legitimising alternative dispute resolution methods. Appropriate amendments should also be made to the Commercial Procedural Code of Ukraine and other sectoral procedural codes to identify alternative dispute resolution methods that allow the parties to settle disputes more quickly and cheaply. Further studies should be aimed at the development of potential provisions of the legislation.

Órgãos extrajudiciais de resolução de conflitos trabalhistas

Resumo: O Nas condições de uma guerra causada pela invasão de tropas russas no território da Ucrânia em fevereiro de 2022, uma taxa de câmbio instável do dólar e do euro, a suspensão de várias estruturas. Após uma invasão em grande escala, a Ucrânia precisará de mais de uma década para restaurar a economia. Todas as entidades empresariais devem trabalhar e garantir a recuperação econômica. Para o bom funcionamento das sociedades anônimas, é necessário que suas atividades não sejam prejudicadas pela demora na resolução de litígios em juízo. É necessário resolver disputas que surgem em sociedades anônimas usando métodos alternativos. O objetivo deste estudo é determinar a relevância de formas alternativas de resolução de disputas de acionistas nas relações de propriedade na Ucrânia e na União Europeia, introduzir na Ucrânia uma prática positiva da União Europeia de resolver disputas por métodos alternativos e apresentar propostas para a regulamentação desta instituição a nível legislativo, adoptando a lei pertinente. O estudo utiliza os seguintes métodos de cognição científica em um complexo: histórico, jurídico, hermenêutico-semântico, sistema-estrutural, estrutural-funcional, análise complexa, modelagem. Em particular, as formas alternativas de resolver disputas são a reconciliação, as negociações, a mediação, a arbitragem. O estudo de formas alternativas de resolução de litígios de acionistas nas relações de propriedade na Ucrânia e na União Europeia está relacionado economicamente, pois a resolução de litígios sem recurso aos tribunais pouparia as finanças da empresa e permitiria que o litígio fosse resolvido mais rapidamente. Isso permitiria que as sociedades anônimas funcionassem adequadamente e investissem na economia ucraniana.

Palavras-chave: Formas alternativas de resolução de conflitos; conciliação; negociações; mediação; arbitragem

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Online Sports Betting in Brazil and conflict solution clauses

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Abstract: Sports betting sites are now a reality in Brazil. According to Exame[1] magazine, in 2018, it moved around 2 billion reais per year, and with the imminent regulation of Act n. 13.756 /2018, it should move approximately 8 billion reais annually. Online gambling will only reach the peak of its market, according to Rohan Miller,[2] when consumers' risk perception is reduced or neutralized. Questions such as who to look for if something goes wrong and which laws apply in the event of a conflict should be answered clearly by the betting sites' Terms of Service (EULAs). Therefore, this article's general objective will be to analyze the methods of conflict resolution included in the Terms of Use of the 9 (nine) main sports betting sites used by Brazilians, namely: 1. Bet365; 2. SportingBet; 3. Betboo; 4. Betway; 5. Rivalo. 6. 22Bet; 7. Betmotion; 8. Bumbet; 9. Bet9. As a specific objective, we will analyze the mediation and arbitration procedures as well as the statistics of two ODR (Online Dispute Resolution) service sites used by the betting sites: the e-Commerce Online Gaming Regulation and Assurance (e-Cogra - online mediation service) and Independent Betting Adjudication Service

[1] Retrieved from https://exame.com/blog/esporte-executivo/futebol-sites-de-apostas-ja-sao-maioria-dos-patrocinios-na-elite-nacional/. Accessed on 02.11.2020.

[2] MILLER, Rohan. The Need for Self-Regulation and Alternative Dispute Resolution to Moderate Consumer Perceptions of Perceived Risk with Internet Gambling. *UNLV Gaming Research & Review Journal*, v. 10, n. 1, p. 52, 2006.

(IBAS online arbitration service). Both legally based in England. We could realize that the Brazilian bettor, as a rule, does not read the terms of service and is unaware of the conflict resolution clause provided by the website. Besides, through data analysis from eCOGRA and IBSA, we can state that Brazilian gamblers who access ODR service providers are very rare both because they are unaware and because of linguistic difficulties. Also, the chances of success in resolving conflicts in favor of the consumer through mediation are greater than through online arbitration. In short, we can say that the model established by the UK Gambling Act and the Great Britain Gambling Commission is a model that guarantees the fundamental principles of both mediation and arbitration (impartiality, due process, and easy access). The fact that arbitration and mediation are not binding on bettors under any circumstances also guarantees the parties equal treatment.

Keywords: Sports Betting; Online Dispute Resolution; Brazil; Mediation; Arbitration

1 Introduction

Sports betting sites are now a reality in Brazil. According to Exame magazine,[3] in 2018, it moved around 2 billion reais per year, and with the imminent regulation of Law 13.756/2018, it should move approximately 8 billion reais annually. Between 2018 and 2020, the sports betting market in Brazil went up from 2 billion reais to 7 billion reais.[4] There are currently two federal decree drafts[5] to be approved to regulate the 2018 Act.

Online gambling will only reach the peak of its market, according to Rohan Miller,[6] when consumers' risk perception is reduced or neutralized. Questions such as who to look for if something goes wrong and which laws apply in the event of a conflict should be answered clearly by the betting sites' Terms of Service.

Therefore, this article's general objective will be to analyze the methods of conflict resolution included in the Terms of Use of the 9 (nine) main sports betting sites used by Brazilians, namely: 1. Bet365; 2. SportingBet; 3. Betboo; 4. Betway; 5. Rivalo. 6. 22Bet; 7. Betmotion; 8. Bumbet; 9. Bet9. As a specific objective, we will analyze the mediation and arbitration procedures as well as the statistics of two ODR (Online Dispute Resolution) service sites used by the betting sites: *the e-Commerce Online Gaming Regulation and Assurance (e-Cogra - online*

[3] Retrieved from https://exame.com/blog/esporte-executivo/futebol-sites-de-apostas-ja-sao-maioria-dos-patrocinios-na-elite-nacional/. Accessed on 02.11.2020.

[4] Retrieved from https://revistacapitaleconomico.com.br/entenda-o-crescimento-do-mercado-de-apostas-esportivas-no-brasil/. Accessed on 20.06.2022.

[5] See, for example, the decree proposed in 2020: https://www.gamesbras.com/u/archivos/2020/2/18/200218_economia_secap_apostas_quota_fixa_minuta_decreto_11fevereiro2020.pdf. Accessed on 20.06.2022.

[6] MILLER, Rohan. The Need for Self-Regulation and Alternative Dispute Resolution to Moderate Consumer Perceptions of Perceived Risk with Internet Gambling. *UNLV Gaming Research & Review Journal*, v. 10, n. 1, p. 52, 2006.

mediation service) and *Independent Betting Adjudication Service (IBAS - online arbitration service)*. Both legally based in England.

2 Literature review

At the present time there is significant number of papers on the topic of gambling and sports betting. Authors analyze this area from different perspectives. Due to the risk nature of this area the topic is quite interesting also for legal research.[7]

There are many papers devoted to the regulation of online sport's betting and gambling. Thus, Holden consider USA regulation on sports gambling[8]; Rohsler considers legal and philosophical aspect of gambling in general.[9] At the same time national peculiarities of the overcoming the issues of the online sports betting and the ways to resolve disputes arising from it are not considered enough.

Republic of Brazil is the country where sport is extremely popular. Sport's disputes are quite wide spread. That is why analysis of the national peculiarities of online sport's betting and the possibilities to resolve issues arising from it is highly important.

At the same time, papers on the topic consider mostly published in Portuguese, that doesn't allow international community to understand defined peculiarities of Brazilian sport's betting and dispute resolution. Those ones that published in English consider online sport's betting regulation in general.[10]

3 Methodology

To achieve the goals of the article authors applied a set of methods, which included the comparative legal and systemic method, as well as the method of content analysis.

Comparative legal analysis allowed to us to find the peculiarities of the Brazilian sports betting regulation and dispute resolution in comparison with UK regulation. It also allowed us to compare the law that is applied if dispute arose from the sports bet (depending on the sports betting website).

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7 CAHALI, Francisco José. *Curso de arbitragem, mediação, conciliação, tribunal multiportas*. 7. ed. São Paulo: Thompson Reuters Brasil, 2018. p. 180-181; MILLER, Rohan. The Need for Self-Regulation and Alternative Dispute Resolution to Moderate Consumer Perceptions of Perceived Risk with Internet Gambling. *UNLV Gaming Research & Review Journal*, v. 10, n. 1, p. 52, 2006.

8 HOLDEN, J. A short treatise on sports gambling and the law: how America regulates its most lucrative vice. *Wisconsin Law Review*, n. 2. p. 907, 2020.

9 ROHSLER C. *et al. Gambling Law Review*. 2nd ed. UK: Law Business Research, 2019. p. 401.

10 MAIA, L., PICCI, F. The Gambling Law Review: Brazil. *The Law Reviews*, 2022.

Systemic method gave the opportunity to consider online sport's betting and gambling in Brazil as a system with national peculiarities.

Content analyses of the sports betting sites allowed us to detect the applicable law and conflict resolution clauses.

4 The sports betting sites used in Brazil and their conflict resolution clauses

Article 14, IV of Act nº 13.756/2018 opens the flank for the country's sports lottery, conceptualizing it as a lottery of sports predictions, that is, a lottery in which the bettor tries to predict the outcome of sporting events.

Bets, under the terms of article 29 § 1 of the Law, will follow the fixed-rate model. That is verbatim, a betting system related to real sporting events, in which it is defined, at the bet's moment, how much the bettor can earn in case of a correct prognosis.

As a comparison, in Europe, Great Britain is the region with the most massive volume of bets approved the Gambling Act of 2005. This diploma allowed the possibility of online (remote) betting in its Section 4 (1).[11] Online sports betting in Great Britain, in 2017, represented 56% of the total bets and exceeded a volume of 31 billion Euros.[12]

The Brazilian Act (pending regulation by the Ministry of Economy) establishes in the headline of article 29 that the lottery modality of fixed-rate bets is an exclusive public service of the Union, and item II (paragraphs A to F) of article 30[13] establishes the destination of the earnings from the collection of such bets in percentages.

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[11] Section 4 - Remote gambling (1) In this Act "remote gambling" means gambling in which persons participate by the use of remote communication. (2) In this Act "remote communication" means communication using— (a)the internet, (b)telephone, (c)television, (d)radio, or (e)any other kind of electronic or other technology for facilitating communication. (3)The Secretary of State may by regulations provide that a specified system or method of communication is or is not to be treated as a form of remote communication for the purposes of this Act (and subsection (2) is subject to any regulations under this subsection). Retrieved from http://www.legislation.gov.uk/ukpga/2005/19/section/4. Acessed on 02.11.2020.

[12] Retrieved from https://www.sportsbusinessdaily.com/Journal/Issues/2018/04/16/World-Congress-of-Sports/Research.aspx. Accessed on 18.11.2020.

[13] Art. 30. The earnings from the collection of the fixed-rate betting lottery will be allocated as follows: II - in virtual media: a) 89% (eighty-nine percent), at least, for the payment of prizes and payment income tax on the award; b) 0.25% (twenty-five hundredths percent) for social security; c) 0.75% (seventy-five hundredths percent) for the executing entities and executing units of the public school units for early childhood education, elementary school and high school that have achieved the goals established for the results of the national evaluations of primary education , as per the act of the Ministry of Education; d) 1% (one percent) for the FNSP; e) 1% (one percent) for sports entities of the football modality that assign the rights to use their denominations, their brands, their emblems, their hymns, their symbols and the like for publicizing and executing the fixed-odds betting lottery ; f) A maximum of 8% (eight percent) to cover the cost and maintenance expenses of the agent operating the fixed-rate lottery. Retrieved from http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Lei/L13756.htm#art47. Accessed on 02.11.2020.

In the table below we list the following information: 1. Website name; 2. Country of headquarters; 3. Applicable law; 4. Conflict resolution clause; 5. Mediation or arbitration provider (in case of conflict resolution clause).

(Continua)

Website	Country of Headquarters	Applicable law	Conflict resolution clause	Mediation or arbitration Provider
Bet365	Great Britain	English and Welsh	Negotiation followed by online arbitration (IBAS -Neg-Arb)	Independent Betting Adjudication Service (IBAS) or Online Dispute Resolution (ODR). The bettor can also forward a complaint to the Malta Gambling Authority (Malta Gaming Authority [MGA])
SportingBet	Gibraltar	Gibraltar	Negotiation and Choice of Court Clause (bettor's home court) and IBAS for U.K Residents	IBAS (for U.K residents)
Betboo	Gibraltar	Gibraltar	Negotiation followed by online mediation (Neg-Med)	eCOGRA
Betway	Malta	Malta	Negotiation followed by online mediation (Neg-Med)	eCOGRA (for non-UK residents)
Rivalo	Curaçao	Curaçao	Negotiation. The Terms of Use are silent if the company is unable to resolve the conflict internally[14]	None

[14] The Terms of Use of the betting site only mention that the case will be referred to the management. However, it does not elect any form of external and impartial conflict resolution. Let's see: XVI. Complaints - Rivalo makes every effort to make using www.rivalo.com as pleasant as possible. However, it may happen that a customer is dissatisfied with the service offered. In such a case, the customer is entitled to contact the Rivalo support department or send an email to meajude@rivalo.com. In general, the complaint will be processed within 48 hours and if applicable forwarded to management. Retrieved from https://www.rivalo.com/pt/terms-conditions/#agb_XVI. Accessed on 02.11.2020.

(Conclusão)

Website	Country of Headquarters	Applicable law	Conflict resolution clause	Mediation or arbitration Provider
22Bet	Cyprus	Cyprus	Negotiation and Choice of Court Clause (Cyprus)	None
Betmotion	Curaçao	Curaçao	Negotiation and Choice of Court Clause (Curacao)	None
Bumbet	Curaçao/Malta	Curaçao	No information	No information
Bet9	Curaçao	Curaçao	Choice of Court Clause (Curacao)	None

As we can see, the sports betting sites used in Brazil are owned by companies established abroad and that, in turn, do not offer any guarantee to customers. They even transfer the responsibility for knowing the legality of betting in their countries of residence to bettors. One can acknowledge this statement by reading paragraph 1.6.5 of the Bet9 website EULA, verbatim: "The Player is only recommended to participate in events and games where these are legal under the laws that apply in the jurisdiction where the player is connected. The player must understand and accept that Bet9 is unable to provide the player with any legal advice or legal guarantees".[15]

The sites that direct their conflicts through the choice of court clauses in Curaçao and Cyprus, as we have seen, ultimately make it impossible to resolve disputes between the betting site and Brazilian bettors if there is no initial solution by direct negotiation between the parties.

Of the 9 (nine) terms of use of sports betting sites analyzed, 4 (four) establish a multi-tiered clause where negotiation is followed by arbitration (neg-arb) at IBAS or negotiation followed by mediation (neg-med) at e-COGRA. Therefore, the conflict will be resolved by mediation or arbitration (after frustrated prior and mandatory bargaining). Two virtual mediation and arbitration institutions (Online Dispute Resolution Services) based in England are used: *e-Commerce Online Gaming Regulation and Assurance* (e-Cogra)[16] and *Independent Betting Adjudication*

[15] Retrieved from https://11bet9.com/info/terms_and_conditions. Accessed on 20.06.2022.

[16] E-COGRA also works as a certifying institution for betting sites in general, establishing a standard of operation to guarantee a fair game. The company claims that the majority of its employees have previous professional experience in BIG 4 audit companies. Of the current sports betting sites in the present study, only BETWAY has a SAFE AND FAIR seal. The ODR service provider maintains on its website a list of online casinos and sports betting sites (among other modalities), consolidated with the SAFE AND FAIR stamps. Retrieved from https://www.ecogra.org/srs/holders_safe_fair_seals.php. Accessed on 02.03.2020.

Service (IBAS). The Great Britain Gambling Commission approves both under local regulations. The arbitration and mediation services provided are free of charge for bettors since the operating companies pay monthly fees.

At least 4 (four) of the betting sites refer to the resolution of conflicts in their Terms of Use to Online Dispute Resolution (ODR). The service providers are regulated by British law and are responsible for inspecting the betting sites' impartiality and seriousness through regular audits (case of e-COGRA).

5 Sporting betting sites Online Dispute Resolution (ODR) providers

ODR providers play crucial part in modern dispute resolution.[17] As mentioned, there are two primary Online Dispute Resolution providers for online betting sites (not only sports betting, but mainly virtual casinos): e-COGRA and IBAS.

E-COGRA offers online mediation services between bettors and operators and points out in its regulation that: "eCOGRA will use its reasonable efforts to resolve the dispute through reference to the Operator's terms and conditions and a process of non-binding mediation between the Player and Operator. The process will follow eCOGRA's standard practice which may be varied by eCOGRA at any time at its discretion. The process does not restrict a Player's right to bring proceedings against the Operator in any court of competent jurisdiction before or following eCOGRA's proposed resolution of the dispute. The proposed resolution may be different from an outcome determined by a court applying legal rules".[18]

IBAS, on the other hand, is an arbitral institution that renders non-binding arbitration awards. The British dispute resolution service provider claims to avoid and minimize red tape, that is, inaccessibility to the service, since it is exempt from fees. The arbitration is entirely text-based. There are no hearings. The arbitration procedure is conducted in seven steps,[19] and the award is posted on the website for the parties simultaneously for fairness purposes. There is still the possibility of an internal appeal against the decision. IBAS also stresses that the party should present the facts in the best possible way and leave aside the concern with rhetoric and good presentation.[20] In our view, such a statement aims to make

[17] FERREIRA, D., GIOVANNINI, C., GROMOVA, E., DA ROCHA SCHMIDT, G. Arbitration Chambers and trust in technology provider: impacts of trust in technology intermediated dispute resolution proceedings. *Technology in Society*, n. 68, 101872, 2022.

[18] See item 14 of the institution rules. Retrieved from https: https://ecogra.org/products-services/alternative-dispute-resolution. Accessed on 20.06.2022.

[19] See the seven procedure steps at https://www.ibas-uk.com/how-ibas-works/. Accessed on 18.11.2020.

[20] "Adjudications are not made on the basis of which party makes a better presentation of their case. Gambling operators and their customers do not need to be concerned about the quality of presentation or writing skills. It is the role of IBAS to identify relevant issues; therefore adjudications are always based

the consumer more comfortable to represent himself without seeking help from a lawyer. That fact, without a shadow of a doubt, makes the service more accessible.

It is interesting to observe clause 19[21] of the IBAS Terms of Use. The clause states clearly that the arbitration will not be binding on the bettor. He may seek help from the Judiciary after the arbitration award. However, the arbitration will be binding to the operator for amounts up to 10,000 Pounds. The arbitration will not be binding for the operator for disputes that surpass 10,000 pounds. The same dynamic occurs in the mediation procedure carried out by e-COGRA. The agreement reached in mediation is binding only for the operator and for values up to 10,000 Pounds.

Regarding the non-binding arbitration provided for in clause 19 of the IBAS Terms of Use, we identified an apparent conflict with the Terms of Use of a betting site that uses the service: Bet365. In its dispute resolution clause, Bet365 states that the decisions rendered by IBAS will be final and binding, verbatim: "If bet365 is unable to resolve the dispute, either party will have the right to refer the dispute to arbitration, such as the Independent Betting Adjudication Service (IBAS) or Online Dispute Resolution (ODR), whose decisions will be final (except in the event of an obvious error), with all parties involved being subject to full representation. Betting conflicts will not result in litigation, legal suits, or opposition to bookmaker licenses (including distant operator licenses or personal licenses) unless bet365 is unable to implement the decision rendered by the responsible organizations".[22]

We are facing a pathological arbitration clause (defective because it is contradictory),[23] which goes against the elected chamber's arbitration regulation. In our view, by establishing an arbitration clause electing a particular institution for conflict resolution, the operator is endorsing the institution's arbitration rules. Therefore, the understanding of non-binding arbitration provided for in the IBAS terms of use should prevail in this case.

In the event of a factual error or error of interpretation of the procedural rules, there is the possibility of award review. Nonetheless, the request for review has a deadline of 40 (forty) days from the panel's award notification. The IBAS Chief Executive will analyze its admissibility under Clause 21[24] of the Terms of Use.

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on the facts of a case and not on either of the parties' rhetoric. We only ask that statements submitted cover as many facts as you consider relevant to your dispute". Retrieved from https://www.ibas-uk.com/how-ibas-works/. Accessed on 18.11.2020.

21 See clause 19 in IBAS Terms of Use, verbatim: At the conclusion of IBAS's adjudication process, the IBAS Panel will issue a ruling in writing which IBAS will notify simultaneously to the Customer and Operator. IBAS rulings shall be legally non-binding on the Consumer but binding on the Operator unless the value of the dispute exceeds £10,000. Retrieved from https://www.ibas-uk.com/how-ibas-works/terms-of-use/. Accessed on 20.06.2022.

22 Retrieved from https://help.bet365.com/br/terms-and-conditions. Accessed on 20.06.2022.

23 CAHALI, Francisco José. *Curso de arbitragem, mediação, conciliação, tribunal multiportas*. 7. ed. São Paulo: Thompson Reuters Brasil, 2018. p. 180-181.

24 21. IBAS may, in its absolute discretion, undertake a review of a ruling which it has issued but then only in exceptional circumstances and provided that a request for review is received within 40 days of the notifying

In 2019 IBAS awarded damages of 634.426 pounds and received 6.282 arbitration requests[25] (many rejected for not meeting the conditions of the Institution). Its list of arbitrators is currently composed of 15 (fifteen) arbitrators[26] of varied professional backgrounds (some are sports journalists). From the years 2018 and 2019, the vast majority of complaints are from consumers from Great Britain vis-à-vis operators from the same location (total of 5.235) while only 1.052, a volume five times smaller, originated from foreign consumers against Britain websites. In the same period (2018-2019), 3.196 applications were accepted for arbitration. Of this total, 1.776 cases were rendered in favor of operators, and only 362 cases were rendered in favor of the consumer (an 11.3% success rate for bettors).[27] A total of 1.058 cases ended in settlement. In addition to these, a total of 2.039 applications were rejected for non-compliance with the terms of use.

E-COGRA, in turn, in its first 10 (ten) years of operation (2005-2014),[28] had a total number of 7.169 with 1.775 complaints being classified as invalid because they did not comply with the standards established in the institution's regulations. Of the 5.394 (75%) mediated complaints, 2.492 (46%) favored the bettor.[29] In 2015/2016[30] the institution received 359 complaints, 455 in 2016/2017, 895 in 2017/2018, and 951 in 2018/2019. Thus, from 2015/2016 to 2018/2019 there was an increase of 165% in the number of complaints. All of these disputes over the past four years refer to domestic disputes, that is, involving only bettors from Great Britain (Historically, according to information obtained from e-COGRA, less than ten Brazilians used the company's services). Between 2018/2019, 61% of mediations resulted in an agreement in favor of the operator, 32% were operator concessions in favor of the bettor (Conceded by operator [either as a goodwill gesture or admission of fault] or compromise agreed with the player). Only 7% of the agreements were considered favorable to the bettor (Ruled in favor of the

of the decision to the parties. The decision to review will rest solely with the Chief Executive and will only be undertaken if there is compelling evidence to suggest that a ruling may have been wrong, for example, if it is clear that the Panel has adjudicated upon the basis of factually incorrect information or if it appears that there has been an obvious misinterpretation of the relevant rules. The parties will be informed as soon as reasonably practical of a decision to refuse a review and in the event of a review being undertaken, IBAS will notify the parties of the outcome of the review simultaneously. Retrieved from https://www.ibas-uk.com/how-ibas-works/terms-of-use/. Accessed on 18.11.2020.

25 Retrieved from https: https://www.ibas-uk.com/. Accessed on 18.11.2020.

26 See at https://www.ibas-uk.com/about-us/adjudication-panel/. Accessed on 18.11.2020.

27 See the detailed statistics at the IBAS Comparative Annual Statistical Reporting 2017-2019. Retrieved from https://www.ibas-uk.com/media/1082/2017-19-annual-adr-report-comparisons.pdf. Accessed on 18.11.2020.

28 The company was founded in 2003, nevertheless was approved by the *United Kingdom Accreditation Service (UKAS) ISO* in 2005.

29 Retrieved from https://www.ecogra.org/ata/newsItem.php?code=p800osr2-3k56-0282-2589-y53fs5hd9y3t. Accessed on 02.03.2020.

30 Statistics for the period from October 1st to September 30th of the following year. We obtained the numbers and statistics for the last four years directly from the company through an e-mail request.

consumer). In other words, in 39% of complaints, the bettor obtained a reasonable agreement in mediation.[31]

E-COGRA classifies complaints into 10 (ten) categories (considering various types of games and not just sports betting). The three main reasons for complaints are: 1. Bonuses & Promotions; 2. Responsible Gambling; 3. Deposits and Withdrawals.

The two main reasons for e-COGRA's rejection of complaints are respectively: 1. Incompatibility of the complaint with the regulation of the *Gambling Commission* of Great Britain; 2. The bettor has not exhausted the negotiation process with the operator company previously.

Both e-COGRA and IBAS condition their actions to previous significant negotiation[32] attempts carried out by both the operator and the consumer. The conflict resolution providers also establish a limitation period of 1 (one) year from the date of the company's notification for the bettor to file his complaint.

It is worth mentioning that only companies that have a license from the Gambling Commission of Great Britain or another license accepted by IBAS and e-COGRA, for example, will be able to use the company's conflict resolution service. Due to *The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015*[33] in Great Britain, the aforementioned virtual arbitration and mediation providers are fair and impartial. In *Section 9 (4)*, such regulation only authorizes arbitration or virtual mediation providers established in Great Britain. In the application to become a licensed provider, there are several

[31] ADR service providers are required by law to produce an annual report on their activities under Schedule 5 of *The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015*, see the requirements of the report: SCHEDULE 5 Information to be included in an ADR entity's annual activity report a) the number of domestic disputes and cross-border disputes the ADR entity has received; b) the types of complaints to which the domestic disputes and cross-border disputes relate; c) a description of any systematic or significant problems that occur frequently and lead to disputes between consumers and traders of which the ADR entity has become aware due to its operations as an ADR entity; d) any recommendations the ADR entity may have as to how the problems referred to in paragraph (c) could be avoided or resolved in future, in order to raise traders' standards and to facilitate the exchange of information and best practices; e) the number of disputes which the ADR entity has refused to deal with, and percentage share of the grounds set out in paragraph 13 of Schedule 3 on which the ADR entity has declined to consider such disputes; f) the percentage of alternative dispute resolution procedures which were discontinued for operational reasons and, if known, the reasons for the discontinuation; g) the average time taken to resolve domestic disputes and cross-border disputes; h) the rate of compliance, if known, with the outcomes of the alternative dispute resolution procedures; i) the co-operation, if any, of the ADR entity within any network of ADR entities which facilitates the resolution of cross-border disputes. Retrieved from https://www.legislation.gov.uk/uksi/2015/542/contents/made. Accessed on 18.11.2020.

[32] See, for example, IBAS terms of use: 3. IBAS reserves the right to refuse to adjudicate on a Dispute at any time if: (a) IBAS considers that the Customer and Operator have failed to make reasonable efforts to resolve the Dispute.

See also e-Cogra rules: 2. Players must ensure that they have followed the operator's internal complaints procedure and that all reasonable attempts have been made to negotiate a solution with the operator before submitting an ADR dispute form.

[33] Retrieved from http://www.legislation.gov.uk/uksi/2015/542/contents/made. Accessed on 18.11.2020.

requirements under *Schedule 2*.[34] *Schedule 3* of the same regulation sets out the conditions that must be complied for approval of the ODR service by the Gambling Commission, such as expertise, independence, impartiality, procedures for conflicts of interest, transparency, efficiency, equality of parties, and fairness. In other words, principles that are also established in the Brazilian Arbitration Act (Act nº. 9.307/96 - articles 13 and 21) and the *English Arbitration Act* of 1996.

In short, the four sports betting sites that elect *Online Dispute Resolution* (arbitration at IBAS and mediation at e-COGRA) as a way of resolving conflicts in such chambers, in fact, offer their consumers a viable and fair service for resolving eventual disputes. Feasible because it is free and fair because British regulation guarantees impartiality and accessibility to the service. For Brazilians, the main obstacle, in our view, is the mastery of the English language for more effective and conscious participation in the mediation or arbitration procedure since there is no translation.

On the other hand, betting sites that elect the Judiciary from where they are legally established are just trying to make cross-border conflict resolution unfeasible (typical of the online environment). Two websites, in turn, Rivalo and Bumbet, do not have a conflict resolution clause. That is, they do not establish either a choice of court clause or dispute resolution clause.

Therefore, after analyzing the conflict resolution clauses in the terms of use of sports betting sites used by Brazilians, we suggest using websites that refer to ODR service providers. The odds of bettors' success increase in case of conflict. More so, they will know who to look for in an eventful dispute.

6 Conclusion

In Brazil, we have to wait if the regulation of Act 13.756 / 2018 will bring in its core a Commission similar to the Great Britain Gambling Commission. It would be good news if Brazil regulated conflict resolution providers' licensing for sports betting sites and other betting modalities hosted in Brazil. Considering the Federal Decree drafts for 2019 and 2020, this seems unlikely. The conflict mediation site

[34] SCHEDULE 2 - Information that an ADR applicant must supply - a) the ADR applicant's name, contact details and website address; b)information regarding the structure and funding of the ADR applicant, including such information as the competent authority may require regarding its ADR officials, their remuneration, term of office and by whom they are employed; c) the rules of the alternative dispute resolution procedure to be operated by the ADR applicant; d) any fees to be charged by the ADR applicant; e) where the ADR applicant already operates an alternative dispute resolution procedure, the average length of the alternative dispute resolution procedure; f) the language in which the ADR applicant is prepared to receive initial complaint submissions and conduct the alternative dispute resolution procedure; g) a statement as to the types of disputes covered by the alternative dispute resolution procedure operated by the ADR applicant; h) the grounds, if any, on which the ADR applicant may refuse to deal with a dispute; i) a reasoned statement which sets out how the ADR applicant complies, or proposes to comply, with the requirements set out in Schedule 3. Retrieved from https://www.legislation.gov.uk/uksi/2015/542/contents/made. Accessed on 18.11.2020.

consumer.gov.br, or a similar site endorsed (licensed) by the Federal Government yet to be created for the area, could serve as a certifying and supervising institution for the betting services such as e-COGRA in Britain. According to the Federal Decree draft of 2020, hardware and software certification companies must be accredited by the Brazilian Ministry of Economy.

In short, the consumer, when accepting to place a bet on sports betting sites or any other modality of online betting games, should READ the Terms of Use (Terms of Service or General Terms and Conditions). Otherwise, they will also be betting on the possibility of never solving their eventual disputes.

Also, when opting for negotiation followed by mediation, the bettors' chances are statistically higher for the conflict's satisfactory resolution (see the rate of around 40% and 50% of agreements favorable to the e-COGRA bettor). However, according to data provided by IBAS, the success rate of consumers in arbitrations of this type is only 11%, similar if we consider in isolation only the status of mediation agreements in favor of consumers, that is, without a concession from operators (percentage 7% in 2018-2019 on e-COGRA). Therefore, knowing the procedure for resolving any conflict is essential for hiring any service, including betting. After all, one should never play BlackJack blindfolded.

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The active position of the court is the basis for the successful application of alternative measures in criminal proceedings

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Abstract: The institution of encouragement in criminal proceedings is an alternative form of making a final decision on a criminal case. The resolution of a criminal case through the use of incentive forms entailing the release from criminal liability of the defendant involves active actions of participants in procedural relations: the will and desire of the parties to terminate the criminal case in one of the alternative ways to the court verdict; negotiating to determine the main mutually beneficial conditions and their coordination; the fulfillment of these conditions and the final confirmation of such agreements by a single «conventional» petition for the termination of the criminal case on the appropriate grounds. The parties exercise active procedural powers within the framework of the principles of disposability and adversarial criminal proceedings. This indicates the universality of the incentive norm. It is possible to effectively apply alternative measures in criminal proceedings with the mandatory explanation by the court to the persons participating in the case of the procedural possibilities of these measures. The conducted analysis indicates the need for legislative consolidation of the procedural obligation of the court when considering criminal cases against persons brought to criminal responsibility for the first time on charges of committing a crime of small or medium gravity, to explain to the participants of the process the non-rehabilitating grounds for termination of criminal prosecution provided by the current legislation. The author believes that this duty of the court will allow to resolve the issue of initiating the procedure for the application of incentive norms by the parties, as well as the court to understand the procedural perspective of this procedure for resolving a criminal case.

Keywords: Alternative measures in criminal proceedings; Incentive forms; Termination of a criminal case; Reconciliation of the parties; Exemption from criminal liability; Court duty; Court decision

1 Introduction

A person, his rights and freedoms are the highest value, and the recognition, observance and protection of human and civil rights and freedoms is the duty of the state.

This fundamental provision is of fundamental importance within the framework of the social and legal activities of each state and is enshrined in the sectoral legislative norms regulating all spheres of public life.

This obligation of the State acquires particularly high importance in the framework of criminal proceedings. In this area, the protection of human rights and freedoms is connected with the mechanism of their significant restriction due to the measures of procedural coercion established by law, ensuring the criminal procedural function of the state. In this regard, the direction of legal thought associated with the search for a balance between the protection of human and civil rights within the framework of compulsory criminal procedure and the implementation by the State of its public function to combat crime, does not lose its relevance.

Theoretical development of concepts, doctrines, scientific and practical provisions in the field of criminal proceedings allows us to form a broad scientific basis for identifying existing problems not only of a scientific nature, but also for improving law enforcement practice, eliminating collisions and gaps in legislative technology regulating legal relations in the field of criminal procedure.[1]

The role of criminal justice as a social institution that meets the needs of society (a system of a higher level of organization) is to provide society with tools that ensure justice.[2] It is important to investigate the issue of exemption from criminal liability as a form of encouragement of the accused from the point of view of a fair resolution of the criminal law conflict.

According to the provisions of part 1 of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, everyone, in the event of a dispute about his civil rights and obligations or when any criminal charge is brought against him, has the right to a fair and public hearing of the case within a reasonable time by an independent and impartial court established by law.

By virtue of article 14 of the International Covenant on Civil and Political Rights, 1966, everyone has the right to a fair and public hearing by a competent, independent and impartial court established by law when considering any criminal charge against him or when determining his rights and obligations in any civil process.

The above regulations enshrine the fundamental principles of the criminal procedure of the Russian Federation, such as fairness, publicity of the criminal process, independence and impartiality of the court, compliance with a reasonable

1 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, 101872, 2022.

2 VOLODINA, L. M. Purpose and principles of criminal proceedings – the basis of moral principles of criminal procedural activity. *Bulletin of the O.E.* Kutafin University (MSLA), v. 2, p. 18, 2018.

period of trial. Nevertheless, there is an ambiguity of legislative formulations, the lack of precise definitions and a uniform legal mechanism for their implementation. This leads to a broad scientific and law enforcement discussion, including regarding the active position of the court in the application of alternative criminal liability measures.

2 The concept of incentive forms of criminal proceedings

Ashworth A. notes the existence of two interrelated paradigms of goal-setting of criminal proceedings: the «paradigm of punishment», 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 paradigm» is not to punish the person who committed the crime, but to restore the rights of the victim and, ultimately, the rights of the state.[3]

Elements of restorative justice are widely developed in the world judicial practice. 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.[4]

The spread of the institution of encouragement in criminal proceedings upon termination of a criminal case and the release of a person from criminal liability, fully allows achieving the goals of the criminal process. This is expressed in the active socially positive behavior of the defendant, compensation for damage to the victim, the implementation of the educational function of the criminal process. The educational function assumes that a person who has committed a crime of minor public danger for the first time, getting into the state mechanism of legal proceedings, takes measures to neutralize negative legal consequences and restore the rights of the victim. At the same time, the victim also wishes to complete all the prescribed procedures in a short period of time and no longer be involved in criminal procedural activities.

Incentive forms of criminal proceedings allow the use of alternative measures.[5] In the Russian Federation, alternative measures are the termination of a criminal case with exemption from criminal liability on the basis of reconciliation of the

[3] ASHWORTH, A. *The criminal process*. An evaluative study. Oxford: Clarendon Press, p. 34-35, 1994.
[4] HOWARD, Z. *The Little Book of Restorative Justice*, 2002.
[5] DE NAZARETH, Serpa M. Multi-Door Mediation: Processo composto de Resolução de Conflitos. *Revista Brasileira de ADR*, v. 4, p. 103-131, 2020.

accused with the victim, with the appointment of a criminal law measure in the form of a court fine and active repentance.

At the same time, under the incentive forms of criminal proceedings, we understand the system of criminal procedural relations arising from the implementation of the incentive norms provided for by the criminal and criminal procedure law, entailing the termination of criminal prosecution or criminal case with the release of the accused (suspect, defendant) from criminal liability in connection with his positive post-criminal actions of a restorative nature aimed at compensating for damage, making amends for harm and reducing his public danger.

When implementing incentive norms in criminal proceedings, the state, represented by authorized entities and the victim, expect from the person accused of committing a crime, active socially positive post-criminal behavior – repentance for what he did, compensation for damages, apologies and other positive activity indicating the intention of the latter to minimize the negative consequences of criminal actions, reduce their negative assessment. In this case, the manifestation of free will is a prerequisite for encouragement in criminal proceedings, but the internal position of the subject of encouragement may differ from its external manifestation under specific circumstances.[6]

3 The legislator's view on the duty of the court to clarify the right to encouragement in criminal proceedings

Along with the positive results of the application of incentive norms, the termination of a criminal case on the grounds provided for by the Criminal Procedure Law in its procedural and legal form fully meets the requirements of justice and humanity. These requirements are integral criteria of a civilized society and fair justice.

At the same time, in judicial practice there are cases when, in the presence of all the necessary legal conditions for the termination of a criminal case, the court passes a sentence. At the same time, the parties are not explained the possibility of exercising the subjective right to file a petition for termination of a criminal case in connection with reconciliation of the parties or active repentance, as well as the possibility of applying a court fine.

Neither the defender, nor the public prosecutor, nor the court, without explaining to the defendant these procedural possibilities, in the absence of petitions from the parties to terminate the criminal case on the non-rehabilitating grounds indicated above, do not take possible actions to resolve the criminal

[6] RUSMAN, G. S. Incentive forms or court proceedings as an element of the transformation of the criminal process. *International Journal of Law in Changing World*, v. 1, p. 3-16, 2022.

case in any other way, in connection with which the court passes a sentence that worsens the defendant's situation and generates the relevant criminal law and the procedural consequences for him.

It should be recognized that in the realities of the existing criminal process, which tends to be adversarial, there is a lack of professionalism of both the judicial staff and the participants of the defense and prosecution, who often formally perform their powers and do not delve into or carefully study criminal cases.

The professionalism of a judge is defined as a systematic education consisting of a combination of such elements as: intelligence, culture, moral and psychological qualities that are necessary for a judge to fully exercise his official duties. Intelligence implies a deep knowledge of substantive and procedural law, the ability to legal analytical thinking; culture includes legal, personal and aesthetic aspects; moral and psychological qualities include such as honesty, courage, truthfulness, etc.[7]

For example, when the court does not explain to the parties during the court session (if there are procedural conditions for that) the right to terminate the criminal case in connection with the reconciliation of the parties or does not explain the legal grounds for the application of a court fine.

Perhaps such procedural amorphousness of the court can be justified by the presence of professional participants in the proceedings – a defender and a public prosecutor.

Indeed, the function of the defender is to provide competent qualified legal assistance to the suspect, the accused (the defendant), which implies the development and coordination of a position, the development of tactics, discussion of legal possibilities for a successful outcome of the case. Realizing his professional functions, the defender must explain to his principal the conditions of possible exemption from criminal liability and the use of alternative measures.

The question arises, is the court obliged in this case to explain to the persons involved in the case about the procedural and legal possibilities of applying incentive norms, or is the court limited only by the right to consider the relevant petition of the parties for their application?

By virtue of Article 11 of the Criminal Procedure Code of the Russian Federation, the court, the prosecutor, the investigator, the inquirer are obliged to explain to the suspect, the accused, the victim, the civil plaintiff, the civil defendant, as well as other participants in criminal proceedings their rights, duties and responsibilities and to ensure the possibility of exercising these rights.

[7] BEREZHKO, E. V. *Moral foundations of criminal proceedings*, p. 108.

The Criminal Procedure Law of Russia prescribes the court, the prosecutor, the investigator and the inquirer to explain to the suspect and the accused their rights and to provide them with the opportunity to defend themselves in all ways and means not prohibited by the criminal procedure law.

Within the framework of judicial proceedings in a criminal case, the presiding officers, in accordance with article 267 of the Criminal Procedure Code of Russia, explain to the defendant the rights and obligations provided for by law, including the right of the defendant to file petitions and challenges, to object to the termination of the criminal case on non-rehabilitating grounds (provided for in part 2 of Article 27 of the Criminal Procedure Code of Russia).

The supreme judicial instance of the Russian Federation has repeatedly paid attention to the issues of the court's activity in its rulings. Thus, in paragraph 3 of the resolution of the Plenum of the Supreme Court of the Russian Federation dated December 19, 2017 No. 51 "On the practice of applying legislation when considering criminal cases in the court of First instance (general procedure of legal proceedings)" indicated that the presiding judge in the preparatory part of the court session explains to all participants in the trial the rights, obligations and the procedure for their implementation, as well as introduces the rules of the court session established by article 257 of the Criminal Procedure Code of Russia and explains the responsibility for violating the order in the court session.

At the same time, the defendant in the trial, along with his basic rights, is explained his other rights, including the right to participate in the debate of the parties and the right to the last word.

In turn, the provisions of paragraph 21 of the above-mentioned resolution of the Plenum of the Supreme Court of the Russian Federation provide for the obligation of the court, if there are grounds for termination of a criminal case on non-rehabilitating grounds, to explain to the defendant the legal consequences of a court decision to terminate a criminal case, including the possibility of confiscation of property belonging to him, recognized as material evidence, filing a civil claim against him for compensation the harm caused by the crime.

A similar provision is also established by paragraph 21 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 19 dated June 27, 2013 "On the application by courts of legislation regulating the grounds and procedure for exemption from criminal liability". In particular, the Plenum of the Supreme Court of Russia obliges the court to explain to the person brought to criminal responsibility his right to object to the termination of the criminal case on non-rehabilitating grounds and the legal consequences of the termination of the criminal case, as well as to find out whether it agrees to the termination of the criminal case. In its position, the Plenum of the Supreme Court of the Russian

Federation also emphasizes the need to reflect the consent (disagreement) of a person in a court decision.

In addition, the position of the Plenum of the Supreme Court of Russia establishes, based on the interrelated provisions of part 1 of Article 11 and part 2 of Article 16 of the Criminal Procedure Law, the obligation to explain to the accused his rights and obligations. At the same time, the obligation to ensure the possibility of exercising these rights is imposed on persons carrying out the verification of a crime report and a preliminary investigation of the case: on the inquirer, the body of inquiry, the head of the body or unit of inquiry, the investigator, the head of the investigative body, the prosecutor, and in the course of judicial proceedings – on the court.

In continuation of its position, the Plenum of the Supreme Court of Russia indicates that the rights provided for by the norms of the criminal procedure law should be clarified to the extent determined by the procedural status of the person against whom the proceedings are being conducted, taking into account the stages and features of various forms of legal proceedings. In particular, when considering the case on the merits by the court of first instance, not only the rights specified in article 47 of the Criminal Procedure Code of Russia are subject to explanation to the accused, but also his other rights in court proceedings, including the right to petition for participation in the debate of the parties along with the defender, and in the absence of a defender - to participate in the debate of the parties, the right to the last word.

As can be seen from the above legal positions of the Highest Judicial Instance, the current legislation does not directly fix the obligation of the court to explain to the defendant the right to apply incentive measures provided for by the current legislation (in this case, the right to file a petition for the termination of a criminal case, criminal prosecution on non-rehabilitating grounds stipulated by law).

At the same time, according to article 268 of the Criminal Procedure Code of Russia, the presiding judge, along with the rights provided for in articles 42, 44, 45, 54 and 55, also explains to the victim his right to reconciliation with the defendant in cases provided for in article 25 of the Criminal Procedure Law.

We believe that the indicated procedural uncertainty indicates, on the one hand, the need for mandatory clarification to the participants of the process of the incentive norms provided for by the current legislation and the possibility of an alternative to the verdict of the final court decision. On the other hand, such an explanation should encourage the parties to initiate the issue of the application of incentive norms in criminal proceedings.

It seems that the court, if there are grounds provided by law for the application of incentive norms, should provide the parties with an opportunity to discuss and resolve the issue of exemption from criminal liability on one or another non-rehabilitating basis, which were explained to them during the court session.

The legislator has defined the procedure for initiating the issue of the application of incentive norms in different ways. Thus, when reconciling the parties, the law establishes the right of the court to terminate a criminal case on the basis of a statement by the victim or his legal representative.

At the same time, a judicial fine as a measure of a criminal nature may be applied by the court on its own initiative or based on the results of consideration of the investigator's petition filed with the consent of the head of the investigative body.

Termination of criminal prosecution in connection with active repentance is also allowed by the court, the investigator or the inquirer with the consent of the investigating authority and the prosecutor, respectively.

A similar procedure is provided for when releasing a person from criminal liability in connection with compensation for damage.

Thus, the declarative nature of actions aimed at terminating a criminal case, criminal prosecution is provided by the current procedural legislation for participants in the process within the framework of reconciliation of the parties, as well as for officials authorized to investigate upon termination of a criminal case in connection with the imposition of a court fine, active repentance or in connection with compensation for economic crimes.

At the same time, neither the defender nor the defendant (accused, suspect) are directly specified in the law as initiators of the procedure for applying incentive norms. Whereas, it is the defense side that is primarily interested in the possibility of resolving a criminal case with an alternative verdict by a final court decision.

The question arises whether a statement by the participants in the petition process is required to terminate the criminal case on the grounds under consideration and is it the only reason to discuss the application of incentive norms?

Based on the provisions of article 25 of the Criminal Procedure Law of Russia, for reconciliation of the parties as a form of implementation of incentive norms, a victim's statement to terminate the criminal case is required.

In the remaining cases under consideration of the application of incentive norms when considering a criminal case by a court, the legislator indicates the procedural possibilities of the court to terminate the criminal case. At the same time, the law does not provide for the corresponding duty of the court to explain to the parties such options for resolving a criminal case, as well as the duty of the court to satisfy such petitions when establishing the required legal and procedural conditions.

It is worth noting that the use of incentive forms in criminal proceedings gives the state the opportunity to save its own efforts and funds to solve a crime, compensate for damage and neutralize its negative consequences due to the active post-criminal actions of the person who committed it.

As a result of the cooperation of the State, the victim and the accused (defendant), a mutually beneficial exchange takes place, in which the person who committed the crime atones for his guilt with positive post-criminal actions, thereby reducing the public danger of a criminal conflict.

Thus, the relations that develop between the state and the person brought to criminal responsibility and the victim can be designated as a "procedural compromise", within which each of the participants in the legal relations that arose after the crime committed, through mutual concessions stipulated in the law, find a way to resolve the criminal-legal conflict and smooth out its consequences.

This compromise has a procedural nature, since it is associated with the implementation of the procedural form of criminal proceedings, in which it is possible to identify and consolidate the agreement reached by the parties.

At the moment when the crime occurs, any compromise between the offender and the victim will be of a substantive nature, since it is associated with the legal qualification of the deed and the circumstances of the commission of a specific crime (for example, an attempted crime or voluntary termination of an illegal act).

Only after the State becomes aware of the criminal law conflict that has taken place, expressed in a specific crime, in the person of its authorized bodies, public criminal procedural legal relations arise.

Publicity in the formation of agreements between the parties is also manifested in the fact that the parties are limited by the minimum conditions and requirements stipulated in the law, the fulfillment of which is necessary for the termination of a criminal case. This state of affairs characterizes a special connection that arises between the principle of publicity on the one hand and the principle of disposability on the other. The principle of disposability is limited by the scope of publicity, expressed both in the legislative requirements for exemption from criminal liability, and the existence of a special procedural order for this. Also, one of the manifestations of publicity, limiting the principle of disposability, should be considered the discretionary powers of an official or court, mistakenly believing about their right, and not the obligation to terminate a criminal case if there are legal and factual grounds for that.

4 The importance of the active position of the court in the implementation of incentive forms in criminal proceedings

It is the court, not being a body of criminal prosecution, not acting on the side of the prosecution or defense, that creates the necessary conditions for the parties to fulfill their procedural duties, exercise the rights granted to them.

The specified purpose of the court within the framework of the existing public-adversarial process[8] is fully subject to implementation within the framework of the institution of exemption from criminal liability in the application of incentive norms. The creation of the necessary conditions for the use and application by the parties of the rights and procedural opportunities provided by law for the resolution of a criminal case ensures effective judicial proceedings in a criminal case.

Accessibility of information and adaptability of legislative formulations for participants in the process, including on the rights provided by law and existing incentive procedures, is provided primarily by the court, whose communicative competence[9] is one of the important elements of its professionalism.

We believe that the initiation of the procedure for the application of incentive norms at the trial stage should be provided by the court, thereby reducing the risk of missing the procedural possibility of a successful resolution of the criminal case due to the inaction of professional participants in the process or with their subsidiary participation[10] in the judicial investigation.

In other words, without relying on the principle of competitiveness and independence of the parties, the court, exercising its powers to direct the judicial proceedings, explaining to the parties in an accessible and understandable form the options provided by law for resolving the criminal case, thereby excludes the hypothetical neglect by the parties of these procedural possibilities and creates conditions for their implementation.

Making up for the insufficient activity of the parties by the court is not so much a manifestation of a public function as ensuring the adversarial beginnings of the process, including the possibility of the manifestation of the dispositive will of the persons involved in the case. The administrative manifestations of the presiding judge, explaining to the parties the forms of resolution of the criminal case provided for by law, allow to maintain the balance and procedural balance of the parties in the framework of the criminal case, and at the same time exclude the adoption of an unfair judicial decision.

Such procedural transparency provided to the participants of the process allows initiating the issue of termination of the criminal case not by the court, but by the parties. In other words, it is an impetus to the manifestation of dispositive principles within the framework of an adversarial process. The court, explaining to the parties the rules on the existing accelerated procedures and simplified

[8] SHAGIEVA, Z. H. The function of the prosecution in the modern model of the Russian criminal process. Abstract of the dissertation for the degree of Candidate of Legal Sciences, 2007, p. 8.

[9] KARNOZOVA, L. M. Humanitarian principles in the activity of a judge in criminal proceedings: textbook, 2004, p. 57.

[10] MASHOVETS, O. A. Judicial investigation in the criminal process of Russia: theoretical and doctrinal, regulatory and applied aspects: monograph, 2016, p. 147.

procedure for resolving a criminal case (for a crime of small and medium severity), thereby gives the parties the opportunity to independently determine the prospects for their implementation and the conditions for the termination of the criminal case.

At the same time, such assistance to the parties in finding the optimal procedural resource for resolving the criminal case is expressed in the appropriate procedural form: what is happening at the court session is recorded in the protocol, including the actions of the presiding judge and the parties, their positions and objections; written explanations of the rights of the participants in the process, their petitions and written statements may also be attached to the case materials, documents confirming positions or objections; the procedural decision itself is formalized by the appropriate court order.

This procedural form fully complies with the requirements of expediency and rationality, which together ensure the effectiveness of legal proceedings, since it does not involve additional or auxiliary actions and procedural decisions.

5 Conclusion

The resolution of a criminal case by the use of incentive norms entailing the release from criminal liability of the defendant (reconciliation with the victim, the appointment of a criminal law measure in the form of a court fine, active repentance, compensation for economic crimes, etc.) involves active actions of participants in procedural relations: the will and desire of the parties to terminate the criminal case by one of the alternative court verdict in a manner; negotiating to determine the main mutually beneficial conditions and their coordination; the fulfillment of these conditions and the final confirmation of such agreements by a single «conventional» petition for the termination of the criminal case on the appropriate grounds. These active procedural powers of the parties are implemented within the framework of the principle of disposability on the one hand, and the principle of adversarial criminal proceedings on the other, which indicates the universality of the incentive norm.

Accepting the above, we believe that the successful result of the interactive interaction of the court and the participants in the process can be: the parties' request for a break in the court session to agree on the terms and procedure for compensation for damage or for the defendant to carry out socially positive actions and measures indicating a reduction in the degree of public danger of the crime and neutralizing its harmful consequences; a statement by the parties of petitions for the termination of a criminal case in connection with the reconciliation of the parties or for the appointment of a criminal law measure in the form of a court fine, active repentance.

We believe that it is possible to avoid unjustified criminal prosecution and sentencing, if there are legal and factual grounds for the application of incentive norms, with mandatory clarification by the court to the persons involved in the case of the procedural possibilities of applying alternative measures (exemption from criminal liability in connection with active repentance, in connection with reconciliation with the victim, in connection with compensation for damages, with the appointment of a court fine).

We consider it necessary to legislatively fix the procedural obligation of the court when considering criminal cases against persons who are brought to criminal responsibility for the first time on charges of committing a crime of small or medium gravity, to explain to the participants of the process the non-rehabilitating grounds for termination of criminal prosecution provided for by the current legislation.

These actions of the court will allow to resolve the issue of initiating the procedure for the application of incentive norms by the parties, as well as the court to decide on the procedural perspective of this procedure for resolving a criminal case.

The court, having previously familiarized itself with the materials of the criminal case, having established that the defendant is being brought to criminal responsibility for the first time, and the crime belongs to the category of small or medium gravity, explaining in the presence of the parties the procedure for releasing a person from criminal liability provided for by the current legislation, thereby puts this issue up for discussion, motivating the parties to the process to be active and show independence in resolution of a criminal case.

In this form, the procedural interaction of the court and the parties takes place, within the framework of which the result is a discussion of the possibility of terminating a criminal case, criminal prosecution on non-rehabilitating grounds provided for by law. In turn, the specified duty of the court is an additional procedural guarantee for the lawful resolution of the criminal case.

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Sistema de Pré-Insolvência Empresarial – mediação e conciliação antecedentes

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Resumo: O presente artigo aborda, sob uma perspectiva teórica e dogmática, a nova disciplina legal aplicável, no campo da recuperação de empresas em dificuldade, à mediação e conciliação antecedentes. Nele, defende-se que a mediação (e todos os outros métodos não adversariais de solução de conflitos) pode contribuir, significativamente, para viabilizar a apresentação de planos de recuperação de empresas mais transparentes, realísticos e sustentáveis, que se adequem aos interesses dos credores, mas também às reais possibilidades da sociedade empresarial em dificuldades, aumentando o comprometimento de todos os interessados com o seu cumprimento.

Palavras-chave: Mediação; conciliação; métodos consensuais de solução de conflitos; recuperação de empresas; Lei nº 14.112/2020

1 Introdução

Diz-se que o sistema de solução de conflitos, no Brasil, perdeu o caráter unidimensional. Até bem recentemente, o único caminho para a resolução de um litígio era o Judiciário. O cenário mudou, significativamente, nos últimos anos.

A mudança, que se iniciara em 1996, com a aprovação da Lei de Arbitragem (Lei nº 9.307/1996), ganhou força em 2015, com a edição do novo Código de Processo Civil (Lei nº 13.015/2015), e, sobretudo, com a entrada em vigor da Reforma da Lei de Arbitragem (Lei nº 13.129/2015) e da Lei de Mediação (Lei nº 13.140/2015). Hoje, são várias portas de entrada e, também, diferentes portas de saída. É nesse sentido que se fala em "*Tribunal Multiportas*" ou "*Sistema Multiportas*". Conforme assinalam Antonio do Passo Cabral e Leonardo Carneiro da Cunha, é "*como se houvesse, no átrio do fórum, várias portas; a depender do problema apresentado, as partes seriam encaminhadas para a porta da mediação; ou da conciliação; ou da arbitragem; ou da própria justiça estatal*".[1]

Por sua natureza, o emprego dos métodos extrajudiciais de solução de conflitos depende de acordo prévio das partes. É escolha que deriva da autonomia da vontade e, por isso mesmo, não há a necessidade de que a via a ser utilizada esteja prevista em lei. Como explicitado no Enunciado nº 81 da I Jornada Prevenção e Solução Extrajudicial de Litígios, organizada pelo Centro de Estudos Judiciários do Conselho da Justiça Federal (CEJ/CJF), "a conciliação, a arbitragem e a mediação, previstas em lei, não excluem outras formas de resolução de conflitos que decorram da autonomia privada, desde que o objeto seja lícito e as partes sejam capazes".

A Lei nº 11.101/2005 (Lei de Recuperação de Empresas e Falências), em sua redação original, nada dispunha a respeito do tema. Havia, em função disso, certa insegurança jurídica na utilização de vias alternativas de solução de litígios pelas empresas submetidas ao regime recuperacional. O referido vácuo normativo foi preenchido recentemente, com a edição da Lei nº 14.112/2020, que introduziu toda uma nova seção na Lei de Recuperação e Falências, disciplinando nos arts. 20-A a 20-D as conciliações e mediações antecedentes ou incidentais aos processos de recuperação judicial.

Pretende-se, neste artigo, contextualizar a importância do emprego dos métodos extrajudiciais de solução de conflitos como instrumental voltado para auxiliar no soerguimento de empresas em situação de dificuldade financeira, bem como delimitar o alcance das normas sobre o tema introduzidas no regime jurídico aplicável à insolvência empresarial pela Lei nº 14.112/2020.

Para tanto, o presente ensaio será dividido em três tópicos. No primeiro deles, será feita breve análise das vantagens comparativas que derivam do uso dos mecanismos consensuais de solução de conflitos, em relação à justiça estatal, tendo por pano de fundo a realidade das empresas em situação de dificuldade. O

[1] CABRAL, Antonio do Passo & CUNHA, Leonardo Carneiro da. *Negociação direta ou resolução colaborativa de disputas (collaborative law); "Mediação sem mediador"*. *In*: ZANETTI JR, Hermes & CABRAL, Trícia Navarro Xavier. *Justiça Multiportas: Mediação, conciliação, arbitragem e outros meios de solução de conflitos*. Salvador: Juspodivm, 2006, p. 710.

segundo tópico será dedicado ao exame das normas que disciplinam o assunto, na Lei de Recuperação de Empresas (Lei nº 11.101/2005). Ao final, serão compendiadas as principais conclusões constantes do presente trabalho.

2 Os métodos consensuais de solução de conflitos: vantagens comparativas e benefícios para a empresa em situação de pré-insolvência. O caso OI.

Existem inúmeras métodos de solução extrajudicial de conflitos. Não é em todos que a resolução do litígio ocorre de forma consensual. Na arbitragem, por exemplo, a controvérsia é equacionada por um terceiro (o árbitro), imparcial e especialista na temática controvertida, o qual, nos limites da convenção arbitral, de forma semelhante ao juiz estatal, decide quem tem razão, aplicando o direito ao caso concreto. Diz-se, nesse sentido, que a arbitragem é método heterocompositivo de solução de litígios.

Já a mediação, a conciliação e a negociação são formas autocompositivas de resolução de conflitos. Nelas, as partes, com ou sem o auxílio de um terceiro, solucionam suas controvérsias consensualmente. Na negociação, as próprias partes, mediante diálogo e sem a intervenção de terceiro, buscam diretamente chegar a um termo quanto ao litígio. Enquanto isso, tanto na mediação quanto na conciliação, um terceiro (o mediador ou o conciliador), neutro e imparcial, auxilia as partes na composição do conflito.[2]

Mediação e conciliação, contudo, não se confundem. A distinção é sutil: enquanto na mediação[3] o terceiro (mediador) deve levar as partes, elas próprias, a construir o caminho para o acordo, sem influir diretamente nas escolhas feitas, na conciliação permite-se que o conciliador exerça um papel mais ativo na condução do diálogo, apresentando sugestões às partes, na busca da solução consensual.

Nada obstante, para os fins da Lei nº 13.140/2015, "considera-se mediação a atividade técnica exercida por terceiro imparcial sem poder decisório, que, escolhido ou aceito pelas partes, as auxilia e estimula a identificar ou desenvolver

[2] Veja-se, a respeito das diferenças entre negociação, mediação e conciliação: GARCEZ, José Maria Rossani. *ADRS: Métodos alternativos de solução de conflitos: análise estrutural dos tipos, fundamentos e exemplos na prática nacional/internacional*, Rio de Janeiro: Lumen Juris, 2013, p. 13-22 e 29-72.

[3] Na lição de Carlos Eduardo de Vasconcelos, mediação é o "método dialogal de solução ou transformação de conflitos interpessoais em que os mediandos escolhem ou aceitam terceiro(s) mediador(es), com aptidão para conduzir o processo e facilitar o diálogo, a começar pela apresentações, explicações e compromissos iniciais, sequenciando com narrativas e escutas alternadas dos mediandos, recontextualizações e resumos do(s) mediador(es), com vistas a se construir a compreensão das vivências afetivas e materiais da disputa, migrar das posições antagônicas para a identificação dos interesses e necessidades comuns e para o entendimento sobre as alternativas mais consistentes, de modo que, havendo consenso, seja concretizado acordo" (VASCONCELOS, Carlos Eduardo de. *Mediação de conflitos e práticas restaurativas*. São Paulo: Editora Método, 2014, p. 54).

soluções consensuais para a controvérsia" (art. 1º, parágrafo único),[4] não tendo havido, por parte do legislador, a preocupação, ou qualquer rigor técnico, em diferenciar os dois institutos. Assim, para os fins da Lei de Mediação, mediação e conciliação se equiparam, para todos os efeitos legais. E mais: a mediação poderá ser feita pela via eletrônica, inclusive por aplicativo especificamente confeccionado para tal fim, nos termos do art. 46[5] da Lei.

A doutrina,[6] de forma relativamente uniforme (com pequenas variações), costuma apontar as seguintes vantagens na adoção dos métodos não adversariais de solução de conflitos (sempre sob uma ótica comparativa com o processo judicial): (i) a celeridade na resolução do conflito; (ii) significativa redução de custos com o litígio; (iii) minimização das incertezas quanto ao resultado; (iv) confidencialidade do procedimento; e (v) a preservação do relacionamento das partes envolvidas no conflito. Reconhece-se, também, que a adesão, no âmbito empresarial, a métodos consensuais de resolução de litígios gera uma boa imagem pública, pois passa uma importante mensagem para os consumidores de que a empresa com eles efetivamente se importa.

Como se vê, é tudo que uma empresa em situação de insolvência (ou pré-insolvência) almeja: que os conflitos com os empregados, fornecedores, consumidores e parceiros comerciais sejam resolvidos com rapidez, ao menor custo possível, de forma confidencial, com a preservação do relacionamento existente entre as partes e controlando-se minimamente o resultado da disputa.

É lembrar que, para a reestruturação da empresa em situação de dificuldade, é essencial o envolvimento tanto da sociedade empresária, quanto daqueles que com ela possuem vínculo relacional, seja empregatício ou comercial, como empregados, clientes e, também, fornecedores. Com efeito, não raramente há o interesse e a intenção, de parte a parte, de se preservar os vínculos já constituídos, em uma relação de mútua dependência, mas o desgaste, inclusive emocional, gerado pela inadimplência impede que soluções criativas possam ser empregadas. Em tais circunstâncias, a mediação pode contribuir, imensamente, na preservação das relações empresariais e trabalhistas existentes, facilitando o diálogo entre as partes e permitindo que se identifiquem soluções econômico e financeiramente

[4] Esclarecem Humberto Dalla e Marcelo Mazzola que, para que se possa falar em mediação, três elementos essenciais devem estar presentes, obrigatoriamente: (i) existência de sujeitos em conflitos; (ii) clara contraposição de interesses; e (iii) um terceiro neutro capacitado a facilitar a busca pelo acordo. *Vide*: DALLA, Humberto & MAZZOLA, Marcelo. *Manual de mediação e arbitragem*, São Paulo: Saraiva Educação, 2019, p. 50.

[5] "Art. 46. A mediação poderá ser feita pela internet ou por outro meio de comunicação que permita a transação à distância, desde que as partes estejam de acordo".

[6] Por todos, vide: MERLO, Ana Karina França. Mediação, conciliação e celeridade processual. *In*: Âmbito jurídico, publicado em 01 de outubro de 2012. Disponível em: https://ambitojuridico.com.br/cadernos/direito-processual-civil/mediacao-conciliacao-e-celeridade-processual/. Acesso em: 10 jun. 2022.

sustentáveis, que atendam aos interesses de todos os envolvidos, em benefício não apenas da empresa, mas daqueles que com ela se relacionam.

Mais do que isso, a facilitação do diálogo entre os sujeitos de uma empresa em recuperação (judicial ou extrajudicial) não se restringe às relações dela (devedora) com os seus credores, mas assume especial importância, igualmente, nas relações mantidas entre os próprios credores. Nesse sentido, a mediação pode também contribuir para que propostas sustentáveis sejam apresentadas pelo Comitê de Credores, constituído nos termos do disposto no §2º do art. 52 da Lei nº 11.101/2005, após o deferimento da recuperação judicial.

De fato, seja de forma antecedente à recuperação judicial, seja em caráter incidental ao procedimento recuperacional, a mediação pode contribuir, significativamente, para melhorar a comunicação entre as partes e para conferir maior celeridade ao processo. Pode contribuir, ainda, para a apresentação de um plano de recuperação judicial mais transparente, realístico e sustentável, que se adeque aos interesses dos credores, mas também às reais possibilidades da empresa em recuperação, aumentando o comprometimento de todos com o seu cumprimento.

A mediação (aí incluídos todos os métodos não adversariais de solução de conflitos) revela-se, portanto, um valioso instrumento para ajudar no atendimento do princípio da preservação da empresa, insculpido no art. 47 da Lei nº 11.101/2005, potencializando o envolvimento dos credores na análise e discussão do plano de recuperação, o que implica em maior credibilidade em relação ao plano apresentado, em função da participação ativa dos envolvidos, sobretudo em sua discussão e aprovação. O mediador atua como um facilitador do diálogo, em um ambiente sigiloso, conduzindo as partes a um estado de cooperação que propicie a aprovação do plano de reestruturação da empresa. Na dicção de Ronaldo Vasconcelos:

> o plano de recuperação representa a verdadeira 'alma' do processo de recuperação. Portanto, impõe-se que a sua discussão (com vistas à elaboração do acordo com o regime de comunhão de interesses) seja realizada com maior maturidade possível e, principalmente, propiciando meios para a extração da mais objetiva análise da viabilidade econômica do plano de recuperação e da empresa em si.[7]

É emblemático, nesse sentido, o uso da mediação eletrônica na recuperação judicial[8] da OI. Conflitos intermináveis, com milhares de credores, foram

[7] VASCONCELOS, Ronaldo. *A mediação na recuperação judicial: compatibilidade entre as Leis 11.101/05, 13.105/15 e 13.140/15*. *In*: CEREZETTI, Sheila Christina Neder & MAFFIOLETI, Emanuelle Urbano (coord.). *Dez anos da Lei 11.101/2005 – estudos sobre a lei de recuperação e falências*, São Paulo: Almedina, 2015, p. 458.

[8] TJRJ, 7ª Vara Empresarial, Processo nº 0203711-65.2016.8.19.0001, Juiz de Direito Fernando Viana.

prontamente resolvidos, via plataforma on-line,[9] com drástica redução de custos. Todos saíram ganhando.[10]

É verdade que, antes da edição da Lei nº 14.112/2020, no bojo do caso OI, houve relevante discussão a respeito da possibilidade de emprego da mediação no processo de recuperação judicial da empresa. Por maioria de votos, prevaleceu o entendimento, no âmbito Egrégia 8ª Câmara Cível do TJRJ, relatora a Desembargadora Monica Maria Costa di Piero, de que seria possível a mediação, conforme se extrai do seguinte trecho da ementa do julgado:

> 2. A controvérsia posta nos autos reside em aferir a possibilidade de o Juízo Recuperacional exercer controle prévio de legalidade, traçando, antecipadamente, parâmetros a serem seguidos pelos credores e pelas empresas recuperandas, antes mesmo de iniciado o procedimento de mediação.
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> 3. A valorização do mecanismo da autocomposição vem sendo comumente reiterada pelo Poder Legislativo por intermédio da edição de várias leis com escopo de estimular a solução consensual dos litígios, envolvendo os interessados na busca de um resultado que alcance um benefício mútuo.
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> 4. O novo Código de Processo Civil, reconhecendo a importância do instituto, elencou os mecanismos de autocomposição de conflitos no rol das normas fundamentais do processo civil, previstas nos parágrafos 2º e 3º, de seu art.3º.
>
> 5. De certo que conciliação e a mediação são informadas pelos princípios da independência, da imparcialidade, da autonomia da vontade, da confidencialidade, da oralidade, da informalidade e da decisão informada (art.166, do CPC/15).
>
> 6. Com efeito, a Lei nº 11.101/2005 não traz qualquer vedação à aplicabilidade da instauração do procedimento de mediação no curso de processos de Recuperação Judicial e Falência.
>
> 7. Assim, na forma do art.3º da Lei nº 13.140/2015, o qual disciplina "que pode ser objeto de mediação o conflito que verse sobre direitos disponíveis ou sobre direitos indisponíveis que admitam transação", não remanesce dúvidas sobre a sua aplicação aos processos de Recuperação Judicial e Falência.
>
> 8. Não se perde de vista, contudo, que embora a Lei da Mediação (Lei nº 13.140/2015) seja a regra especial do instituto, sua interpretação deve se dar em harmonia com o ordenamento jurídico pátrio e, principalmente, no caso, com a Lei de Recuperação Judicial.

[9] Vale conhecer, a propósito, a plataforma eletrônica construída para a recuperação judicial: Oi - Plataforma da Recuperação Judicial do Grupo Oi. Disponível em: http://www.credor.oi.com.br. Acesso em: 10 jun. 2022.

[10] Sobre o tema, confira-se a entrevista concedida pela advogada Samantha M. Longo. Migalhas, 9 de abril de 2019. Disponível em: https://www.migalhas.com.br/quentes/299960/mediacao-online-foi-fundamental-para-recuperacao-judicial-da-oi–explica-advogada. Acesso em: 10 jun. 2022.

> 9. Em se tratando de procedimento de mediação, a minuta elaborada pelas empresas recuperandas não pode ser de cunho vinculativo e não encerra "acordo de adesão", eis que, se assim o fosse, estaria divorciada da natureza jurídica do instituto proposto, o qual pressupõe a criação de um ambiente para que as partes sejam as protagonistas de uma solução conjunta para o seu impasse, a qual será alcançada, consensualmente, por intermédio de concessões mútuas.
>
> 10. Tendo em vista que a mediação não deve ser solução pronta, com a estipulação prévia de paradigmas por uma das partes, qualquer pretensão nesse sentido, ainda que sob as vestes de conferir legalidade e celeridade ao procedimento, iria de encontro ao próprio instituto.
>
> 11. Diante da índole negocial que o plano de recuperação judicial apresenta, constituindo-se negócio jurídico de caráter contratual, com determinações específicas, a atuação do Estado-Juiz se restringirá à verificação se os interesses das partes para alcançar a finalidade recuperatória estão desrespeitando ou extrapolando os limites da lei.
>
> 12. Considerando que o procedimento de mediação pressupõe que as partes tenham espaçosa oportunidade de, no curso do processo, negociar e eventualmente transacionar acerca das condições e dos valores de pagamento do crédito em discussão, não há como o julgador antecipar quais as soluções poderão ser alcançadas pelas partes.
>
> 13. Não se está dizendo que poderão as partes obrar em descompasso com ordenamento jurídico em vigor, assim como em desarmonia com os princípios regentes do processo de recuperação judicial, porém, não compete ao Poder Judiciário atuar como um órgão consultivo prévio, mormente sobre situações hipotéticas, já que sua função primordial é a solução de conflitos.
>
> 14. Não encerrando o consenso qualquer ilegalidade, deverá se ter em vista que a composição eficiente pressupõe a escolha de um método adequado ao seu tratamento e que o resultado propicie um benefício mútuo e positivo para ambas os polos envolvidos.
>
> 15. Constituindo-se a mediação como uma forma de autocomposição de conflitos, apenas posteriormente ao procedimento é que poderá ser aferido se o acordo engendrado entre as partes suplantará os limites impostos pelo art.304 e segs. do CC/02 e art.45, §3º, da LRF.[11]

Induvidosamente, a anterior aprovação do Enunciado nº 45 da I Jornada Prevenção e Solução Extrajudicial de Litígios, de 2016, organizada pelo Centro de Estudos Judiciários do Conselho da Justiça Federal (CEJ/CJF), teve papel preponderante no reconhecimento da possibilidade de utilização das soluções extrajudiciais de solução de conflitos no campo da recuperação de empresas em dificuldade. Ali, ficou assentado que "a mediação e conciliação são compatíveis

[11] TJRJ, 8ª Câmara Cível, Apelação Cível nº 0018957-54.2017.8.19.0000, Desembargadora Relator Monica Maria Costa di Piero, julgado em 29.08.2017, publicado em 13.09.2017.

com a recuperação judicial, a extrajudicial e a falência do empresário e da sociedade empresária, bem como em casos de superendividamento, observadas as restrições legais".[12] Também o art. 3º, §3º, do CPC/2015 já sinalizava a importância de se incentivar, na esfera judicial e extrajudicial, a conciliação, a mediação e outros métodos de solução consensual de conflitos.

Assim é que, na linha do decidido pela instância inferior, o Colendo STJ, por decisão monocrática do Ministro Marco Buzzi, no Pedido de Tutela de Urgência nº 1.049/RJ,[13] referendou, ainda que em caráter provisório e precário, a orientação externada pelo TJRJ, permitindo o prosseguimento da mediação instaurada no processo de recuperação judicial da OI.

Mais recentemente, em 2019, considerando "os diversos casos exitosos de procedimentos de mediação instaurados em processos de insolvência em curso perante as varas especializadas dos Estados de São Paulo e do Rio de Janeiro" e, ainda, a necessidade de "criação de um ambiente seguro e propício para negociação e acordos", foi editada a Recomendação nº 58, do Conselho Nacional de Justiça, incentivando "os magistrados responsáveis pelo processamento e julgamento dos processos de recuperação empresarial e falências, de varas especializadas ou não, que promovam, sempre que possível, nos termos da Lei nº 13.105/2015 e da Lei nº 13.140/2015, o uso da mediação, de forma a auxiliar a resolução de todo e

[12] Disponível em: https://www.cjf.jus.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/publicacoes-1/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/prevencao-e-solucao-extrajudicial-de-litigios/?_authenticator=60c7f30ef0d8002d17dbe298563b6fa2849c6669. Acesso em: 10 jun. 2022.

[13] STJ, Tutela Provisória nº 1.049/RJ, Ministro Marco Buzzi, 09.11.2017: "... a Corte estadual, ao manter a decisão do r. juízo da recuperação judicial, entendeu que '(...) a Lei n.º 11.101/2005 não traz qualquer vedação à aplicabilidade da instauração do procedimento de mediação no curso de processos de Recuperação Judicial e Falência.' Acrescentou, ademais, que "(...) na forma do art. 3º da Lei n.º 13.140/2015, o qual disciplina 'que pode ser objeto de mediação o conflito que verse sobre direitos disponíveis ou sobre direitos indisponíveis que admitam transação', não remanesce dúvidas sobre a sua aplicação aos processos de Recuperação Judicial e Falência." (fls. 186/215) Dessa forma, não se vislumbra, a existência de teratologia ou flagrante ilegalidade nas razões do v. acórdão recorrido, de modo a se permitir a concessão da tutela de urgência requerida, valendo destacar, quanto à temática ora debatida, o Enunciado 45, da I Jornada de Prevenção e Solução Extrajudicial de Litígios do Conselho da Justiça Federal, no sentido de que "(...) A mediação e conciliação são compatíveis com a recuperação judicial, a extrajudicial e a falência do empresário e da sociedade empresária, bem como em caso de superendividamento, observadas as restrições legais." Na mesma linha de entendimento, o escólio doutrinário acerca da matéria sustenta a aplicabilidade dos institutos da mediação e conciliação no bojo da recuperação judicial, verbis: "(...) A Lei n.º 11.101/2005 consolidou a cultura de segunda oportunidade - não só envolvendo a recuperação extrajudicial, mas também a possibilidade não vetada de obtenção de pactos para recuperação de créditos e elaboração do plano de recuperação - e há pouco tempo o Brasil acolheu o impacto de uma cultura de solução consensual de conflitos com o marco regulatório da Mediação - Lei n.º 13.140/2015 - e com o Código de Processo Civil de 2015 (Lei n.º 13.105), que a integra o procedimento comum." (ut. Recuperação Judicial, extrajudicial e falência: teoria e prática. SALOMÃO, Luis Felipe e SANTOS, Paulo Penalva. Rio de Janeiro. Forense: 3ª ed. 2017, pag. 111) Com efeito, em sede de cognição sumária, não se verifica, assim, a presença cumulativa dos requisitos ensejadores da concessão excepcional de tutela provisória de urgência por este Superior Tribunal de Justiça, sendo de rigor o indeferimento do pedido almejado pelo ora requerente".

qualquer conflito entre o empresário/sociedade, em recuperação ou falidos, e seus credores, fornecedores, sócios, acionistas e terceiros interessados no processo".[14]

Evidentemente, a figura do mediador não se confunde com a do administrador judicial. São funções distintas e não devem, em hipótese alguma, ser exercidas pela mesma pessoa. As competências do administrador judicial encontram-se descritas no art. 22 da Lei de Recuperação de Empresas. Conquanto caiba ao administrador judicial, na forma da alínea "j" do aludido artigo, "estimular, sempre que possível, a conciliação, a mediação e outros métodos alternativos de solução de conflitos relacionados à recuperação judicial e à falência", a mediação propriamente dita deve ser conduzida por terceiro, com habilitação e conhecimento técnico específico. Inclusive, há potencial conflito de interesses entre as duas funções. É papel do administrador judicial, por exemplo, montar o quadro de credores, apontando o valor correto devido pela empresa em dificuldade. Ao passo que mediações podem ter por objetivo, precisamente, viabilizar a concessão de desconto no montante devido, bem como encontrar soluções, em um ambiente negocial, que viabilizem a aprovação do plano de recuperação judicial.

O profissional responsável pela condução da mediação deve ter (i) sensibilidade no trato com as pessoas; (ii) vocação para promover a comunicação eficiente e (iii) capacitação técnica, além de agir com ética, imparcialidade e autonomia, nos termos da Resolução nº 125/2010, do CNJ.

3 A mediação e a conciliação antecedentes na Lei nº 14.112/2020

Sepultando qualquer controvérsia ainda existente sobre o assunto, o art. 20-A da Lei de Recuperação de Empresas, nela introduzido pela Lei nº 14.112/2020, enfatiza que "a conciliação e a mediação deverão ser incentivadas em qualquer grau de jurisdição, inclusive no âmbito de recursos em segundo grau de jurisdição e nos Tribunais Superiores, e não implicarão a suspensão dos prazos previstos nesta Lei, salvo se houver consenso entre as partes em sentido contrário ou determinação judicial". É, portanto, conforme já apregoava o art. 3º, §3º, do CPC/2015, dever de todos os atores do processo o de estimular, não apenas antes, mas também no curso do processo recuperacional, o uso das vias não adversariais de solução de litígios.

A nova legislação, na forma dos seus arts. 20-A a 20-D, prevê a possibilidade de emprego das soluções consensuais de conflitos em dois momentos procedimentais distintos: antes da distribuição do pedido de recuperação judicial

[14] CNJ, Recomendação nº 58, de 22 de outubro de 2019. *DJe* de 30.10.2019.

e durante o processo judicial correlato. No primeiro caso, diz-se que a mediação (ou conciliação) é antecedente, de natureza pré-processual. Ao passo que, no segundo, se fala que a mediação (ou conciliação) é incidental ao processo de recuperação judicial.

A expressão "antecedente", utilizada para legislador, pode passar a errônea impressão de que o ato seria preparatório à apresentação do pedido de recuperação judicial. A intenção objetiva da lei, todavia, é a de que, sendo frutífera a mediação pré-processual (antecedente), o processo recuperacional seja descartado, ante o sucesso na reestruturação das dívidas da empresa, desafogando-se o Judiciário de mais um processo desnecessário.

Nesse sentido, a posterior distribuição de pedido de recuperação judicial não é condição para a deflagração da mediação pré-processual. Ao contrário, a intenção do legislador é evitar a judicialização do tema, viabilizando o reequacionamento das dívidas da empresa em dificuldade, sem a necessidade de intervenção judicial. Tanto isso é verdade que, a teor do parágrafo único do art. 20-C da Lei, em caso de deflagração do processo recuperacional (judicial ou extrajudicial) no prazo de até 360 (trezentos e sessenta) dias da celebração de eventual acordo, firmado na fase conciliatória antecedente, "o credor terá reconstituídos seus direitos e garantias nas condições originalmente contratadas". A ideia, quanto a este particular, é evitar o risco de o credor, após já ter renegociado a sua dívida, ter que submeter o seu crédito, em condições já pioradas, a nova alteração, por força da aprovação do plano de recuperação da empresa. Naturalmente, nenhum prejuízo suportará a recuperanda, podendo deduzir do montante devido ao credor os valores eventualmente pagos a ele. De mais a mais, se o acordo já tiver sido regularmente cumprido, a dívida será tida por extinta. Neste caso, os efeitos pactuados deverão ser integralmente respeitados, conforme disposto na parte final do referido dispositivo legal.

O espectro de incidência das soluções consensuais, na fase pré-processual, não poderia ser mais amplo.[15] Pode a empresa devedora valer-se tanto da mediação como da conciliação para equacionar "disputas entre os sócios e acionistas de sociedade em dificuldade" (20-B, inciso I), bem como "na hipótese de negociação de dívidas e respectivas formas de pagamento entre a empresa em dificuldade e seus credores" (art. 20-B, inciso IV).[16]

[15] Inclusive, sustenta Diogo Rezende de Almeida que o rol do art. 20-B seria meramente exemplificativo. Assim, "desde que o conflito tenha como objeto direito transacionável, é possível o emprego de mediação, conciliação ou outro método autocompositivo" (ALMEIDA, Diogo Rezende. A Reforma da Lei de Recuperação Judicial e Falência (Parte II). *GENJURÍDICO.COM.BR*, publicado em 13 de janeiro de 2021. Disponível em: http://genjuridico.com.br/2021/01/13/reforma-lei-de-recuperacao-judicial-falencia-2/. Acesso em: 10 jun. 2022.

[16] Os incisos II e III do art. 20-B tem aplicação já no curso da recuperação judicial, sendo irrelevantes na fase pré-processual: "Art. 20-B (...) II - em conflitos que envolverem concessionárias ou permissionárias

Em nenhuma hipótese, contudo, a resolução consensual do conflito poderá versar "sobre a natureza jurídica e a classificação de créditos, bem como sobre critérios de votação em assembleia-geral de credores" (art. 20-B, §2º). Em tal hipótese, por envolver norma de ordem pública, o acordo será ineficaz, no bojo do processo de recuperação judicial. Cabe ao juiz da recuperação judicial, inarredavelmente, a decisão a respeito da natureza jurídica e da classificação dos créditos, para fins de definição do quadro geral de credores, sob pena de se admitir que, por acordo das partes interessadas, seja burlado o *par conditio creditorum*.[17] Bem leciona Paulo Furtado Coelho Filho, a respeito:

> A Lei 13.140/2015, em seu artigo 3º, estabelece que 'pode ser objeto de mediação o conflito que verse sobre direitos disponíveis ou sobre direitos indisponíveis que admitam transação.' Em regra, na falência e na recuperação judicial estão em jogo direitos disponíveis, decorrentes de relações de natureza patrimonial mantidas entre o devedor e os credores. Porém, certas normas da legislação de insolvência são inspiradas por interesses superiores ao de cada uma das partes. Quer pela consideração de que na falência os credores não podem ser tratados de forma igual em razão da insuficiência do patrimônio do devedor, que pela necessidade de uma deliberação legítima dos credores na recuperação judicial, não é dado aos credores ajustarem entre si a mudança da natureza do seu crédito, para obter uma posição mais favorável em relação a outros credores na falência, ou com o propósito de ter mais influência na deliberação sobre o plano de recuperação judicial.[18]

Perceba-se, por relevante, que a opção pela mediação (ou conciliação) em nada afeta o decurso dos prazos previstos na Lei, salvo havendo acordo entre as partes em sentido contrário.

Nada obstante, na hipótese de negociação do valor de dívidas ou da respectiva forma de pagamento, em caráter antecedente à distribuição do pedido

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de serviços públicos em recuperação judicial e órgãos reguladores ou entes públicos municipais, distritais, estaduais ou federais; III - na hipótese de haver créditos extraconcursais contra empresas em recuperação judicial durante período de vigência de estado de calamidade pública, a fim de permitir a continuidade da prestação de serviços essenciais (...)".

17 Como bem elucidam Daniel Costa Carnio e Alexandre Correa Nasser de Melo, muito embora "a conciliação e a mediação sejam incentivadas, a Lei traz expressa ressalva que é vedada a composição acerca da classificação de créditos e da natureza jurídica, o que poderia ser utilizado para burlar o concurso de credores reclassificando créditos conforme o interesse e conveniência das recuperandas e ferindo o par conditio creditorum. Assim, fica ressalvado ao Juízo a decisão acerca da natureza e classificação do crédito em suas respectivas classes" (COSTA, Daniel Carnio & MELO, Alexandre Correa Nasser de Melo. *Comentários à lei de recuperação de empresas e falência: Lei 11.101, de 09 de fevereiro de 2005*, Curitiba, Juruá, 2021, p. 96).

18 OLIVEIRA FILHO, Paulo Furtado. *Das conciliações e das mediações antecedentes ou incidentais aos processos de recuperação judicial*. *In*: OLIVEIRA FILHO, Paulo Furtado (Coord.). *Lei de recuperação e falências. Pontos relevantes e controversos da reforma pela lei 14.112/20*, São Paulo, Editora Foco, p. 23.

de recuperação judicial (art. 20-B, IV, da Lei), poderá a empresa em dificuldade se valer da tutela de urgência referida no §1º do art. 20-B, "a fim de que sejam suspensas as execuções contra elas propostas pelo prazo de até 60 (sessenta) dias, para tentativa de composição com seus credores, em procedimento de mediação ou conciliação já instaurado perante o Centro Judiciário de Solução de Conflitos e Cidadania (Cejusc) do tribunal competente ou da câmara especializada, observados, no que couber, os arts. 16 e 17 da Lei nº 13.140, de 26 de junho de 2015". Nesse sentido, conforme a atenta percepção do Ministro Ricardo Villas Bôas Cueva e de Daniel Costa Carnio, a nova lei "oferece à devedora a essencial proteção do stay, típico da recuperação judicial, a fim de se criar um ambiente adequado à negociação coletiva. Considerando que a determinação de suspensão das ações deve ser judicial – só uma decisão judicial pode ter o condão de suspender o andamento de ações judiciais – o mecanismo oferece à devedora a oportunidade de requerer ao juízo competente a medida de stay com natureza cautelar, eventualmente preparatória de futura recuperação judicial".[19]

Incidiu o legislador aqui em uma pequena impropriedade técnica. Isso porque a hipótese não é, propriamente, de tutela de urgência, de caráter cautelar, mas sim de tutela de evidência. É irrelevante a existência, ou não, de *periculum in* mora, para o deferimento da liminar. Pode-se dizer, inclusive, que o *periculum in mora* seria presumido. Não precisa a parte evidenciá-lo, na formulação do pedido. E nem pode o juiz deixar de deferir a tutela, por não vislumbrar risco de dano de difícil ou impossível reparação. Com efeito, demonstrada a situação de pré-insolvência, deve o magistrado deferir a suspensão das execuções, à luz do §1º do art. 20-B da Lei. O ônus probatório que recai sobre a empresa é demonstrar, a não deixar margem a dúvida, de que está em situação de dificuldade financeira e que precisa se reorganizar financeiramente para seguir com as suas atividades.[20]

Instituída a mediação, podem as partes, de comum acordo, postular a prorrogação do prazo de suspensão das execuções em curso, em sendo factível o acordo, na forma do art. 16[21] da Lei de Mediação. Há que se admitir, também, na lacuna da lei, a prorrogação excepcional do prazo, em mais um período de 60

[19] CUEVA, Ricardo Villas Bôas & COSTA, Daniel Carnio. *Os mecanismos de pré-insolvência nos PLs 1397/2020 e 4458/2020*. *Folha Diária*, publicado em 22.10.2020. Disponível em: http://www.folhadiaria.com.br/materia/54/3506/politica/nacional/os-mecanismos-de-pre-insolvencia-nos-pls-1397-2020-e-4458-2020#.YEYXgZ1KhjU. Acesso em: 10 jun. 2022.

[20] Em sentido contrário, entendendo que a hipótese é de típica tutela de urgência, de caráter cautelar, a exigir a demonstração do risco de dano irreparável ou de difícil reparação, sob pena de indeferimento do pedido, veja-se: OLIVEIRA FILHO, Paulo Furtado, *op. cit.*, p. 19-20.

[21] "Art. 16. Ainda que haja processo arbitral ou judicial em curso, as partes poderão submeter-se à mediação, hipótese em que requererão ao juiz ou árbitro a suspensão do processo por prazo suficiente para a solução consensual do litígio. § 1º É irrecorrível a decisão que suspende o processo nos termos requeridos de comum acordo pelas partes. § 2º A suspensão do processo não obsta a concessão de medidas de urgência pelo juiz ou pelo árbitro".

(sessenta) dias, a pedido da empresa devedora, se ela demonstrar que a negociação coletiva avançou significativamente, mas que existem aspectos ainda pendentes de definição. Prevalece aqui o princípio da preservação da empresa. Seria um contrassenso, ademais, prestigiar o emprego da mediação, como método de solução de conflitos, e encerrá-la impositivamente, em função do decurso do prazo legal, mesmo quando o procedimento caminha para a solução consensual. A prorrogação, entretanto, há de ficar restrita a uma única vez, em sintonia com a regra do art. 6º, §4º,[22] da Lei nº 11.101/2005, com a redação dada pela Lei nº 14.112/2020.[23]

Neste ínterim procedimental, enquanto não encerrada a mediação, com a lavratura do termo respectivo, fica suspenso o prazo prescricional, de forma a evitar qualquer prejuízo ao credor de boa-fé. É o que preconiza o parágrafo único do art. 17 da Lei nº 13.140/2015: "Enquanto transcorrer o procedimento de mediação, ficará suspenso o prazo prescricional".

Com isso, protege-se o devedor, com a ordem de *stay period*, estimulando-se o processo de negociação coletiva, antes mesmo da deflagração do processo recuperacional, sem se descuidar do credor, que tem os seus direitos preservados.[24] Remedia-se, ainda, no lúcido comentário de Daniel Costa Carnio e Alexandre Correa Nasser de Melo, "o ajuizamento de centena de outras ações relacionadas ao inadimplemento da devedora em razão da ordem de stay e da coletivização da solução desses conflitos".[25]

Obviamente, a ordem de *stay*, fruto do deferimento da tutela prevista no §1º do art. 20-B, não pode ser usada, estrategicamente, para viabilizar a ampliação indevida do prazo de 180 (cento e oitenta) dias previsto no art. 6º, §4º, da Lei de Recuperação e Falências. Exatamente por isso, estabelece o §3º do

[22] "Art. 6º (...) § 4º Na recuperação judicial, as suspensões e a proibição de que tratam os incisos I, II e III do caput deste artigo perdurarão pelo prazo de 180 (cento e oitenta) dias, contado do deferimento do processamento da recuperação, prorrogável por igual período, uma única vez, em caráter excepcional, desde que o devedor não haja concorrido com a superação do lapso temporal."

[23] Adotando orientação em sentido contrário à do texto: OLIVEIRA FILHO, Paulo Furtado, *op. cit.*, p. 22-23.

[24] CUEVA, Ricardo Villas Bôas; COSTA, Daniel Carnio, *op. cit.*: "O sistema de pré-insolvência criado pelo PL 4458/20 cria estímulos para que empresas devedoras busquem a renegociação coletiva de suas dívidas de forma predominantemente extrajudicial, com mínima intervenção judicial. A utilização da mediação e da conciliação preventivas necessita da criação de estímulos para que seja eficaz e adequada. Nesse sentido, é preciso proteger o devedor de execuções individuais, como condição para que se crie um espaço adequado para realização dos acordos com os credores. Os credores somente se sentarão à mesa para negociar se não puderem prosseguir nas suas execuções individuais. Por outro lado, a devedora somente terá condições de propor um acordo aos seus credores se tiver um espaço de respiro e uma proteção contra os ataques patrimoniais provenientes de ações individuais. Da mesma forma, um credor somente se sentirá seguro para negociar se houver uma proteção ao acordo entabulado, evitando-se que seja prejudicado pelo uso sucessivo de um processo de insolvência. De igual modo, deve-se cuidar para que os devedores não façam uso predatório dessa ferramenta, apenas com o intuito de prolongar a proteção do stay contra os credores".

[25] COSTA, Daniel Carnio; MELO, Alexandre Correa Nasser de Melo, *op. cit.*, p. 96.

aludido art. 20-B que o período de suspensão na fase de negociação pré-processual deverá ser deduzido do *stay period* consagrado no art. 6º da Lei.

Eventual acordo, se obtido, à luz do que estatui o *caput* do art. 20-C, deverá ser reduzido a termo e homologado pelo juízo competente para o processo de recuperação judicial (art. 3º da Lei). Evidentemente, deve o magistrado rejeitar homologação ao acordo, se versar sobre direitos que não são passíveis de transação ou que violem normas de ordem pública.

O procedimento de mediação, assim como o de conciliação, poderá ser conduzido eletronicamente, ou por sessões virtuais, conforme art. 20-D da Lei, e deverá ser instaurado, mandatoriamente, no âmbito do Centro Judiciário de Solução de Conflitos e Cidadania (Cejusc) do tribunal competente ou de câmara privada especializada. Neste particular, entendeu o legislador que, eventualmente, pode ser mais conveniente para os interessados que a mediação ocorra no ambiente estritamente privado, por instituição renomada na área das soluções extrajudiciais de litígios. A propósito, existem inúmeras câmaras especializadas no Brasil, aptas a prestar serviços na área de mediação, com notoriedade e reputação ilibada.

Conclusões

Ao fim de tudo que se expôs, fica claro a vantajosidade do emprego das soluções consensuais de conflito para as empresas em dificuldade. A mediação e a conciliação permitem que eventuais litígios sejam resolvidos com rapidez, ao menor custo possível, de forma confidencial, com a preservação do relacionamento existente entre a empresa e seus colaboradores e parceiros comerciais.

Para a reestruturação da empresa viáveis, mas em dificuldade momentânea, é essencial o envolvimento tanto da sociedade empresária, quanto daqueles que com ela possuem vínculo relacional (empregatício ou comercial). A mediação, nesse sentido, tem, muito a contribuir para facilitar o diálogo entre as partes e permitir que se identifiquem soluções sustentáveis, que atendam aos interesses de todos os envolvidos.

A Lei de Recuperação de Empresas, com as alterações introduzidas pela Lei nº 14.112/2020, positivou, definitivamente, a possibilidade de emprego das vias não adversarias de resolução de litígios como instrumento voltado a permitir a superação de eventual crise financeira, de caráter momentâneo, de empresas viáveis, nos termos dos seus arts. 20-A a 20-D.

A intenção do legislador é a de que, sendo frutífera a mediação (ou conciliação) pré-processual, o processo recuperacional seja descartado, ante o sucesso na reestruturação das dívidas da empresa, desafogando-se o Judiciário de mais um processo desnecessário. Ao mesmo tempo, buscou o legislador equilibrar os interesses da empresa devedora e dos credores.

Caberá à jurisprudência, com o apoio da doutrina, fixar os limites e as possibilidades na utilização da mediação pré-processual, levando em consideração sempre, como norte interpretativo, o princípio *mater* da preservação da empresa, sem, evidentemente, descuidar dos interesses dos credores.

Prior Corporate Insolvency System – previous mediation and conciliation

Abstract: This article approaches, from a theoretical and dogmatic perspective, the new applicable legal discipline, in the field of company recovery, to the mediation and conciliation procedures. It is argued that mediation (and all other non-adversarial methods of dispute resolution) can significantly contribute to enabling the presentation of more transparent, realistic and sustainable recovery plans, which are suited to the interests of creditors, but also to the real possibilities of the company, increasing the commitment of all interested parties with the fulfillment of the recovery plan.

Keywords: Mediation; Conciliation; Alternative Dispute Resolution; Business Recovery; Law 14.112/2020

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Alternative dispute resolution in digital government*

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Abstract: A significant number of people around the world have difficulties with access to justice, and most of the legal conflicts do not reach the consideration by public authorities. Nowadays e-justice and law tech are removing some barriers. The workload in the courts has increased all over the world. The problem of "not everyone can go to the court" turns into a problem of "not everyone will receive a quality service in the court". The solution can be Digital Dispute Resolution (DDR) as an alternative dispute resolution (ADR) option. The analysis of ADRs in different countries showed that most states use classical conflict resolution methods. However, some countries are implementing online dispute resolution (ODR) which is not able to change the situation significantly and prevent a "docket explosion" in the justice. One possible way to change the situation is to integrate ADR into digital government. The authors have substantiated the necessity of developing DDR and analyzed the difference between this technology and e-justice. The DDR systems are being tested in some countries, but it used in the highly specialized cases, for example, in the smart contract disputes. The proposed ADR system describing in the article has to be integrated with digital government. The authors present main DDR principles and prove that the Artificial Intelligence disputes conclusion is not a part of justice and should be regarded exclusively as ADR.

Keywords: "Docket explosion"; Digital dispute resolution; Digital government; Social media arbitration; Process mining

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Introduction

In law, "dispute" is used as a synonym for "social conflict", which is not entirely true since the conflict has several meanings. For example, open conflict (dispute, fight, struggle), subjective conflict (perception by one subject of another as a person having opposite beliefs or interests, or that the other party has somehow harmed the subject of the conflict).[1] Understanding this phenomenon is important for determination of the methods for their settlement. To resolve an open conflict, direct influence on its subjects may be required, for example, to stop a fight. To resolve a subjective conflict, it is necessary to influence the perception of reality by the subject of the conflict, for example, by convincing him of the fairness and reasonableness of the situation that caused his dissatisfaction. Speaking about dispute resolution in a digital government, we proceed from the limited impact of digital technologies on the objects of reality. Therefore, we consider ADR as a system for resolving subjective legal conflicts.

One of the main ways to resolve social conflicts is a law. Explicitly or implicitly, in most studies of law and society, the "moral-functionalist" concept of law appears, which considers it as means of resolving and preventing conflicts.[2] The law resolves conflicts through the actions of public authorities, which either take an active part in their settlement, or create conditions for their resolution by civil society institutions. The efficiency of these methods provides the state with an increase in the level of trust between legal entities, which has a direct impact on the national economy and the social environment. In the context of globalization and the widespread introduction of remote work mechanisms, these factors may be crucial for the choice of a place of residence and work by subjects of the digital economy who are no longer tied to a specific geographical location.

For global competition in the digital economy, the state must ensure a high level of access to justice for all subjects of law. The World Bank, investigating the practice in the field of improving access to justice, notes that among the factors, that can have a significant impact on this area, there is a system of alternative dispute resolution (ADR).[3] Alternative dispute resolution is a method of resolving a conflict by creating a final algorithm for the actions of the parties to the dispute, accepted by the parties to the conflict, without contacting public authorities. Some authors distinguish the following types of ADR: negotiations, arbitration, mediation,

1 DEAN, G. P. Social Conflict: Some Basic Principles. *Journal of Dispute Resolution*, v. 2007, Iss. 1, 2007. art. 8, p. 151-156.

2 AUSTIN, T. T. Law as a Weapon in Social Conflict. Oxford University Press. *Social Problems*, v. 23, n. 3, p. 276-291, 1976. Available at: https://doi.org/10.2307/799774.

3 MARU, Vivek. Access to Justice and Legal Empowerment: A Review of World Bank Practice. *Justice and development working paper series*, n. 9. Washington, DC: World Bank. 2009. Available at: https://openknowledge.worldbank.org/handle/10986/18102 License: CC BY 3.0 IGO.

reconciliation.[4] The World Bank offers another classification: arbitration, conciliation, mediation, dispute resolution councils, including ombudsmen, expert definitions.[5] However, this list is not exhaustive, and alternative dispute resolution methods can be implemented in other forms, for example, using digital technologies. The Civil Justice Council's 2021 Report on mandatory ADR in the UK considers information technology as a third party involved in the dispute resolution.[6] This method is called as Digital Dispute Resolution (DDR).

Digital transformation, affecting changes in the public administration and economy, causes the emergence of new categories of disputes and increases the workload in the courts. The potential of ADR to solve this problem has not been disclosed, since the system uses old methods. It seems that a promising option for its evolution may be its integration into the digital government. The result of this integration we consider as DDR.

1 The value of alternative dispute resolution for society

1.1 Dispute resolution

Each State performs a similar list of functions, among which a special place is occupied by the judicial, which consists in conflict resolution. The importance of conflict resolution is confirmed by the principle of separation of powers, which provides for the creation of an independent branch of government for the administration of justice. Official statistics show the demand for this function among the population. Citizens often resort to the help of public authorities in resolving conflicts, for example, the increase in the number of lawsuits in 2020 in the United States was 5%,[7] in 2021, there was no growth, which the Administrative Department of the US Courts associated with a "lockdown" conducted due to the COVID-19 pandemic.[8] In Russia, the growth of disputes considered by courts in 2021 amounted to 2.5%, and a total of 39.23 million cases were considered

[4] KUMARI, Preeti. Alternative Dispute Resolution (ADR), June 14, 2020. Available at SSRN: https://ssrn.com/abstract=3626625.

[5] Alternative Dispute Resolution Center Manual – a Guide for Practitioners on Establishing and Managing ADR Centers. The World Bank Group, 2011. 131 p. Available at: https://web.worldbank.org/archive/website01553/archived/www.wbginvestmentclimate.org/uploads/15322_MGPEI_Web.pdf.

[6] Compulsory ADR. The Civil Justice Council's report on compulsory alternative dispute resolution (ADR) has been published today (Monday 12 July 2021), p. 59. URL: https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf.

[7] Federal Judicial Caseload Statistics 2020. URL: https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020.

[8] Federal Judicial Caseload Statistics 2021. URL: https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021.

by courts during the year.[9] In Brazil, according to Conselho Nacional de Justiça, 75.4 million cases remain pending in court proceedings in 2021.[10] To reduce the number of court disputes, different countries use different methods to solve this problem, for example, the institution of the Ombudsman.

In Jordan, the Ombudsman is a specific legal instrument used to monitor public authorities, which is part of the Government's efforts to improve the public sector. At the same time, it provides an alternative dispute resolution process compared to filing cases in the courts, thereby reducing pressure on the judicial system and providing remedies that may be more accessible than the courts for certain categories of disputes.[11] The Ombudsman, together with arbitration and mediation, constitute the ADR system. The ADR can be conditionally divided into two groups:

1. Social methods of alternative dispute resolution, which include alternative dispute resolution institutions that are not regulated by the rules of law, which, for example, include customs, religious norms, etc. An example of such methods is an appeal for dispute resolution to an authority that does not have a legal status, including a religious leader, a leader of a social community.

In some countries with a weak system of State power, a parallel system of conflict resolution is being formed, for example, in Somalia.[12] Similar dispute resolution methods are also used in countries with a developed system of public administration, for example, expert opinions that are used in the settlement of legal conflicts in the field of construction (Germany, Italy, USA, etc.). Such expert opinions are not regulated by the norms of law, and in order to apply them, the parties must agree to their use in their legal relations.

These methods are provided by customs, and their execution is guaranteed by the force of public censure. The institution of social reputation, in the conditions of the information society, is often a means of coercion sufficient to ensure that the subjects of the conflict comply with the decision of the social arbitrator. For example, rating and feedback systems on digital platforms may have more significant negative consequences for a legal entity than legal means of coercion to lawful behavior.

[9] The Chairman of the Supreme Court of the Russian Federation summed up the work of the courts for 2021. URL: https://www.vsrf.ru/press_center/mass_media/30781/.

[10] Justiça em Números 2021. Conselho Nacional de Justiça.

[11] CUVILLIER, Emmanuel; ALMAROOF, Salam. A Jordan Ombudsman Bureau with Enhanced Capacity. 2015.

[12] Accessing Justice: Somalia's Alternative Dispute Resolution Centers by International Development Law Organization. URL: https://www.idlo.int/publications/accessing-justice-somalias-alternative-dispute-resolution-centers.

2. Legal methods of alternative dispute resolution include institutions of conflict resolution, enshrined in the norms of law. Conditionally, they can be divided into two groups according to the binding nature of the final decision for the parties.

2.1. Arbitration is the process of resolving legal disputes by appointing an arbitrator, an independent, neutral third party who listens and examines the specifics of the dispute and makes a final and binding decision, called an arbitration award. This process is similar to the judicial process, since it involves the issuance of a decision, however, the parties choose their own arbitrator and the way in which the arbitration will take place. For example, if the dispute is fairly simple and does not involve any factual issues, the parties may agree to waive a formal hearing and provide the arbitrator with only written statements and documentation, which is called a document-only arbitration, whereas in other cases the parties may wish for a full hearing.

2.2. Mediation is a dispute resolution process that focuses on the skills of effective communication and negotiation of a particular person chosen by the parties. The mediator's duties do not include making a decision on disputed issues, but only assistance in reaching agreement between the parties to the legal conflict. There are several types of intermediaries:

- persons who carry out mediation activities on a gratuitous basis (representatives of NGOs);

- persons engaged in mediation on a professional basis for a fee paid by the parties to the conflict (notary, lawyers, mediators, etc.);

- persons engaged in mediation on a professional basis for a fee received from the state (ombudsman).

The list of types of alternative dispute resolution is not exhaustive, because it is influenced by cultural characteristics, the legal system of the country, etc. For example, in New Zealand, when resolving disputes involving Maori under the Te Ture Whenua Maori Law, the mediation model must comply with Tikanga customs.[13] Alternative dispute resolution methods based on Adat have been successfully used in Aceh communities in Indonesia,[14] what is typical for the systems of Islamic law.

In case law countries, early neutral evaluation (ENE) methods are used when an independent and impartial evaluator (usually a retired High Court judge) giving an assessment/evaluation of the merits of each side's case. The evaluation is confidential, without prejudice and non-binding – importantly, this means that it is

[13] MORRIS, Grant Hamilton; ALEXANDER, Katie. Inclusiveness or Tokenism? *Culture and Mediation in New Zealand's Dispute Resolution Statutory Regimes*, 28 ADRJ 170, August 1, 2017). Available at SSRN: https://ssrn.com/abstract=3258090.

[14] FAJRI, M. Kasim; NURDIN, Abidin. Study of Sociological Law on Conflict Resolution Through Adat in Aceh Community According to Islamic Law. *Jurnal Hukum Keluarga dan Hukum Islam*, Samarah, v. 4, n. 2, p. 375-397, 2020. DOI: 10.22373/sjhk.v4i2.8231.

not shared with the trial judge. In the USA, ADR refers to any method of resolving disputes without litigation: mediation, arbitration, conciliation, negotiation, and transaction. Transaction as ADR is not used in all countries of the world.

1.2 "Docket explosion" in a justice

The presence of success in the development of ADR systems in different countries is noted by all experts. At the same time, none of them indicates the presence of a reference ADR variant that can significantly reduce the workload on judges. The growing number of disputes in court reduces the quality of justice and creates a snowball problem. For example, in India, the existence of a "Docket Explosion" has already been recognized, when courts accept more cases for consideration than they consider.[15]

At the same time, public authorities and international organizations recognize the existence of problems with access to justice. For example, the World Justice Project, based on the results of an analysis conducted in 101 countries, found that about half of the population (49%) have faced at least one legal problem over the past two years. Of these, 29% sought advice from family members or friends, 17% turned to the authorities or a third party for mediation.[16] The reasons for refusing to resolve issues in court are: significant legal costs, low level of legal competence, long terms of consideration of cases, organizational barriers.

Barriers to access to justice exist in all countries. For example, in the United States, it may take 26.1 months from filing an application to a civil court (data from 2020-2021).[17] In Europe, the time for consideration of civil and commercial disputes in the first instance is on average 250 days, for example, in Lithuania - 97 days, in Italy – 532 days.[18] Research commissioned by the European Parliament's Department of Policy on Citizens' Rights and Constitutional Issues revealed the following problems of access to justice in the European Union:

1. Shortcomings in the organization of the national judicial system, for example, the lack of effective guarantees for the independence of judges in individual countries.

2. Procedural obstacles, for example, the complexity of drafting and filing appeals to the court, short deadlines for appeal in certain countries.

[15] SIROHI, Parikshet; CHHACHHAR, Varun. Docket Explosion of Courts in India, May 25, 2010. Available at SSRN: https://ssrn.com/abstract=1615385 or http://dx.doi.org/10.2139/ssrn.1615385.

[16] Global Insights on Access to Justice 2019. World Justice Project. 2019. 128 p.

[17] United States District Courts – National Judicial Caseload Profile. URL: https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2021.pdf.

[18] HARLEY, Georgia; SAID, Agnes. Fast-Tracking the Resolution of Minor Disputes: Experience from EU Member States. Washington, DC: World Bank, 2017. URL: https://openknowledge. worldbank.org/handle/10986/26100.

3. High fees for filing documents in court in some countries.
4. High cost of legal services in some countries.
5. Long periods of court proceedings in individual countries.
6. Non-enforcement of court decisions in certain countries.[19]

This makes it possible to consider reliable data from the World Justice Project, which indicate that 1.4 billion people around the world cannot meet their daily needs in the field of civil and administrative justice. For example, in the United States, low-income citizens have not received any or sufficient legal assistance for 92% of their civil law problems.[20] This allows us to argue that the shortcomings of public administration restrain the growth of the number of court disputes. With the removal of barriers, the growth in the number of cases in the courts will increase by more than 2 times.

The removal of barriers to access to justice is quite successful within the framework of an electronic state that allows you to receive public services online without traditional barriers: deadlines, cost, procedural complexity. Services in this case are understood by us in a broad sense: education, healthcare, justice, civil registration, etc. In an offline state, to file a claim, you need to contact a lawyer who would help you draw it up, then visit the bank to pay the necessary fees, then make copies of the documents, certify them by forming a set of applications. In an electronic state, it is not even necessary to get up from a chair and have knowledge in the field of law to file a claim. In most cases, it is necessary to fill out a form in the Legal Technique application, upload it on the court's website, and pay for the bank card fee. The increase in the availability of services leads to an increase in demand for it, and in the case of justice, to an increase in the workload on judges.

These conclusions are confirmed by statistics on countries actively implementing e-justice. For example, Estonia, thanks to the unique program of universal digital identification of citizens, is a leader in the development of an electronic state in the world. In 2020, the number of judges in Estonia remains the same as 20 years ago, but the number of court cases has doubled during this time.[21] A significant contribution to the increase in the workload on judges is made by legal tech applications, which use "no win no fee" policy, whereby consumers are only charged for success. The Cambridge Handbook of Lawyering in the Digital Age notes that a significant part of the population that previously refused to exercise

[19] Effective Access to Justice. PE 596.818 //Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament. B-1047. Brussels. European Union, 2017. 166 p.
[20] The Justice Gap. URL: https://justicegap.lsc.gov/.
[21] Artificial intelligence as the new reality of e-justice. URL: https://e-estonia.com/artificial-intelligence-as-the-new-reality-of-e-justice/.

the right to justice has already gone to the courts with small claims.[22] If LegalTech technologies continue to develop, the barrier to access to justice will be removed, then we can expect a paralysis of the state dispute resolution system.

The authors consider the hypothesis proven that the development of electronic justice and legal tech poses a threat of collapse of judicial proceedings. At the same time, different ways to prevent it are being tested by different countries. The most fashionable in jurisprudence and the most ambiguous from the point of view of human rights is the use of Artificial Intelligence by courts. Within the framework of this article, it is proposed to use the DDR system for this purpose, which is a kind of ADR. To understand what kind of environment it will have to be implemented in, the study analyzed ADR in 31 countries around the world.

2 Alternative dispute resolution in different countries

An effective dispute resolution system ensures a high level of trust, which leads to a reduction in associated costs and contributes to the development of the economy.[23] Considering the shortcomings of the justice system existing in all countries, States have accumulated a wealth of experience in developing alternative dispute resolution systems. Let's look at examples of ADR used by different countries. The authors have studied the experience of many countries, but due to the limited volume of the article, several economically developed countries located on different continents have been selected: Asia, Europe, South and North America.

2.1 Brazil

The Brazilian Constitution enshrines the right to a reasonable length of trial. At the same time, on average, several years pass between the filing of a claim and the determination of a lower court judge, and it may take several more years to obtain a decision on the initiation of enforcement proceedings. In this regard, alternative dispute resolution methods are actively used in the country.

1. Arbitration. It is regulated by the Brazilian Arbitration Act (Federal Law No. 9307) of 1996, as amended in 2015 by Federal Law No. 13129, as well as the

[22] DE ELIZALDE, F. Legal Tech in Consumer Relations and Small-Value Claims: A Survey. *In*: L. DIMATTEO, A. Janssen; P. ORTOLANI, F.; DE ELIZALDE, M. Cannarsa; DUROVIC, M. (Ed.). *The Cambridge Handbook of Lawyering in the Digital Age* (Cambridge Law Handbooks, p. 159-178). Cambridge: Cambridge University Press, 2021. doi:10.1017/9781108936040.013.; FERREIRA, D.; GIOVANNINI, C.; GROMOVA, E.; DA ROCHA SCHMIDT, G. Arbitration Chambers and trust in technology provider: impacts of trust in technology intermediated dispute resolution proceedings. *Technology in Society*, n. 68, 101872, 2022.

[23] SHAVELL, Steven. Alternative Dispute Resolution: An Economic Analysis. *The Journal of Legal Studies*, v. 24, n. 1, p. 1-28, 1995. JSTOR, http://www.jstor.org/stable/724588.

Brazilian Code of Civil Procedure, adopted in 2016. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been applied in the country since 2002. The legislation provides freedom of choice of arbitration, the activity of which does not require any license.

The list of disputes within the jurisdiction of arbitrators is quite wide and includes disputes with state-controlled companies, labor disputes, consumer protection disputes, etc. The arbitration clause in this case must be drawn up in writing. In Brazil, an arbitration award is not subject to appeal, except in certain cases.

2. Mediation. The Brazilian Mediation Act 2015 (Federal Law No. 13140) included rules concerning judicial and non-judicial mediation. The Civil Procedure Code of 2016 expanded the use of mediation, making it a standard stage of judicial proceedings. The novelty of the law is the possibility of transferring a dispute with a state body to a mediator. In 2021, Brazil signed the United Nations Convention on International Trade Agreements Arising from Mediation (Singapore Convention).

3. Online dispute resolution (ODR). A new method of dispute resolution that can be used at the discretion of the parties. An example of its use is the Samarco case, where the courts established a base for compensation of damage to persons affected by a natural disaster, individual compensation agreements were concluded and signed by citizens through an online information system.

4. Dispute Boards. They are not regulated by Brazilian legislation but are used to resolve disputes in certain areas of business activity.[24]

2.2 China

ADR in China has its own peculiarities, it includes arbitration, people's mediation, which allows concluding an agreement that has legal force (the parties can apply to the court for its enforcement), as well as labor arbitration regulated by Labor Law.

1. Arbitration. The Arbitration Law of the People's Republic of China establishes the basic legal framework for regulating arbitration activities. Many regional and national arbitration institutions have been established in the country. Their decisions are final and not subject to appeal. The parties have the right to apply to the court in whose jurisdiction the person, organization or property participating in the arbitration is located to enforce the decision of the arbitration court. China is a member State of the New York Convention.

2. Mediation. People's Mediation Law of China regulates the activities of non-judicial civil mediation. Civil mediation is very common and popular: courts often

[24] REIS PORTO, M.; BARBOSA DOS SANTOS, J. A aplicação dos dispute boards nos contratos empresariais no Brasil. *Revista Brasileira de Alternative Dispute Resolution*, v. 3, n. 5, p. 137-157, 2021.

order parties to refer cases to people's mediation bodies for mediation before filing a lawsuit. The validity of mediation agreements is recognized by law.

2.3 India

There is a large shortage of judges in India, which forces the state to actively popularize ADR methods, which is noted in the decisions of the Supreme Court.[25] In the case of Perry Kansagra v. Smriti Madan Kansagra, he identified the types of disputes in which ADR can be the best alternative to litigation (cases concerning trade, commerce and contracts, disputes between the insurer and the policyholder, bankers, and customers).[26] According to the Supreme Court, the attraction of foreign investments also contributes to the development of ADR.[27]

1. Arbitration. India is a party to the Geneva Protocol on Arbitration Clauses of 1923, the Convention on the Enforcement of Foreign Judgments of 1923, the New York Convention of 1958. The country has a Law on Arbitration. In 2020, India adopted the Industrial Relations Code, which allows employers and employees to agree to submit a dispute to arbitration through a written agreement.

2. Mediation. Mediation was first officially recognized in the Labor Disputes Act of 1947, where officials appointed in accordance with article 4 of the Law "are obliged to mediate and facilitate the settlement of labor disputes." Today, mediation centers have been established by various High Courts, including in Delhi, Madras, Gujarat, Kolkata, Kerala, Allahabad, and Karnataka. In 2019, India signed the United Nations Convention,[28] officially recognizing the settlement agreements arising because of mediation in international commercial disputes.

3. Lok Adalats. India has had a long history of resolving disputes through the mediation of village elders. The current system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, whereby mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they think fit. These are usually presided by a retired judge, social activists, or members of the legal profession.[29]

4. Other forms of ADR. The ADR mechanism is contained in the Law on Micro, Small and Medium-sized Enterprises, which provides that if a company

[25] Afcons Infrastructure Limited v. Cherian Varkey Construction, (2010) 8 SCC 24.
[26] Perry Kansagra v. Smriti Madan Kansagra, I (2019) DMC 568 SC.
[27] Afcons Infrastructure Limited v. Cherian Varkey Construction (2010) 8 SCC 24, most recently relied on in Perry Kansagra v. Madan Kansagra, 2019 SCC Online SC 211.
[28] United Nations Convention on International Settlement Agreements Resulting from Mediation.
[29] Lok Adalat. The National Legal Services Authority (NALSA). URL: https://nalsa.gov.in/lok-adalat.

has not received a payment or has become a victim of default, it can apply to a specialized council, initiate mandatory reconciliation. In case of failure, the case will be referred to arbitration. The Labor Relations Code 2020 also provides for the appointment of conciliators as one of the measures for resolving labor disputes.

2.4 USA

There is a problem of access to justice in the country, and to solve it, the U.S. Department of Justice created the Office for Access to Justice (ATJ).[30] The length, cost and complexity of the trial leads to the fact that the subjects of law are trying to settle their disputes out of court using ADR, the list of which may differ in different states.

1. Arbitration. In the United States, arbitration agreements are governed by the Federal Arbitration Act. The parties can independently determine the dispute resolution algorithms using recognized arbitration instructions, for example, the instructions of the International Chamber of Commerce or the American Arbitration Association. In the contract, the parties may determine the qualifications and experience of the arbitrator. Unlike judges, whose cases are randomly assigned without regard to biography or experience, arbitrators are often appointed or selected precisely because they have special experience in the issues to be considered. Unlike court proceedings, arbitration proceedings are confidential.

Arbitration proceedings can be completed within a few months, which will lead to lower costs for lawyers and the proceedings themselves. In particular, arbitration procedures provide fewer opportunities for disclosure, including fewer depositions and little or no written disclosure. Arbitral awards are binding and can only be set aside in certain circumstances, as specified in state and federal arbitration laws. After the decision is made by the arbitrator or the arbitration commission, it must be confirmed in court. After approval, the decision is reduced to a judicial decision, which can be enforced by the winning party in court.

2. Mediation. Mediation can be appointed at any time. Mediators are often chosen based on their experience in matters to be settled. And the information disclosed during mediation may not be disclosed as evidence in any subsequent arbitration, judicial or other proceedings. The results of mediation are binding if the parties conclude an appropriate agreement.

3. Expert definition. This procedure is not regulated by legislation or procedural rules. Expert determination is often included in construction and energy contracts as a mechanism for resolving disputes before initiating arbitration.

[30] Mission Office for Access to Justice (ATJ). URL: https://www.justice.gov/archives/atj.

2.5 France

ADR is often used in France, which is facilitated by the time the case is considered by the court (from 12 to 18 months). The following ADRs are used in the country.

1. Arbitration. The International Chamber of Commerce, headquartered in Paris, is widely used in both domestic and international arbitration. The updated set of rules for its consideration of legal conflicts was adopted in 2021.[31] According to French law, in accordance with the principle of competence, French courts called upon to rule on a dispute must declare themselves incompetent when an arbitration clause is applied and allow the arbitral tribunal to make a decision. The decision of international arbitration is not subject to appeal (unlike domestic arbitration, where decisions can be appealed to the court of appeal). Arbitration is regulated by the Law on Arbitration as amended by Decree No. 2011-48 of January 13, 2011 and the Code of Civil Procedure.

2. Mediation and conciliation. Decree No. 2012-66, which entered into force in 2012, approved Book V of the Code of Civil Procedure of France, dedicated to the peaceful settlement of disputes. In France, there is a difference between the level of training of mediators and intermediaries. Mediators are not required to undergo special training or have any experience if they are qualified to understand the nature and subject of the dispute. On the contrary, intermediaries are unpaid court employees who must have at least three years of legal experience. Agreements reached through these procedures may be made binding by the judge with the consent of the parties. Resolution No. 2019-1333 of December 11, 2019 introduced the obligation to resort to these procedures before the start of the trial at a claim price of less than 5,000 euros.

3. Participatory procedure. In addition to the usual mediation and reconciliation in France, there is this negotiation mechanism, which is both procedural and contractual in nature. Law No. 2010-1609 of December 22, 2010 introduced this peaceful method of dispute resolution into the Civil Code for the first time. The 2012 resolution defines the scope of its application and consequences, as well as its confidentiality.

4. Other forms of ADR. In some areas, French law provides for special tribunals, commissions, or quasi-judicial bodies with limited jurisdiction, for example, in matters of social security, competition, journalism and broadcasting.

[31] The International Court of Arbitration of the International Chamber of Commerce. Arbitration Rules 2021. URL: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

2.6 Germany

German corporations often use out-of-court dispute resolution methods, such as arbitration, mediation and conciliation.

1. Arbitration. The rules governing arbitration proceedings in Germany are contained in book X of the Code of Civil Procedure, which almost completely repeats the provisions of the UNCITRAL Model Law. The jurisdiction of arbitration extends to any domestic or foreign dispute, unless it concerns rental agreements, family disputes, for example, guardianship or guardianship. The legislation provides for many features of dispute resolution, implemented with the participation of ordinary courts. The country is a party to various international agreements related to arbitration: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, the Convention on the Settlement of Investment Disputes between States and Citizens of Other States of March 18, 1965, the European Convention on International Commercial Arbitration of April 21, 1961, the Protocol on arbitration clauses of September 24, 1923, etc.

2. Mediation. The Mediation Act of 2012 defines mediation as a confidential and structured procedure in which the parties, with the assistance of one or more intermediaries, voluntarily and on their own responsibility seek a peaceful resolution of their dispute. It contains provisions aimed at ensuring the independence and impartiality of the mediator, as well as confidentiality of mediation. In Germany, federal lands are given the right to establish a mandatory pre-trial mediation procedure for certain types of claims, for example, claims for up to 750 euros, disputes between neighbors.

3. Online dispute resolution. The EU Directive 2013 on consumer alternative dispute resolution and the regulation on the settlement of disputes with consumers on the Internet are aimed at providing consumers and sellers with a simplified, fast, and inexpensive out-of-court procedure for settling their disputes. The Directive has direct application in the EU member States and has been implemented in German legislation since 2016.

4. Adjudication. It means the establishment of a permanent decision-making board for a certain project. It is often used in construction projects. The decision of adjudication boards is usually provisionally binding. These are backup dispute resolution mechanisms for specific projects established by the agreement between the parties to avoid escalation of disputes. Although it is successfully applied, there are no legal norms regulating it in Germany.

5. Expert determination. The parties resort to expert opinions in disputes on technical or accounting issues, for example, in connection with determining the purchase price in transactions. They usually require an expert to prepare a written

opinion, which, depending on the decision of the parties, may be either mandatory or optional. In Germany, there are no rules of law governing it.

2.7 Generalization

The studied ADR experience in different countries shows common features in the development of technology.

1. In most cases, ADR applies only to certain disputes categories. States generally promote ADR in two ways:

- to reduce the workload in the courts, for example, in disputes which are widespread - cases with a low claim value, labor disputes, etc.;

- to increase confidence in the system of authorities, for example, in cases with a foreign investor requiring a high level of trust in the arbitrator.

It seems that DDR can help to resolve only the first category of disputes.

2. The parties agree to apply ADR forms even which are not regulated by the law (for example, an expert definition). Consequently, at the initial stage the development of DDR can take place without strict legal regulation and the creation of "regulatory sandboxes".

3. Countries striving for a digital economy use new types of ADR, for example, ODR. These dispute resolution methods are usually limited to the use of the Internet for communication between the parties of the conflict and an independent mediator. The usage of this technology speeds up the dispute resolution and reduces its costs, but ODR cannot be used as DDR.

4. ADR is based on the more flexible rules, and it can adapt to new digital technologies faster. Competition with state courts will stimulate this process. Thus, in our opinion, ADR adapts faster than courts to the technologies of the digital government and will be able to prevent the problem of "docket explosion".

3 Access to justice in an e-government

Access to justice is the foundation of the rule of law. The need to ensure it is recognized by all countries of the world, as well as the existence of significant shortcomings in their judicial systems. This encourages States to use methods to improve the effectiveness of justice. Today, the main one is the electronic justice system.

There is no single understanding of this term. For example, in Europe, within its framework, the transfer of justice to the marketplace mode is carried out. The European e-justice Portal is conceived as a future electronic one-stop shop in justice. As a first step it strives to make your life easier by providing information on justice

systems and improving access to justice throughout the EU, in 23 languages.[32] To ensure that the potential of e-justice is fully embraced in the development and rights protection context, UNDP's Global Program for Strengthening the Rule of Law, Human Rights, Justice and Security for Sustainable Peace and Development has spotlighted this area as one of the priorities of its justice work in the program phase IV (2022-2025).

UNDP has surveyed e-justice projects globally. This massive undertaking materialized into a series of products: a research paper "E-justice: Digital Transformation to Close the Justice Gap".[33] The toolkit presents seven specific tools for anyone working on e-justice to use in the design process to centre human rights and rule of law, and the map highlights over 200 projects allowing e-justice pioneers to connect globally and learn from each other. An analysis of these projects suggests that in most cases, e-justice means that courts post information about their activities on official websites and communicate with participants in the trial via the Internet. These innovations have shown a significant effect, increasing access to justice in countries of the world with different legal systems and different structures of judicial authorities. For example, in Indonesia, E-justice has improved legal proceedings in the religious courts of Serang.[34]

Scientists and law enforcers often make the mistake of considering e-justice as an element of "e-democracy". In legal science and regulatory legal acts, terms are used that denote various state-legal concepts of the use of information technologies in the field of public administration: "electronic democracy", "electronic government", "open government", "digital government". All of them were initially considered as part of the "open government" concept. In 2011, the international organization Open Government Partnership was established,[35] in 2022, it includes 77 countries and 76 administrative units. According to the cases of the organization's participants, they have successfully implemented technologies that provide access to justice, fiscal openness, mechanisms for reviewing complaints by public authorities, social audit, and open contracts. However, in legal science, the concept of "open government" has given way to "electronic democracy".

[32] European e-Justice Portal. URL: https://e-justice.europa.eu/home?action=home.

[33] Global Map of E-Justice Initiatives. URL: https://www.rolhr.undp.org/content/ruleoflaw/en/ejusticemap.html.

[34] AULAWI, Anton; ASMAWI, Muhamad. Effectiveness of E-Court in Improving Service Quality at Serang Religious Courts / Advances in Social Science, Education and Humanities Research, v. 410. 1st International Multidisciplinary Conference on Education, Technology, and Engineering (IMCETE 2019). URL: ttps://www.researchgate.net/publication/339819026_Effectiveness_of_E-Court_in_Improving_Service_Quality_at_Serang_Religious_Courts.

[35] Open government partnership. Articles of governance. URL: https://www.opengovpartnership.org/wpcontent/uploads/2019/06/OGP_Articles-of-Governance_2019.pdf.

The disadvantage of e-democracy is the lack of countries in the world that fully advise the standards of democracy. This is confirmed by studies analyzing the decline in the number of citizens participating in the electoral process in all countries and the crisis of parliamentarism.[36] At the same time, the introduction of information technology in public administration provokes the formation of a digital panopticon, which also casts doubt on the possibility of mixing the concepts of electronic democracy and electronic justice. This allows us to assert that the countries creating the electronic state system are between "electronic democracy" and "electronic autocracy". It is possible to assess their position in this area by analyzing digital indicators.[37] The key indicators are the principles of working with personal data, the possibility of algorithms influencing human rights, the protection of privacy and digital assets in cyberspace.

Thus, it is advisable to consider e-justice as an element of the "electronic state", which is characterized by the active use of the Internet by public authorities to post information, communicate with citizens and companies, and provide public services. For example, in the UK, when resolving disputes between the tax service and the taxpayer, it is possible to use alternative dispute resolution.[38] This service is included in the electronic state system, which involves electronic interaction between citizens and public authorities.[39]

This service is included in the electronic state system, which assumes electronic interaction between citizens and public authorities. The electronic government structure is not monolithic, but includes "e-executive", "e-justice", "e-parliament". It is important to note that the center of each element is the state information systems built on various information technologies. In order to comply with the principle of separation of powers and maintain the operability of critical information infrastructure, it is necessary to ensure the independence of these systems. For example, the transfer of legal proceedings to electronic form and the drafting of judicial acts in electronic form requires full independent control of the court over the information system, excluding the possibility of interference in it by the executive.

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[36] EVSIKOV, K. Mechanisms of participatory democracy in realization of the constitutional right of citizens to participate in the management of public affairs. *Journal of Russian Law*, v. 6, p. 36-49, 2019. DOI: 10.12737/jrl.2019.6.4.

[37] POLYAKOVA, T.; MINBALEEV, A. The concept and legal nature of digital maturity. Gosudarstvo i pravo, v. 9, p. 107-116, 2021. DOI: 10.31857/S102694520016732-6. GROMOVA, E.; TITOVA, E.; KONEVA, N. Legal barriers to the implementation of digital industry (Industry 4.0). *The Journal of the World Intellectual Property*, v. 1, n. 25, p. 186.

[38] Compliance checks: alternative dispute resolution - CC/FS21. URL: https://www.gov.uk/government/publications/compliance-checks-alternative-dispute-resolution-ccfs21.

[39] Online form to apply for ADR. URL: https://www.tax.service.gov.uk/submissions/form/apply-foralternative-dispute-resolution-to-settle-tax-dispute/did-hmrc-issue-a-decision-giving-you-a-right-to-appeal?n=0&se=t&ff=t.

The development of electronic justice influences the development of alternative dispute resolution. For example, in 2021, the Supreme Court of China adopted the Rules of Online Litigation, which, among other things, regulated the mediation process via the Internet or an electronic judicial platform.[40] In addition, the Beijing Internet Court has built a judicial blockchain platform "Tianping Chain", focusing on solving the problems of storing electronic evidence and online verification of evidence in the chain, as well as gradually expanding the blockchain to areas such as law enforcement and management of the source of litigation.

The electronic state had a significant impact on ADR, which led to the emergence of Online Dispute Resolution (ADR).[41] Researchers in different countries note the convenience of this technology and its effectiveness for ensuring access to justice, for example, in Australia,[42] Turkey.[43] The single European Online Dispute Resolution Platform (ADR) operates in all European countries. All online retailers and traders in EU, Iceland, Liechtenstein or Norway are obliged to provide an easily accessible link to the ODR platform and an e-mail address for the ODR platform to contact you (Article 14 of the Regulation (EU) nº 524/2013[44]). Today, it is impossible to imagine the existence of digital commerce without this type of ADR. However, the potential of ODR is limited, and digital technologies should be used to increase the efficiency of ADR.

The development of electronic justice is proceeding in a similar way. Since the peak of efficiency growth due to the institutions of the "electronic state" has been passed in many countries. Public authorities are beginning to use end-to-end digital technologies:

- big data analytics;
- artificial intelligence;
- virtual and augmented reality;
- quantum technologies;

[40] 《人民法院在线诉讼规则》本月起施行 网上审案,便民又规范. URL: https://www.court.gov.cn/zixun-xiangqing-317061.html

[41] AMY, J.; SCHMITZ, Lola Akin Ojelabi; ZELEZNIKOW, John. Ohio State Legal Studies Research Paper, n. 680. Researching Online Dispute Resolution to Expand Access to Justice, GIUSTIZIA CONSENSUALE (CONSENSUAL JUSTICE), p. 269-303, 2022.

[42] LEGG, Michael. The Future of Dispute Resolution: Online ADR and Online Courts, July 18, 2016. Forthcoming – *Australasian Dispute Resolution Journal*, UNSW Law Research Paper, n. 2016-71, Available at SSRN: https://ssrn.com/abstract=2848097.

[43] KADIOGLU, Cemre. Bricks and Clicks: Online Dispute Resolution Mechanisms and Implementation of Online Arbitration in Turkey for Cross-Border Business to Consumer E-Commerce Disputes, January 8, 19. ASBU Digital Law Review (BHD), v. 1, n. 1, 2019. Available at SSRN: https://ssrn.com/abstract=4083115.

[44] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) OJ L 165, 18.6.2013, p. 1-12 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV). Special edition in Croatian: Chapter 15, v. 28, p. 202-213. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426859531321&uri=CELEX:32013R0524.

- distributed registries;
- conventional technologies;
- digital platforms.

These information technologies provide great potential for the development of the economy, social sphere, and public administration. However, their application requires new rules and principles of legal regulation, which are considered within the framework of the "digital government" concept. The importance of the development of this direction is noted by the Department of Economic and Social Affairs UN,[45] the Organization for Economic Co-operation and Development (OECD).[46] Analysis of the existing justice system suggests that Digital Government will become a new stage in the development of ADR, which can be called Digital Dispute Resolution (DDR).

4 Digital Dispute Resolution in the Digital Government

4.1 Digital Dispute Resolution definition

Scientists and practitioners at national and international levels speak about Digital Dispute Resolution. For example, in 2021, a conference was held at the UN site [47] and UK Jurisdiction Taskforce recently announced the publication of its Digital Dispute Resolution Rules.[48] The rules are recommended for use by the Law Commission of England and Wales in 2021.[49] The importance of such events and documents cannot be overestimated. Despite the active research in jurisprudence, a unified understanding of the essence of DDR has not been formed. The points of view proposed by some authors[50] are highly controversial. For example, the opinion that a software algorithm created within the framework of a certain digital technology (supervised learning, smart contracts, etc.) is a third-party ADR, as well as the hypothesis that smart contracts, digital enforcement and internal complaint handling, a new era of dispute resolution by contract without a neutral third-party dawn, in the opinion of the authors, is wrong. In the future, such a position may create problems in determining who is responsible for making an illegal decision within the DDR. It is more logical from the point of view of the right to recognize the creator or user of the ADR algorithm as the party resolving the

[45] Digital Government. URL: https://publicadministration.un.org/en/ict4d/Good-Practices-for-Digi-

[46] Digital government. URL: https://www.oecd.org/gov/digital-government/.

[47] Conference UN. Dispute Resolution in the Digital Economy. March 2021. URL: https://uncitral.un.org/ru/disputeresolutiondigitaleconomy.

[48] Digital Dispute Resolution Rules UK Jurisdiction Taskforce. URL: https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf.

[49] Smart Legal Contracts: advice to Government, Law Commission of England and Wales, 2021, para 5.156. URL: https://perma.cc/4WFA-2JYP.

[50] WAGNER, Gerhard; EIDENMUELLER, Horst G. M. *Digital Dispute Resolution*, June 22, 2021. Available at: SSRN: https://ssrn.com/abstract=3871612 or http://dx.doi.org/10.2139/ssrn.3871612.

conflict. The Cambridge Handbook of Lawyering in the Digital Age indicates that legal scholars, referring to arbitration or mediation, often take it for granted that these language labels are sufficient to designate a certain procedure, which is completely unacceptable.[51] None of these terms is monolithic, and each of them denotes a family of phenomena that may differ significantly. Thus, DDR cannot be defined unambiguously. We understand by it a wide range of alternative dispute resolution procedures using digital technologies. The key difference that makes it possible to distinguish DDR from other ADR is the use of an algorithm in the dispute resolution process that forms the final decision or part of it, regardless of the will of the person who is a third party. At the same time, dispute resolution can be fully automated, for example, smart contracts, or can be sanctioned by a person, for example, the approval by an arbitrator of a decision created by artificial intelligence. Although DDR is in its infancy and requires testing, it is possible to propose the principles of its implementation in the Digital Government system.

4.2 Disputes classification in the Digital Dispute Resolution

In each country there is a list of disputes that the state allows to settle with the help of ADR. In our opinion, all these disputes can be divided into:

- disputes, the solution of which can be algorithmized;
- disputes with difficult algorithmization.

To create a DDR, it is advisable to start with the algorithmization of disputes related to the first group. The second group should be used for machine learning. It seems that the future stage of the development of justice will be the use of artificial intelligence. Today, its use, considering the level of technology development, is associated with several risks that are unacceptable for the administration of justice. Other researchers hold a similar point of view.[52] Therefore, it is advisable to create and test artificial intelligence systems for the administration of justice within the ADR. Moreover, solutions created by Artificial Intelligence should be considered as DDR. Then the proceedings leave the logical trap, assuming that the decision is made not by the judge, but by the algorithm.

In court, a judge must always make a decision to resolve a legal conflict, he/she may oblige the parties to upload information to Artificial Intelligence, which

[51] ORTOLANI, P. Digital Dispute Resolution: Blurring the Boundaries of ADR. *In:* L. DIMATTEO, A; JANSSEN, P. Ortolani; F. DE ELIZALDE, M. Cannarsa; M. DUROVIC (Ed.). *The Cambridge Handbook of Lawyering in the Digital Age* (Cambridge Law Handbooks, p. 140-156). Cambridge: Cambridge University Press, 2021. doi: 10.1017/9781108936040.011.

[52] REDDEN, J.; BANKS, D., & Criminal Justice Testing and Evaluation Consortium, 2020. Artificial Intelligence Applications for Criminal Courts. U.S. Department of Justice, National Institute of Justice, Office of Justice Programs. URL: https://cjtec.org/files/5f5f943055f95.

makes a decision recognized by the DDR act. The formed decision can be made by the parties or challenged in court. The proposed scheme reduces the risks of adverse consequences from shortcomings in the operation of the algorithm formed by machine learning methods and does not retain the status of the court.

It seems that the use of artificial intelligence for adjudication is possible only after the creation of a strong Artificial Intelligence, which is currently a technically unsolved task.[53]

4.3 "ADR-first" in the Digital Dispute Resolution

For disputes, the solution of which can be algorithmized, the state should establish the ADR-first rule. In different countries, the question of whether it is possible to consolidate the obligation of ADR for litigation is debated. Many states have followed this path and have fixed ADR-first in legislation. The authors failed to identify examples of negative consequences from such a decision. Regarding the compliance of the ADR-first principle with human rights, we consider it appropriate to rely on the logic set out in the Civil Justice Council's report on compulsory alternative dispute resolution (UK, 2021).[54] The document substantiates the argument that ADR should be considered as an integral part of the dispute resolution process, which makes it possible to consider ADR-first not contrary to article 6 European Convention on Human Rights.[55]

4.4 Negative motivator in the Digital Dispute Resolution

ADR stimulation can occur in two ways:

- a positive motivator;
- negative motivator.

For a positive motivator, a significant change in the legal system is not required since economic expediency encourages the parties to use ADR. This fact is confirmed by the experience of different countries. A negative motivator for stimulating the use of ADR today is an inefficient justice system. In a digital government, this motivator will disappear, and the status of the court will increase. Consequently, the parties will seek to apply to the court for dispute resolution and ignore DDR. For example, in Russia, the development of the institute of mediation

[53] MINBALEEV, A. V.; EVSIKOV, K. S. Anti-Corruption Information Technologies. *Journal of Siberian Federal University-Humanities and Social Sciences*, v. 14, n. 12, p. 1674-1689, 2022.

[54] The Civil Justice Council's report on compulsory alternative dispute resolution (ADR) 2021. URL: https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf.

[55] European Convention on Human Rights as amended by Protocols nº 11, 14 and 15 supplemented by Protocols nº 1, 4, 6, 7, 12, 13 and 16. URL: https://www.echr.coe.int/documents/convention_eng.pdf.

has a significant negative impact on the increase in the speed of consideration of cases. In the country, the cost of litigation has always been at a low level, which has been supplemented by the electronic justice system, which is gradually reducing the time for consideration of cases. As a result, the demand for the services of mediators is minimal, and the parties began to fall into court more often.

In a digital government, it is necessary to create a new negative motivator to stimulate demand for DDR. A variant of such an incentive may be "significant compensation of state costs for judicial review of the dispute, collected from the losing party in case of its refusal to apply DDR or execute an optional DDR decision." For example, the court directs the parties to use DDR based on Artificial Intelligence. The system makes a decision that does not suit one of the parties, then she has the right to go to court with the same dispute. If the court makes a similar decision during the consideration of the case, the initiator pays the court costs of the state and the opposing party in two times the amount.

4.5 Digital Government Process Mining in the Digital Dispute Resolution

Central to the construction of a digital government is the adaptation of public services to the needs of the population. One of the ways to achieve this goal is to move to proactive provision of public services. The state, based on the information available to it, analyzes to whom a particular service can be provided, and then either informs the person about the possibility of receiving it, or provides it automatically. At the same time, the citizen is not required to collect additional documents and make applications. For example, in Russia, from January 1, 2022, citizens can automatically receive payments for temporary disability or maternity based on an electronic sick list, which all medical organizations place in the unified federal information system "Social Insurance".[56]

The application of this principle in the field of DDR does not lie on the surface. Indeed, it is impractical to resolve a person's dispute if he does not declare it. However, we believe that in the Digital Government, the authorities should focus on the prevention of disputes. Thus, the proactive provision of DDR services consists in the analysis of existing or emerging legal conflicts and legal gaps to eliminate them promptly before the appearance of mass reasons for court cases.

[56] Decree of the Government of the Russian Federation of 11/23/2021 No. 2010 "On approval of the Rules for Obtaining by the Social Insurance Fund of the Russian Federation the information and documents Necessary for the Appointment and Payment of benefits for temporary disability, pregnancy and childbirth, one-time allowance at the birth of a child, monthly allowance for childcare". URL: http://pravo.gov.ru.

Let's consider proactive DDR on the example of legal conflicts between citizens and public authorities. In a digital government, the actions of any official leave a digital footprint. When building an integrated public administration system, all these traces are recorded in a single Data Lake. Taking into account that the state compiles an algorithmic process for each of its functions, this data warehouse will contain information about all deviations of a particular official or authority from the established process. Then the information technology used today in commercial companies and called Process Mining can identify these inconsistencies and analyze their causes.

It seems that Process Mining in the Digital Government is a DDR method, then it is advisable to transfer the management of this system, based on the established ADR institutions, to the Ombudsman for the Protection of Human Rights.

4.6 Automation Dispute Resolution in the Digital Dispute Resolution

At this stage, we assume that the state can transfer a significant amount of its functions to an algorithmized system that can be automated. For example, a system for providing social assistance, a system for recording acts of civil status. In this case, the decision is made not by a specific official, but by an algorithm. At the same time, the authors proceed from the need to prevent the emergence of the problem of the "dictatorship of the algorithm". It seems that a system of selective human control can resist this. an official of public authorities must selectively check at least 10% of transactions made automatically and 100% of transactions for which a citizen's complaint of dissatisfaction with a public service has been submitted. This control system is one of the ADR methods in the digital government, providing dispute resolution between a person and a state algorithm.

At the same time, the state has already begun to use blockchain for the digital transformation of individual spheres of government. For example, in Russia, Estonia and several other countries, this technology is used for electronic voting in elections and referendums. This allows us to consider this public service as a kind of smart contract. Accordingly, the dispute resolution procedures in this area can be automated by analogy with the automation of disputes in the financial system proposed by UK Jurisdiction Taskforce of the LawTech Delivery Panel in the Digital Dispute Resolution Rules.

4.7 Creating temporary Digital Dispute Resolution

The World Justice Project, based on the results of an analysis conducted in 101 countries, found that 49% of the population have faced at least one legal

problem over the past two years. The most common in this case are legal conflicts in the field of consumer disputes, housing, debts, insurance, etc.[57] Similar types of disputes are present in all countries of the world. In different countries, the legal system has gaps that generate massive disputes over a certain category of cases. For example, disputes over utility bills or debt collection on a loan. In most cases, such disputes are resolved by the court uniformly, and the arguments of the parties and the evidence are typical. The experience of some countries shows that a specialized ADR mechanism can help resolve these disputes. For example, in New Zealand, a Law on mediation in relation to farm debt was adopted in 2020. Kiwi farmers hold up to $63 billion in debt – an increase of over 270% in two decades. Distinguishes mediation under the Act is that typically, there is no real substantive dispute. The farmers owe the money, and the lenders have the right to enforce (2020). Instead, the emphasis is placed on the practical workability of solutions - such as over the timing, control, and monitoring - to settle the debt.[58]

We proceed from the fact that mass disputes are temporary in nature, and their destruction should occur by changing legislation or law enforcement practice. However, up to this point, ADR can solve the problem. Its mechanisms are especially relevant in the conditions of economic and social crises that create a significant number of disputes of a certain category.

4.8 Social Media Arbitration in the Digital Dispute Resolution

Currently, a significant number of Earth's inhabitants use social platforms to exercise their natural rights, including the right to exchange information, cultural rights, rights to self-development, etc. Social media also has an impact on the development of ADR.[59] In most countries, there is one or more social networks that have a dominant position. Since there are no economic relations between an individual and the owner of the information platform, it is impossible to talk about the regulation of these legal relations by the legislation on the protection of competition. However, social networks, taking advantage of their dominant position, began to cause damage to public relations. One of the most famous examples of such a policy is the blocking of the account of the current US president at the time of the election. The illegality of the actions of IT giants is confirmed by

[57] Global Insights on Access to Justice 2019. World Justice Project. 2019. 128 p. URL: https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf.

[58] MORRIS, Grant Hamilton. The Final Piece of the Jigsaw: A Longitudinal Study of New Zealand's Commercial Mediation Market. *New Zealand Business Law Quarterly*, v. 26, n. 1, p. 41-58, 2020.

[59] HARSHITA A. SEN, P. Social Media-Tion: A Constructive Approach to Dispute Resolution? *Revista Brasileira de Alternative Dispute Resolution*, v. 3, n. 6, p. 131-145, 2021.

judicial acts adopted in different countries that recognize the illegal blocking of the acanthus of a particular person.

Since the role of information platforms will increase in the digital government, it is advisable to create an appropriate arbitration to settle disputes on this issue. Since the number of disputes can be significant, and the parties to the dispute will not always be able to bear significant costs for its consideration, it is advisable to create a Social Media Arbitration in DDR format. To do this, it is advisable to approve algorithms for assessing the permissibility of blocking an account at the state level or at the level of a public organization.

Conclusion

Today the problems with access to justice are being identified in many countries around the world. According to various researchers, no more than half of all disputes arising in society reaches to the court. Fighting for citizens' access to justice, states attempt to reduce administrative barriers that restrict the citizens' access to the courts. From one side, the e-justice helps to solve this problem, from another side, this solution leads to the exponential growth of the workload in the courts in all countries. For example, there has been a growth in the number of small claims disputes, in which plaintiffs previously avoided proceedings due to high legal costs and difficulties with filing a claim.

This is confirmed by the widespread increase in the workload of judges, which in some countries reaches an unusually large size (so-called "docket explosion"). It is characterized by a low number of court decisions and a high number of lawsuits coming to the court. If this situation persists for a long time, it could lead to a justice system collapse. So, without changing the dispute resolution system at the current level of e-justice development, the justice systems in the many state courts may face with the "docket explosion". As one of the possible ways out of this situation may be the development of alternative dispute resolution methods. We believe that the states have to initiate competition in this area.

Most countries use these methods of dispute resolution, which ensure the settlement of legal conflicts on terms that are more comfortable than offered by state courts. ADR participants are offered shorter decision-making deadlines, lower fees, and a more professional level of decision-makers. Based on the existing practice, which we studied in detail, we have identified the following common features of ADR in different countries.

1. In most cases, ADR applies only to certain disputes categories. States generally promote ADR in two ways:

- to reduce the workload in the courts, for example, in disputes which are widespread - cases with a low claim value, labor disputes, etc.;

- to increase confidence in the system of authorities, for example, in cases with a foreign investor requiring a high level of trust in the arbitrator.

It seems that DDR can help to resolve only the first category of disputes.

2. The parties agree to apply ADR forms even which are not regulated by the law (for example, an expert definition). Consequently, at the initial stage the development of DDR can take place without strict legal regulation and the creation of "regulatory sandboxes".

3. Countries striving for a digital economy use new types of ADR, for example, ODR. These dispute resolution methods are usually limited to the use of the Internet for communication between the parties of the conflict and an independent mediator. The usage of this technology speeds up the dispute resolution and reduces its costs, but ODR cannot be used as DDR.

4. ADR is based on the more flexible rules, and it can adapt to new digital technologies faster. Competition with state courts will stimulate this process. Thus, in our opinion, ADR adapts faster than courts to the technologies of the digital government and will be able to prevent the problem of "docket explosion".

The performed analysis made it possible to substantiate the need to create DDR in the digital government, as well as to propose principles for its development.

1. Classification of disputes.
2. Approval of the "ADR-first" rule.
3. Introduction of a negative motivator for abandoning DDR.
4. Process mining in the digital government (like DDR).
5. Automation of dispute resolution.
6. Creation of temporary DDR algorithms.
7. Social Media Arbitration (like DDR).

Designing DDR based on these principles allows to argue in favour of exclusion of Artificial Intelligence from the trial. All dispute solutions created by Artificial Intelligence should be treated as DDR. Only a judge should make a decision in the court. In order to develop the justice system, we suggest that the court may oblige the parties to use Artificial Intelligence in resolving a legal conflict. The judgement can be accepted by the parties, or they can continue the trial. The proposed scheme reduces the risks of consequences from shortcomings due to possible problems with the algorithm, generated by machine learning methods, and maintains the high public status of the judge.

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The Role of Trade Unions as a Subject of Social Partnership in Resolving Labour Disputes

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Abstract: The relevance of this scientific work which focuses on trade unions as subjects of social partnership to resolve labour disputes lies in the need to enhance the role of trade union organisations in the mechanism of implementation of social partnership activities in resolving labour disputes. The purpose of this article is to conduct an analysis of trade union activities in general, highlighting its main

characteristics and principles on which such activities are based, and also to investigate what is the role of trade unions as the subjects of social partnership. The scientific work was aimed at revealing both theoretical and practical aspects. Such methodological approaches include theoretical and methodological, dialectical and methodological, deduction method, induction method, logical analysis method, synthesis method, and others. Thus, in the course of the research, it was revealed that trade unions play a rather important role in the formation of civil society and in improving the mechanism of social and labour relations. In addition, the mechanism of trade unions as subjects of social partnership in resolving labour disputes was analysed in detail, and the problems that stand in the way of the proper functioning of participation of trade union organisations in social partnership were identified. The results of the study will contribute to the development of methodological recommendations to help resolve problems related to trade union participation in social partnerships and to enhance the role of cooperation between trade unions and employers in the settlement of labour disputes.

Keywords: Social and labour relations; civil society; tripartism; labour conflict; civil law

1 Introduction

In recent decades, the study of the social partnership sector as one of the important directions in the implementation of social and public policy has gained special relevance in scientific research. Therefore, with the development of social and economic relations, and the policy focus on stabilising the social sector of society development, the social partnership is a significant regulator in social and labour relations between the employee, the employer, and the state.[1] The role of social partnership is conditioned by its direct purpose, the key areas of which are optimal coordination of interests of such different groups, as a state representative, employees, and employers; carrying out preventive measures on arising conflicts in organisations and resolution of such conflicts; directing the management of organisations towards democratisation; developing and supporting the employer's attractiveness brand for its employees in the organisation.[2]

Social partnership is a rather important tool in social and labour relations, which contributes to their regulation and optimisation. The content of the concept of social partnership is interpreted rather ambiguously. In general, it can be seen as one of the best-known types of corporatism and neo-corporatism, which occurs in the relationship between three groups of actors, namely entrepreneurship, trade unions, and states, which classify social partnerships into systems such as bipartism, tripartism, micro-corporatism, and meso-corporatism.[3] The social

1 KNIAZIEVA; SHEVCHENKO; SHEVCHENKO; YAROSHENKO; INSHYN; YAKOVLYEV, 2021, p. 279-292.
2 STRELCHENKO, 2018, p. 262-270.
3 BORNSCHIER; NOLLERT, 2017, p. 377-403.

partnership acts as a way of cooperation at the level of state relations, expressed as a form of harmonious interaction between the subjects of social and labour relations. It is also worth mentioning that on the other hand, the social partnership is considered as a method and mechanism that allows regulating social and labour relations, neutralise emerging conflict situations that arise in organisations, contributes to the resolution of such situations and appeared contradictions between employees and employers in the most effective and constructive ways.[4,5] It is not only a means of stabilising economic and political development but also an important tool in the development and change of social society. It should also be mentioned that social partnership is one of the special types of social relations, where an important factor is an alignment of interests of different social groups within the existing legal framework of the socio-economic sector.[6]

To implement social partnership activities, citizens have the right to associations and freedom for trade unions. In general, trade unions should be defined as an association of citizens voluntarily, which is linked to common occupational and professional interests according to the nature of their work, which is established to perform the function of representation and implement a mechanism for the protection of the rights and freedoms of citizens and their labour interests.[7] At the moment, there are two types of trade unions, in particular alternative trade unions, which focus their activities on the classical protective functions, and traditional trade unions, which aim to support the contact between the employer and the employees. The main difference between the two is that they are politicised, independent of the organisation's leaders, confrontational in orientation, and address the social and welfare problems of union members and organisations.[8]

The importance of the study of trade unions' activities stems from the need to identify the role in the mechanism of implementation of social partnership between employees, employers, and the state.[9] The peculiarity of trade unions' activities is that they help in the formation of civil society and in the formation of social and labour relations. Effective social partnerships provide opportunities for constructive dialogue to resolve conflicts between employees and employers, establish synergies between union actors and prevent the increase of social tensions in a social society.[10] Therefore, the important steps in the research work are to conduct a detailed analysis of the trade union mechanism in general, to consider this

4 KRAINOV, 2019, p. 115-124.
5 KUCHKO, 2021.
6 YAROSHENKO; MOSKALENKO; SLIUSAR; VAPNYARCHUK, 2018, p. 1-10.
7 LIU; YANG; XIAO; HUANG; NIE; LIU; CHANG, 2021.
8 WATSON, 2018.
9 INSHYN; VAVZHENCHUK; MOSKALENKO, 2021.
10 KEUNE; PEDACI, 2020, **p**. 139-155.

sector as a subject of social partnership in labour dispute resolution, as well as to identify the problems that may stand in the way of the proper functioning of the segment and identify recommendations to improve its effectiveness.

2 Materials and Methods

The study that has been carried out in the framework of studying the role of trade unions as subjects of social partnership in resolving labour disputes has been carried out through various methodological approaches that help in revealing the theoretical and practical components of the topic of study. Thus, due to the theoretical and methodological approach, it is possible to study in more detail the concept of trade unions, to highlight the characteristic features and principles of implementation of their activities. Further, highlighting such methodological approach as a dialectical methodological approach in scientific work, it is possible to highlight the key objectives, directions, and features of trade unions in the implementation of their activities, in particular, in the resolution of labour disputes. The method of logical analysis will help to analyse in more detail what are the peculiarities of labour dispute resolution with the participation of the trade union as a subject of social partnership. Equally important is the method of deduction, which allows highlighting the specific features of trade unions' activities in resolving labour disputes, and characterising this mechanism in its role as a subject of social partnership. The methodological approach opposite to this one, the induction method, makes it possible to identify the specific features inherent in the implementation of their powers in the settlement of labour disputes based on the general characteristic of trade unions' activities. The formally legal methodological approach will assist in the analysis of individual legal norms that enshrine acts of social partnership. The methodological approaches, such as the method of analysis and comparative analysis, are also useful in studying this aspect of the work, which enables a detailed analysis of the stated theoretical and practical aspects, from which the main objective of the research can be identified, in particular, to identify the role of trade unions as the subjects of social partnership in resolving labour disputes. The method of synthesis is quite important in the research, as it brings together the studied theoretical and practical aspects into an overall picture and makes it possible to layout the material consistently and logically, thus achieving the main goal of the work.

Therefore, the author identifies such stages in the conduct of scientific research:

1. The first stage of the research is aimed at revealing the theoretical component, through which the concept of social partnership can be

analysed in more detail and the main characteristics and principles of this segment's activities can be highlighted.

2. The second stage of the work helps to reveal the main purpose of the study, which is to consider the trade union as a subject of social partnership in the implementation of labour dispute resolution and analysing such activities, and, equally importantly, analysing the legal provisions that enshrine social partnership acts.
3. The third stage, which is the final stage of the research work, assists to highlight the characteristics and problematic aspects when considering the role of trade unions as subjects of social partnership in resolving labour disputes and to highlight recommendations that will improve and enhance the effectiveness of the role of trade unions as subjects of social partnership in resolving labour disputes.

3 Results and Discussion

3.1 Exploring the Social Partnership Mechanism

In today's context, the most common way to regulate labour relations is to find a way to reach an agreement. "Social partnership" is one of such ways. In general, it should be stressed that the term "social partnership" is conditional, because a partnership between the employer and the employee cannot be formed because of their opposing interests. But at the same time, notwithstanding their opposites, there is also a commonality of interests, which manifests itself in achieving the effective functioning and organisation to create the necessary conditions in the implementation of the necessary interests of the employer and the employees.[11] For the system of social partnership, three main elements should be distinguished, through which the effectiveness of this mechanism can be realised. These elements include a set of operating bodies formed by representatives of employers, employees, and public authorities that interact between them at different levels on a permanent basis; a set of various acts, such as agreements, collective bargaining agreements, decisions, and others that aim to regulate the emerging social and labour relations; the establishment of appropriate procedures, the definition of forms through which the interaction between subjects of social and labour relationships and be carried out, the relations and sequences in the development, timing, and prioritisation of bodies and regulations can be determined.

[11] TOMASHEVSKI; YAROSHENKO, 2020, p. 41-49.

The object of the social partnership should include the implementation of the social and labour policy of the state and the relations between the subjects of labour activity, the definition of working conditions, labour protection and its organisation, the establishment of wage for work, the definition of social guarantees and their extension, and ensuring the participation of labour collectives in solving social and work-related issues that arise.[12]

In order to analyse the mechanism for implementing social partnership activities in more detail, it is worth highlighting the principles on which it is based.[13] The main principles include equality of the parties, which means that each party can initiate negotiations; ensuring that the interests of all parties are taken into consideration and that they are respected, which is realised by ensuring that the interests of the parties are reconciled in the course of negotiations; the interest of both parties in participating in negotiations to reach agreements; active participation of the state in promoting democratisation and stabilising social partnerships, which is realised by creating a special establishments who are authorised to regulate social and labour relations; compliance with labour legislation and other regulations governing labour law in the course of negotiations; freedom of choice in negotiations in issues regulating labour standards; the obligations arising from the negotiations should be real and enforceable for the parties to the negotiations; the supervision of collective agreements and agreements; the responsibility of the parties and their representatives for the implementation of obligations; negotiations are based on the principles of tolerance, consensus, and compromise.[14] When considering the concept of social partnership, the following are generally distinguished: negotiations that arise for the conclusion of collective contracts or collective agreements, participation of employees and employee representatives in the management of the organisation, mutual negotiations to reach agreements, participation of employee and employer representatives in pre-trial proceedings in matters related to labour disputes, negotiations and consultations to implement social and labour policy, negotiating actions and obligations to achieve the satisfaction of all parties to the negotiations, and monitoring the parties' compliance with obligations and agreements during the negotiations.[15]

Social dialogue is the most effective instrument of social partnership to achieve all the objectives and principles that underpin the social partnership mechanism. It refers to the system of relationships between employees, employers, public

[12] ADDISON, 2020.
[13] MARAGNO, 2020, p. 17-39.
[14] TASSINARI; DONAGHEY, 2020.
[15] ATZENI, 2021, p. 1349-1362.

authorities, and their representatives with a view to implementing and shaping social and labour policies and settling economic, labour, and social relations.[16]

In other words, it is thus worth noting that modern social partnership prioritises people and human values, gives priority to national consensus, and agreement is reached through compromise rather than the confrontation of the parties' interests.[17] Next, models of social partnership should be examined to examine the mechanism by which it functions in more detail. World practice demonstrates that social partnership and the relationships it generates are always regulated with state participation, with an advisory and legislative function, but the degree of state involvement varies depending on the chosen model of social partnership in the state.

Hence, in countries where the role of the state is not dominant in the regulation of social and labour relations, such as the United Kingdom, Canada, the United States, and Japan, the social partnership model is based on the principle of bipartisanship, meaning that two parties participate in the negotiations: trade unions as employee representatives and employers' associations, while the role of the state is indicated by facilitating the negotiations between these parties.[18] In contrast, the social partnership model of tripartism, which is widespread in countries such as France, Germany, Sweden, Finland, and other European Union countries, involves the active participation of the state in the contracting process as a full party but has its own specific characteristics in each country.[19] In Northern Europe, for example, there are three levels of regulation – local, sectoral, and national – while in countries such as France and Germany, regulation of social partnerships with the state involvement takes place on only two levels – sectoral and regional.[20]

It is also worth considering other approaches to defining models of social partnership. There is a distinction between pluralistic, conciliatory. and conservative and liberal models of social partnership. The pluralistic model of social partnership refers to the localisation of the parties' cooperation and decentralisation of the negotiations process, which is characteristic of organisations in the United States, Canada, Japan, and the United Kingdom. Considering the conciliatory model of social partnership, in this case, there is the participation of three parties in the negotiations process, i.e. trade unions, state, and entrepreneurship, which is noted in the practice of Australia, Scandinavian countries, and the Netherlands. Also, highlighting the conservative and liberal model of social partnership, its

16 KOVAL, 2021, p. 8-24.
17 BRAGA; SIRANGELOV, 2019, p. 39-67.
18 IBSEN; TAPIA, 2017, p. 170-191.
19 MAIKAWI, 2021, p. 1-9.
20 KARLHOFER, 2020, p. 139-155.

characteristic feature is the reduced role of trade unions in social partnership, which is found in the practice of France.[21]

A different methodological approach highlights social partnership models such as the cross-sectoral model and the trade unionist model, which refers to the tripartite system. The notion of intersectoral partnership should be understood as the interaction of two or three sectors, i.e. the state, business, and trade unions in its constructive manifestation, used to resolve social and labour problems, allowing for synergies that depend on the use of different types of resources and are beneficial to each of the parties in the negotiations and the population as a whole.[22] That is, based on the above, the mechanism of social partnership aims to achieve social peace and harmony in the organisation, society, and the state as a whole, with such fundamental conditions as equality of the parties, respect, and satisfaction of their interests, finding consensus to resolve disputes and conflicts that arise, the implementation of social justice, and the control over the mutual responsibility of parties to fulfil obligations under the arisen agreements. The role of the state in providing a social partnership mechanism depends on the chosen model of social partnership.[23]

Next, it is worth examining the mechanism of trade unions as actors in social partnership and identifying the current status of their role in social partnership.

3.2 Trade Unions as Subjects of Social Partnership

It is worth noting that all citizens have the right to form trade unions to protect their rights and interests. A trade union is a voluntary public association of citizens to represent their interests of social and labour nature, production and professional directions, and to protect violated rights within labour relations.[24] Violations of labour law are becoming more and more frequent and widespread. Most of the labour disputes that arise relate to working hours, working conditions, non-payment or late payment of wages, and the quantitative inability to reproduce the workforce or incentives for employees. It is precisely based on this list of reasons that trade unions have a special role to play in the regulation of social and labour relations. Trade unions are mandated to regulate such relations at all possible levels, namely at the macro-, meso-, and micro-levels.[25]

At the micro-level, for example, when collective labour agreements are concluded, it is the responsibility of the trade union to regulate social and labour

[21] ORR, 2021, p. 498-515.
[22] LEISERSON, 2020.
[23] NOVAK, 2021.
[24] SOSHNIKOVA, 2021, p. 284-290.
[25] PREENA, 2019.

relations in the organisation. At the micro-level, the dissatisfaction of the subjects of organisations may be due to violations of normative-legal acts or other agreements that contain labour law norms, the general index of labour discipline, a large index of personnel turnover in the organisation, and the index of labour conflicts in the organisation, the strength of arising conflicts, their number, reasons of arising conflicts in the organisation and others.

At the meso-level, the role of trade unions is to participate as a joint commission in the drafting of tariff agreements. At the macro level, it is worth noting that the role of trade unions is to participate as part of a tripartite commission in issues that relate to the regulation and formation of methods to improve social and labour policy in organisations.[26]

The role of trade unions in the regulation of social and labour relations is precisely to conduct analysis and expertise on their condition and to carry out certain activities that will improve their current condition. Regardless of the level of regulation of social and labour relations, any trade union organisation must go through several key stages in the functioning of its own activities. There are seven such key stages, in particular informational, analytical, problem identification, subjects' behaviour assessment, compliance stage, analysis of causes of disruptive behaviour of subjects and project stages.[27]

The first stage is informational, it collects information about the needs and interests of the subject of the labour dispute and the extent to which these needs and interests can be realised. The second stage, which is analytical, is to analyse the needs and interests of the subject of the labour dispute and to identify which of the collected information is most relevant to the issue at hand. The third stage – problem identification, consists of examining the subjects of the social and labour relations between the actors that are likely to cause the greatest discontent and dissatisfaction. The next stage evaluates the behaviour of the subjects, and. that is, assesses the behaviour of both the employer and the employee, which consists of such criteria as evaluating the actions of the subjects, evaluating the costs of the employer to the employees, and evaluating the efficiency of the employee's labour costs. The next step is the compliance stage, i.e. analysing the consistency of the actors' interests and their actions aimed at achieving them as well as identifying causes of their destructive behaviour; this stage is implemented by analysing the employees' actions that can hinder the implementation of the employer's interests, analysing employer's behaviour that can hinder the realisation of the employee's interests, and analysing subject's actions that can hinder the implementation of personal interests.

[26] ATANTAEV, 2021, p. 133-141.
[27] KRAINOV, 2020, p. 115-124.

The next stage allows for an analysis of the causes that can create destructive behaviour on the part of actors and act as causes of labour disputes. The seventh stage, which is the final stage in the mechanism for the implementation of trade union powers in social partnership, allows the development of recommendations, methods, and techniques for resolving labour disputes, increasing the effectiveness of social and labour relations, and facilitating the mechanism for implementing these methods and recommendations in social partnership.[28]

The representation of employees in individual labour disputes by trade unions has not been regulated by law. This lack of regulation is seen in the fact that to apply to the court to implement the mechanism of protection of employee interests by the trade union, it can be done only in three cases: on its initiative, at the request of trade union members or at the request of other employees. For recourse to the court on the request of trade union organisation members, the important conditions are direct membership in the trade union organisation and the proof of the authority held by the trade union organisation. It is worth mentioning that the representation of an employee by a trade union organisation can be legally secured through a written request by the employee to the trade union organisation to go to court to enforce their interests and rights.[29]

In addition, trade unions have the right to apply to the court for their own initiative to protect the rights and interests of their member employees in cases where labour law regulations have been violated. However, such applications are perceived ambiguously by the courts, arguing that the employees have not specifically designated or authorised the trade union as their representative for the protection of their rights and interests, which is why in practice such applications are often rejected by the court.[30]

It's worth noting that a trade union organisation has authority in negotiations representation in labour disputes of a subject who is not a member of the trade union organisation. Such type of representation is often used when a labour dispute involves issues of declaring a dismissal unlawful or issues of reinstatement, as in such cases the employee would not be a member of a trade union organisation. Such representational relations could be said to be of a purely private, contractual nature. It should be noted that this is possible if the local acts provide for the trade union representative to act not on behalf of the trade union organisation that is within the framework of the trade union organisation's legislation, but on a voluntary basis.[31]

[28] KOVAL, 2021, p. 8-24.
[29] LEISERSON, 2020.
[30] KARLHOFER, 2020.
[31] ATANTAEV, 2021, p. 133-141.

Equally significant is the fact that trade unions' function of representation to protect their rights and interests is denied to young workers. In general, the minimum age for joining a trade union is fourteen years of age or older. The purpose of this restriction is that a young worker is not able to fully understand when his rights are violated and in what cases, and under what circumstances, it becomes necessary to protect the rights and interests of such a young worker. But in this case, it is worth mentioning that the under-aged worker has the right to approach a trade union organisation for representation in labour disputes on a contractual basis.

To summarise the above, the role of trade unions in the social partnership mechanism for resolving labour disputes is quite important as it enables the protection of the rights and interests of employees, but the proper functioning of trade union organisations is hampered by certain factors that can contribute to the role of the trade union in social partnership and the effective resolution of labour disputes.

3.3 Problems in Trade Union Activities and Recommendations for Dealing with them

The most important of these factors is a lack of awareness. It is quite common that employees do not see the tangible results of trade union activities and therefore refuse to join them. This is due to the fact that employees are poorly informed about the results of the activities of the primary trade union organisations. It has been noted that the poor performance of trade unions in informing employees means that most of their members do not know what exactly they do and what their purpose is.[32]

The lack of interaction between trade unions and the younger generation is another fact worth mentioning. This is since trade unions do not have departments for working with young people, and collective agreements do not include clauses that would implement the protection of the rights and interests of the younger generation in the organisation. This indicates that, given the current situation, not only is the younger generation reluctant to actively participate in the trade union organisation, but it is also reluctant to join this institution. In such a case, it should be noted the importance of creating a positive image in the group of the younger generation of employees, and mentioning the addition of clauses in collective agreements that would indicate the presence of social guarantees and benefits that would be relevant and necessary for the younger generation of employees.[33]

A further problem is the reduced responsibility of the employer. For example, it is often the case that employers "make advances" by concluding collective

[32] NELSON, 2019.
[33] ORR, 2021, p. 498-515.

labour agreements and undertaking certain contractual obligations, but trade union representatives have no influence on the employer in this case. Therefore, one of the main tasks that trade unions have to perform is the implementation of these collective bargaining contracts or agreements. Often in practice, the trade union organisation is not very active in this matter, since the agreements are determined by the employer and the chairman on an individual basis. In this case, the employer can apply its own leverage to its subordinate to change any clauses of the collective contract or the agreement, which significantly reduces the effectiveness of the protection of the rights and interests of the employees.[34]

Hence, the following recommendations should be considered in order to resolve such problems that stand in the way of the effective functioning of trade union organisations. First of all, to raise awareness among employees about the activities of trade unions, their goals, functions, and tasks. This can be done through the use of information and communication technology, publishing reports on their activities, informing employees about them, etc. The next step is to create awareness of the importance of trade unions, especially among the younger generation of employees, which is done through effective protection of employees' rights and interests. Equally important is the conduct of surveys by trade unions to help identify desired employees the benefits or problems that hinder the proper performance of work duties, and the use of the most relevant mechanisms to protect employee rights and interests in resolving labour disputes.

Thus, by conducting scientific research into the study of trade unions as subjects of social partnership in resolving labour disputes, it has been revealed that this mechanism performs the function of protecting the rights and interests of employees, but at this stage of its functioning there are several problems, according to which recommendations to improve the effectiveness of the studied segment have been identified.

4 Conclusions

By conducting a study on trade unions in social partnership in the resolution of labour disputes, their key role has been identified, and it's significantly important since the mechanism of trade union organisations aims to protect the rights and interests of the subjects of organisations and enterprises. This work has been carried out in several key stages, which help to analyse the area under study in more detail.

[34] TASSINARI; DONAGHEY, 2020.

Thus, the first stage is theoretical, it helps to consider social partnership as a whole, according to which, its key functions, principles, and features can be identified. It has been established that social partnership is a method and mechanism that enables the regulation of social and labour relations, the neutralisation of emerging conflict situations that arise in organisations, the resolution of such situations and emerging contradictions between employees and employers in the most effective and constructive ways. The key elements of the social partnership include a set of operating establishments formed by representatives of employers, employees, and public authorities interacting with one another, a set of various acts aimed at resolving emerging social and labour relations, and the establishment of appropriate procedures through which interaction between the subjects of social and labour relations is possible, the determination of the correlation and consistency in the development, timing, prioritisation of establishments and regulations.

The next stage implied revealing the trade union as a subject of social partnership. In general, it is a voluntary public association of citizens to represent their interests of social and labour nature, production and professional directions, and to protect violated rights in the sphere of labour relations. Characteristic features for the implementation of this mechanism at the micro-, meso-, and macro levels have been highlighted, and its key functions have been considered.

The final stage aimed at uncovering problems that may reduce the role of trade unions in social partnership and hinder its effectiveness. Such problems were emphasised as poor awareness, reduced employer responsibility, and insufficient interaction with the younger generation by the trade union organisations. To the factors outlined in the research paper, recommendations have been proposed to address them, and they will also help in improving the effectiveness of trade unions in their obligations of protecting rights and interests in labour disputes.

O Papel dos Sindicatos como Sujeito da Parceria Social na Resolução de Controvérsias Trabalhistas

Resumo: A relevância deste trabalho científico que incide sobre os sindicatos como sujeitos da parceria social para a resolução de conflitos laborais reside na necessidade de reforçar o papel das organizações sindicais no mecanismo de implementação das actividades de parceria social na resolução de conflitos laborais. O objetivo deste artigo é realizar uma análise das atividades sindicais em geral, destacando suas principais características e princípios em que se baseiam tais atividades, e também investigar qual é o papel dos sindicatos como sujeitos da parceria social. O trabalho científico teve como objetivo revelar aspectos teóricos e práticos. Tais abordagens metodológicas incluem teórico e metodológico, dialético e metodológico, método de dedução, método de indução, método de análise lógica, método de síntese, entre outros. Assim, no decorrer da pesquisa, foi revelado que os sindicatos desempenham um papel bastante importante na formação da sociedade civil e na melhoria do mecanismo das relações sociais e trabalhistas. Além disso, analisou-se detalhadamente o mecanismo dos sindicatos como sujeitos da parceria social na resolução de conflitos laborais e identificaram-se os problemas que impedem o bom funcionamento da participação das organizações sindicais na parceria social. Os resultados do estudo contribuirão para o desenvolvimento de recomendações metodológicas para

ajudar a resolver os problemas relacionados com a participação sindical nas parcerias sociais e para reforçar o papel da cooperação entre sindicatos e empregadores na resolução de conflitos laborais.

Palavras-chave: Relações sociais e trabalhistas; sociedade civil; tripartismo; conflito trabalhista; direito civil

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On ways to protect the rights of the parties to the contract: Based on the Supreme Court of Ukraine practice

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Abstract: The article considers ways to protect the rights of the parties to a contract in resolving their disputes based on the application of the Supreme Court of Ukraine practice. The institution for the protection of civil rights is inextricably linked with the institution for the exercise of civil rights since a clear civil turnover implies not only the recognition of certain civil rights for subjects but also ensuring their reliable legal protection. For that reason, the relevance of the research lies in the fact that the conclusions and proposals will considerably improve the effectiveness of human rights activities and the quality of providing legal assistance to subjects of civil law relations. Considering the above, the purpose of the study is to analyse the doctrinal and regulatory aspects of ways to protect the rights of the parties to the contract during resolving their disputes and determine the main trends in the practice of the Supreme Court of Ukraine on this problem. The main methods used in the study of ways to protect the rights of the parties to the contract are observation, empirical description, and experiment. The main results of the study are the construction of national civil law on the pandect system by separating the general and special parts to determine the correct application in judicial practice of general and special provisions of the Code, which regulate certain legal institutions.

Keywords: Human rights; Civil law; Obligations; Legitimate interests; Legal liability

1 Introduction

One of the main guarantees of the parties' fulfilment of their obligations under the contract is the possibility to protect their rights. Currently, the problem of protecting civil contracts is becoming relevant in Ukraine. The effectiveness of all contractual regulations in the country depends on the solution of this issue. Protection of civil rights is one of the most important categories of the theory of civil and civil procedure law, without clarifying which it is very difficult to understand the type and features of civil sanctions, mechanisms for their implementation, and other issues that arise due to the violation of civil rights.[1] Therefore, in the case of illegal encroachment on the property and personal non-property rights and legitimate interests of a person, the latter should be subject to protection, which, in turn, requires the state to ensure proper legal regulation to determine the means of exercising such rights and interests, to establish effective ways to protect them.[2]

Methods of protecting civil rights should be divided into measures of state enforcement procedure that have signs of civil liability measures, and measures of protection in the narrow sense that do not have signs of civil liability.[3] Therewith, for effective protection of the rights of the parties during resolving their disputes, it is advisable to apply liability measures and protection measures.[4] The provisions of Article 15 of the Civil Code of Ukraine stipulate that each person can protect their civil rights in case of violation. For the protection of their right or interest, a person has the right to apply to the court (Article 16 of the Civil Code of Ukraine).[5]

Civil law protects the status of individuals and legal entities, establishes legal guarantees for the protection of their civil rights.[6] While the lack of full-fledged effective guarantees of protection of the parties to the contract entails for the weaker party in the contract, the occurrence of unreasonable adverse material consequences.[7] The above undermines the credibility of the state authorities, attempting to implement the principle of a social market economy laid down in the provisions of the Constitution of Ukraine, and encourages individuals to be wary of concluding various civil contracts. This situation negatively affects the creation of a system of property relations based on the ideas of good faith and mutual respect of participants in civil legal relations. The dynamic state of civil protection of the interests of the parties to the contract is expressed in the implementation of a certain interest and elimination of consequences of its violation. Legal means for

1 MIRANDA NETTO; PELAJO, 2019.
2 Effective judicial protection..., 2020.
3 KREUTOR *et al.*, 2016.
4 MARQUES and PAOLIELLO, 2019.
5 2003.
6 GEVAERD, 2019.
7 WÓJTOWICZ, 2020.

such activities are legal opportunities (tools) that are contained in the provisions of civil law and are used in exercising the rights and obligations of the parties to the contract. Considering the functional focus on preventing and suppressing violations of the interest of the obligated person and eliminating the negative consequences of the violation, they should be called ways to protect the parties to the contract.

It is worth emphasising that in many cases, participants in civil law relations have different, sometimes contradictory, or oppositely directed interests. Thus, when entering into a loan contract, the bank's interest is to maximise its profit and minimise the risks of non-repayment of funds, and the borrower's interest is to receive money on the most attractive terms. Generally, both sides make compromises, conceding in something and winning in the main, and as a result of interaction, both sides achieve their goals. However, in conditions of imperfect competition, there may be gaps in such a mechanism, and therefore the intervention of law and legal regulation is necessary. For that reason, for the effective protection of a civil right or interest, it is important that the method of protection is chosen by the interested party, which must correspond to such a right. The purpose of the article is an analysis of the doctrinal and regulatory aspects of ways to protect the rights of the parties to the contract and determine the main trends in the practice of the Supreme Court of Ukraine on this problem.

2 Materials and Methods

The methodological basis of the presented research is a systematic review of the legal regulation of ways to protect the parties to the contract and in the segment of judicial practice that has developed in the field of civil protection.

The research is based on basic philosophical methods – metaphysics, synergetic dialectics, with an emphasis on epistemological aspects of the procedural institution of protection of the parties to a contract as one of the most important categories of the theory of civil and civil procedure law. Such methods allowed discovering the types and features of civil sanctions, mechanisms for their implementation, and other issues that arise due to the violation of civil rights. In addition, the possibilities of private scientific methods of cognition, such as historical, logical, formal-legal, comparative-legal, descriptive, legal modelling, and forecasting were actively used. The applied methods allowed interpreting the studied material to comprehend the theoretical provisions for their application by the Supreme Court of Ukraine. Moreover, these research methods characterised the ambiguous application of the provisions of the Civil Code of Ukraine in case of refusal of the contract.

Having analysed the considered positions of legal scholars, it can be concluded that the methodology of legal research in this study allowed not only

learning state-legal phenomena by philosophical methods but also independently creating principles and ways to protect the parties to a contract in civil law. Thus, general scientific methods (formalisation, abstraction, modelling) allowed defining the "methods of protection" and actually giving their classification. General methodological techniques and tools for the study of civil law phenomena and processes were presented in the form of a certain template, which was filled in based on the specific features of the cognitive object or in the form of general principles and rules for conducting research activities. Such rules were the basis for the principles of protecting the weaker party of a civil contract and adapting civil legislation to actual situations.

Special legal techniques and tools are represented by exceptional methods, principles, requirements, and techniques used only in legal science. Such methods, for example, can include the formal-legal method, interpretative, comparative-legal, etc. These methods contributed to the characterisation of various scientific approaches to the study of ways to protect the parties to the contract, considering current trends in legal science and the practice of the Supreme Court.

The study also highlights methodological techniques and tools that are combined into a system of legal techniques and research methods, which are a certain algorithm for collecting the necessary material for research, which is based on data generalisation and law enforcement practice. The main purpose of such technological methods and procedures is to prepare empirical material that has been included in the scope of scientific knowledge, in particular, the practice of the Supreme Court of Ukraine. On this basis, individual decisions of the Supreme Court of Ukraine in the field of protection of the parties to various contracts were analysed.

The most common methods in the study are systematisation of documents, generalisation of law enforcement and judicial practice, interpretation and systematisation of existing regulations, etc. This level has a special legal certainty, as the practice of the Supreme Court is not presented in its classical sense, but as a set of samples and models of cognitive activity created by lawyers for convenience.

3 Results

In accordance with Part 1 of Art. 15 of the Civil Code of Ukraine, every person has the right to protection of civil rights in case of their violation, non-recognition, or challenge. Thus, the subjective right to protection is a legally established ability of a person to use law enforcement measures to restore the violated right and stop actions that violate the right of the weak party. The development and establishment of a social market economy make it necessary to highlight the principle of protecting the weak party to a civil contract and adapt civil legislation to the actual state and actions of subjects of contractual legal relations. Signs of

the weak party to the contract are increased interest of one of the subjects of the contract in concluding it; insufficient information about the subject of activity of the counterparty under the contract; insufficient information about the established rights, obligations, and responsibilities of the subjects of contractual relations; hastiness of the decision to conclude the contract, made in such conditions that contribute to making a rash decision and allow asserting the lack of will of the subject who made the decision, etc.

Signs of a weak party to a contract can manifest in contractual relations in different ways. Therewith, the need to protect the weak party in the contract arises only if the presence of one or more signs of the weak party led to the conclusion of the contract on discriminatory terms, including depriving the weak party of the relevant rights, imposing additional, unjustified obligations, excluding or limiting the liability of the second party for violation of obligations. The level of protection of the weak party of a contractual relationship should be commensurate with the consequences of the strong party's use of the weakness of its counterparty.

The above, admittedly, concerns the institution of protection of subjective civil rights of the parties to the contract. Therewith, it is worth noting that in recent years the Supreme Court (SC) of Ukraine has made many generalisations to ensure the unity of approaches to understanding the criteria for the effectiveness of ways to protect the rights of the parties in the contractual sphere.[8] Thus, there are many examples that indicate the correct, in the authors' opinion, approach in applying methods of protecting the rights of a party to a contractual obligation, which take place in the judicial practice of the SC, and examples of the ambiguous application of the provisions of the Civil Code of Ukraine in terms of protecting the rights of the parties to a contract.

Hereinafter the application of substantive law provisions in the legal positions of the Grand Chamber (GC) of the SC of Ukraine, which are perceived positively, is described, in particular:

1. Regarding the definition by the SC of "a way to protect a subjective right", which fully reflects doctrinal trends in this area and is covered through "material and legal protective measures stipulated by law, through which the restoration (recognition) of violated (disputed) rights and influence on the offender are taken. This interpretation is found in the Resolution of the GC of the SC of Ukraine in case No. 925/1265/16.[9]
2. Simultaneous application of various forms of contractual liability follows from Art. 61 of the Constitution of Ukraine, according to which no one

[8] Judgment of the Supreme Court in case No. 216/3521/16-ts., 2019.
[9] 2018.

can be twice brought to the legal responsibility of the same type for the same offence, since this case does not imply application of different types of legal liability for the same offence, on the contrary, different pecuniary consequences within the limits of liability in civil law in general are applied. Given this, it becomes possible to combine different forms of liability within the institution of contractual liability, in particular the doctrine of types of penalties.

3. An indisputable positive aspect is a considerable expansion in the practice of the legal consequences of default on monetary obligations defined in Part 2 of Art. 625 of the Civil Code of Ukraine to a wide variety of legal relations in the private law sphere in contracts of various types, the subject of which is money.
4. A serious obstacle to the effective protection of the rights of the parties to the contract is the lack of established practice in this area. As the most effective way to solve this problem, studying international legislation concerning various types of contracts can be suggested. The current legislation provides for such a legal possibility. Moreover, the current legislation of Ukraine establishes the primacy of international law. This allows applying the provisions of an international contract of Ukraine, if it establishes other rules for protecting the rights of the parties to the contract, rather than those provided for by civil legislation (Article 9 of the Constitution of Ukraine).[10] The study of international provisions allows considering more progressive provisions of law since at the international level the practice of protecting the rights of the parties to a contract is more advanced.
5. The doctrinal developments of civil lawyers are also aimed at developing the appropriate judicial vision. In this regard, it is worth highlighting the main conclusions, in particular: interest, which is provided for in Art. 625 of the Civil Code of Ukraine, in its essence, is not identical to the concept of interest for the use of funds under a loan agreement or credit contract, so their simultaneous collection does not contradict the current legislation of Ukraine; three per cent per annum for violation of a monetary obligation in accordance with Art. 625 of the Civil Code of Ukraine and a penalty as liability for violation of a monetary obligation can be applied simultaneously (Civil Code of Ukraine). Another important point to note is that the general rules of liability for violation of any monetary obligation, defined in Art. 625 of the Civil Code of Ukraine, apply to contractual and

[10] 1996.

non-contractual obligations, which is demonstrated in the Resolution of the Supreme Court of Ukraine in case No. 910/10156/17.[11]

6. Application of general provisions on compensation for non-pecuniary damage, which is defined in Art. 23 of the Civil Code of Ukraine,[12] regardless of whether this form of civil liability is fixed in legislative provisions or contractual clauses, which is an important step towards improving the legal mechanism for protecting the subjective civil right of a party to a contract.
7. In terms of applying such a method of protection as invalidation of the contract, which is essentially used to dispose of such a legal fact as the contract: a) further delineation of the grounds for declaring the contract invalid (when the conditions of its validity are violated) and not concluded (when there is no contract on its essential terms); b) development of a vision about the possibility of recognising the contract as valid (mainly in case of non-compliance by the parties with the requirement for the written form of the transaction or the requirement for its notarisation); c) determination of cases when this method of protection will not be effective. Thus, the Supreme Court states that "the recognition of contracts for the alienation of disputed property as invalid will not result in the release of the land plot or the removal of obstacles to its use, and therefore will not restore the violated right of the plaintiff, who is not the owner of the property, alienated under the disputed purchase and sale contract." The above legal position is embodied in the Resolution of the Supreme Court of Ukraine in the case nº 462/5804/16-ts.[13]

An extremely important point in this context is that the Supreme Court of Ukraine emphasises that such a method of protection as declaring a contract invalid may be used solely to protect the civil rights or interests of a person (for example, to create prejudice for a public dispute; in cases of default on obligations arising from public legal relations; default on debt obligations). Thus, in one of the Resolutions,[14] the Supreme Court of Ukraine indicates that "when entering into a disputed transaction, the plaintiff pursued the goal of preventing the bank from satisfying its claims (protecting the violated right) in the future by enforcing a possible court decision to recover credit debt from it, as it noted in the statement of claim." In this regard, the Supreme Court absolutely correctly considered such intentional actions of the plaintiff as unscrupulous with the application of the legal consequences that follow from it.

[11] 2018.
[12] 2003.
[13] 2019.
[14] Resolution of the Supreme Court in case No. 462/5804/16-ts., 2019.

4 Discussion

The main reason for the need to protect one of the parties to the contract is the economic inequality of the subjects. In particular, according to many researchers, the "weakness" primarily relates to unprofessionalism rather than economic weakness. The inequality of the parties to the legal relationship, apparently, is also associated with an underdeveloped competitive environment.[15] Thus, even with economic resources and sufficient competence, the subject of civil turnover often has no real choice, since all for entities that provide, for example, communication or banking services, the conditions are almost equally unfavourable for the counterparty.

Researchers have formulated signs of the weak party of the contract: increased interest of one of the subjects of the contract in concluding a contract in comparison with its counterparty; insufficient information about the subject of activity of the counterparty under the contract, offered goods and services; insufficient information about the established rights, obligations, and responsibilities of subjects of contractual relations; hastiness of the decision to conclude a contract, made in conditions that obviously contribute to making a rash decision and allow asserting the absence of the will of the subject who made the decision.[16] Admittedly, these signs may not be present all at the same time. Given this, researchers distinguish three main signs of the weak party to the contract: increased interest in concluding a contract; lack of professionalism in comparison with the counterparty in the field in which the contract is concluded; unequal negotiation opportunities in comparison with a professional counterparty.[17]

However, the authors consider it inappropriate to outline the latter feature, since unequal negotiation opportunities do not occur independently, but due to increased interest, lack of professionalism, and a number of other factors, in particular, unequal economic opportunities, lack of necessary information, etc. All these factors are often interrelated, as a lack of professionalism leads to a lack of sufficient awareness etc. Therefore, the weak party in a civil contract is a certain symbol of a participant in contractual obligations, which has a considerably smaller volume of certain organisational, material, professional, informational, and other competitive opportunities that are important for the development, implementation, and protection of a subjective right in comparison with its counterparty. This approach to the concept of the weak party to the contract correlates with the theory of inequality of negotiation opportunities, which was widespread in the West at

[15] DUPEYRÉ and ROSA, 2019.
[16] VAVILIN, 2009.
[17] VAVZHENCHUK, 2019, p. 6-11.

one time.[18] As the English judge Lord Denning indicated, inequality of negotiation opportunities can arise for various reasons, including various forms of moral pressure, social conditions, the market situation, and even improperly obtained benefits. The result of unequal negotiation opportunities may be the use by a party with a stronger negotiating position of unreasonable or excessively burdensome conditions for the other party.[19]

As a solution to this situation, researchers suggest applying the contra proferentem principle, which is an extremely successful tool for reducing the level of unpredictability in the relations of the parties and in resolving their disputes, minimising the costs of the parties to coordinate their behaviour and of the court to enforce the contract. It imposes the negative consequences of the unclear text of the contract solely on the drafter, instructing the courts to interpret the disputed condition in favour of the receiving party. Accordingly, the ambiguity of the contractual condition ceases to be a serious problem for the receiving party and the court. In addition, a counterparty who is offered an unclear condition can easily predict, without serious costs, what interpretation will be applied by the court, and rely on it in its behaviour. The same will be done by a drafter who is aware that this position will be supported by the court when resolving a dispute. As a result, this rule of interpretation coordinates the behaviour of the parties to the contract quite effectively, indicating the most favourable interpretation of the contract for the receiving party. On the other hand, this principle offers a fairly simple way for the court to determine the content of disputed contractual terms, which does not require applying political and legal considerations to the process of interpretation and allows it to resolve the dispute based on the content of the contract, and not replacing it with one's own ideas about good faith, reasonableness, and fairness. This in turn saves the cost of legal proceedings by simplifying the procedure for resolving contractual disputes in court.[20] The contra proferentem principle has already been supported by the Supreme Court of Ukraine in the Decision of the Civil Court of Cassation as part of the SC of April 18, 2018, in case No. 753/11000/14-C, the Decision of the Economic Court of Cassation as part of the SC of May 2, 2018, in case No. 910/16011/17.

In the legal literature, the inequality of the de facto parties is formulated, from which the definition of strengths and weaknesses can be derived. Actual inequality is a situation in which one side of a relationship (a strong party) uses its formally and legally existing rights to the detriment of the other party (a weak party); the former receives unjustified advantages, and the latter does not receive

[18] PYANKOVA, 2011.
[19] CICORIA, 2003, p. 4-12.
[20] SISUEV, 2021.

what it could expect. The Supreme Court of Ukraine in its practice also linked the weak party to the contract and the inequality of negotiation opportunities.[21] Therefore, the approach of this institution to the weak party of a legal relationship, in general, should be recognised as correct.

Nevertheless, this approach requires detail, there is not even an approximate list of factors that affect the inequality of negotiation opportunities. On the one hand, this will not allow the courts to focus only on the listed factors, since it is impossible to provide an exhaustive list of situations in which there are unequal negotiation opportunities. On the other hand, an inexhaustible list of factors that affect the inequality of negotiation opportunities could serve as a kind of guide for the future. Considering the above, the researchers suggest that the following factors should be considered when analysing negotiation opportunities: asymmetry of information and professionalism, the presence of trusting relationships and personal dependence, etc.[22] The authors believe that the weak party of legal relations can be any participant in civil turnover, an individual and a legal entity, including a person engaged in business activities. Moreover, the establishment of the "weakness" of the party should occur precisely within the framework of a specific legal relationship. Additional ways to exercise and protect the legitimate interests and rights of the weak party are objectively in demand. Ways to protect the rights of a weak party under a contract are possible from the standpoint of unilateral strengthening of the rights of one party to the contract (a weak subject in the obligation), and from the standpoint of strengthening civil liability or increasing the obligations of the other party (a strong party in the obligation).[23] Therewith, the protection of the weak party in the obligation cannot be limited to the legislative level of legal regulation – only the foundation is laid at the legislative level, all the nuances of a particular transaction can be considered only at the bylaw level. This is the positive role of the judicial authorities in ensuring the interests of the weak party of the legal relationship.

It is also worth noting that in modern conditions, courts are faced with the analysis of an intervention in other people's contractual relations, that is when one contract contradicts another (including making transactions to the detriment of creditors). Thus, as experts in this field note, the provisions of Art. 620 of the Civil Code of Ukraine apply to cases of the conclusion of several contracts for the purchase and sale of property rights. Therewith, the judicial practice has formed two scenarios, depending on the registration or non-registration of ownership rights to a real estate object by the second acquirer of property rights and, accordingly, the

[21] Resolution of the Civil Court of Cassation of the Supreme Court in case No. 750/1535/17., 2019.
[22] SISUEV, 2021.
[23] DJAKOVICH, 2019.

choice of methods of protection considering the above. In the case of registration of ownership rights, compensation for losses will be effective, unlike the recognition of the second contract as invalid. In the case of non-registration of property rights, an effective method of protection will be the recognition of the contract as invalid.[24]

Separately, it is worth paying attention to the application by the judicial practice of provisions regarding the beginning of the limitation period for a claim to declare a transaction invalid. Thus, as a general rule, as V.I. Krat emphasises, for a claim to declare a transaction invalid, the statute of limitations begins from the day when the person learned or could learn about the transaction (when the transaction was committed under the influence of violence - from the date of termination violence). An exception to this rule is to determine the beginning of the statute of limitations on the requirements for invalidation of the testament because the right to sue in this case arises only after the death of the testator.[25] In addition, judicial practice correctly proceeds from the fact that in case of violation of the civil right of a minor, the statute of limitations begins from the date of reaching the legal age, which is confirmed by the Supreme Court of Ukraine Decision of March 11, 2020, in case No. 753/6432/16-C.[26]

Therewith, there are a number of examples of judicial practice of the Supreme Court of Ukraine, which can be called losses rather than achievements in law enforcement. Hereinafter those examples that have attracted special attention are listed:

1. An indication of the Supreme Court that only the methods of protection defined by law or contract are possible in the application. Thus, in one of the cases considered by the Supreme Court of Ukraine, the plaintiff asked to recognise the bank deposit contract as valid, after receiving a letter from the bank, which informed that the contract is void in accordance with the provisions of Art. 38 of the Law of Ukraine "On the deposit guarantee system for individuals".[27] Obviously, the Supreme Court should have specified that this method of protection is ineffective in a particular case. Recognition of bank deposit contracts as null and void based on the above article has been repeatedly criticised by civil lawyers because the category of nullity of a transaction (contract) is clearly defined by the provisions of the Civil Code of Ukraine (Art. 215). However, the Supreme Court stated that "the method of protection chosen by the plaintiff must be provided for by law or contract".[28] It should

[24] KRAT, 2020.
[25] KRAT, 2021.
[26] The decision of the Supreme Court in case No. 753/6432/16-ts., 2020.
[27] 2012.
[28] Resolution of the Supreme Court in case No. 522/3541/15-ts., 2020.

be emphasised that the legality of the method of protecting violated civil law is also determined by the principle of access to justice, the choice of an effective method of protection, the general principles of civil law and the moral foundations of society. A list of ways to protect violated rights, as rightly noted by V. A. Vasilieva, today is not exhaustive and the aggrieved party applies the method of protection that it considers the most effective, admittedly, provided that it meets the eligibility criteria.[29]

2. As a negative example of application, isolated cases regarding the interpretation of the grounds for declaring transactions invalid can be mentioned. Thus, in particular, the case of notarisation of a testament by a notary outside the notary district has gained resonance. In this regard, I. V. Spasibo-Fateyeva rightly emphasises the lack of grounds to consider such transactions invalid. A transaction may be void or declared invalid by a court in the cases and on the grounds provided for, in particular, in Articles 215 and 203 of the Civil Code of Ukraine. If a notary has certified a person's testament outside of the notary district, this does not affect the form of the transaction and does not fall under the requirements on the procedure for certifying it, which are contained in the Civil Code and may affect the validity of the testament.[30] The authors of the study unequivocally agree with this conclusion of the researcher and consider such examples of judicial practice to be an extremely negative phenomenon.
3. Ambiguous application of the provisions of the Civil Code of Ukraine in case of refusal of the contract. For example, in one of the Resolutions of the Supreme Court of Ukraine, which concerned the determination of the procedure for refusing a lease contract, it is indicated that, since the provisions of the Civil Code of Ukraine, which regulate hiring relations, do not define the form of refusal from the contract, the refusal can take any form, at the choice of the party to the lease contract that makes the refusal.[31] Therewith, the general provisions of the Civil Code of Ukraine regarding the form of refusal of a transaction define a rule according to which the form of refusal must correspond to the form of the contract itself unless otherwise is established by legislative acts. As follows from the Civil Code of Ukraine, its provisions do not contain special rules regarding the procedure for refusing a contract of employment, which means that the general provisions of the code should be applied. In fact,

[29] VASILIEVA, 2019.
[30] SPASIBO-FATEYEVA, 2021.
[31] Judgment of the Supreme Court No. 910/4391/19., 2002.

examples of such incorrect application of general and special provisions of the Civil Code of Ukraine in terms of contracts are not uncommon in judicial practice.

5 Conclusions

As is commonly known, guarantees of the exercise of rights and liability for violation of obligations are a necessary structural element of the status of subjects of legal relations. In this regard, the legislative formalisation of the mechanism for protecting the rights of the parties to the contract during resolving their disputes will best contribute to the normal interaction of civil law entities, the creation of favourable conditions for the achievement of the goal of the contracts reached by them, the development of the institution of the contract in general. One of the mechanisms for protecting the rights of the parties to a contract is the application of the contra proferentem principle, which is an extremely successful tool for reducing the level of unpredictability in relations between the parties and in resolving their conflicts, minimising the costs of the parties to coordinate their behaviour and of the court to enforce the contract. It imposes the negative consequences of the unclear text of the contract solely on the drafter, instructing the courts to interpret the disputed condition in favour of the receiving party. The legislation in this area and judicial practice should be developed in expanding ways to protect the violated rights of subjects of contractual relations. The main goal of the legislator in this area should be to create appropriate mechanisms for protecting the rights of participants in civil legal relations, which, on the one hand, would provide the maximum possible number of tools for protecting rights, on the other hand, provide for effective restrictions that allow eliminating or considerably minimising the risks of abuse of the right by unscrupulous parties.

Admittedly, it is impossible to address all problematic aspects of protecting the rights of the parties to the contract within the framework of one study. Summarising the above, it is worth noting that despite a certain ambiguous application of substantive law provisions in terms of protecting the rights of the parties under the contract, the judicial practice of the Supreme Court of Ukraine is consistent, mostly corresponds to the doctrinal vision, and reflects the trends in the field of relations under study.

Sobre as formas de proteger os direitos das partes no contrato: com base na prática do Supremo Tribunal Federal

Resumo: O artigo considera formas de proteger os direitos das partes de um contrato com base na aplicação da prática da Suprema Corte. A instituição da proteção dos direitos civis está indissociavelmente ligada à instituição do exercício dos direitos civis, uma vez que uma clara rotatividade civil implica não

só o reconhecimento de certos direitos civis dos sujeitos, mas também a garantia de uma proteção jurídica confiável. Por isso, a relevância da pesquisa reside no fato de que as conclusões e propostas melhorarão significativamente a eficácia das atividades de direitos humanos e a qualidade da assistência jurídica aos sujeitos das relações de direito civil. Diante do exposto, o objetivo do estudo é analisar os aspectos doutrinários e normativos das formas de proteção dos direitos das partes no contrato e determinar as principais tendências da atuação do Supremo Tribunal Federal sobre esse problema. Os principais métodos utilizados no estudo das formas de proteção dos direitos das partes do contrato são a observação, a descrição empírica e a experimentação. Os principais resultados do estudo são a construção do direito civil nacional sobre o sistema pandêmico, separando as partes geral e especial para determinar a correta aplicação na prática judiciária das disposições gerais e especiais do Código, que regulamentam determinados institutos jurídicos.

Palavras-chave: Direitos humanos. Direito civil. Obrigações. Interesses legítimos. Responsabilidade legal.

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Regulamentações da arbitragem pela Administração Pública em âmbito infranacional: um estudo crítico e comparativo

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Resumo: O presente artigo aborda os relevantes aspectos incutidos nas normas de arbitragem que vêm sendo editadas pelos entes da Administração Pública. Por sua natureza de norma geral, a Lei de Arbitragem possibilita aos entes públicos que queiram se valer deste instituto o tratamento específico de conceitos e critérios conforme suas particularidades. Sob uma análise constitucional, histórica e comparativa, discorre-se acerca da importância de tais regulamentos para a consagração da segurança jurídica na aplicação da arbitragem pelo Poder Público.

Palavras-chave: Arbitragem; administração pública; regulamentações infranacionais

1 Introdução

O presente estudo tem por objetivo analisar comparativamente as formas pelas quais a arbitragem está disciplinada pelos diversos entes que compõem a Federação.

Não remanescem dúvidas quanto ao cabimento e a utilidade de tão importante instituto jurisdicional pela Administração Pública, especialmente nos contratos de grande vulto econômico e de maior complexidade.

Consistindo em norma geral, a Lei de Arbitragem traz para os entes federados, ainda que de forma implícita, a responsabilidade para regulamentarem o uso deste mecanismo alternativo (ou adequado) para solução de conflitos no âmbito de suas próprias competências.

É neste contexto que se revela fundamental compreender os limites da autonomia legislativa dos entes federativos para legislar sobre arbitragem, o histórico do advento das normas que cuidam do seu emprego pela Administração Pública e as semelhanças e diferenças entre determinados aspectos regulamentares de que tratam as respectivas normas arbitrais.

2 A competência dos entes federados para legislar sobre arbitragem

Tal como inicialmente aprovado pela Câmara dos Deputados, o texto do projeto de lei, que viria a se tornar a Lei nº 13.129/2015, condicionava o uso da arbitragem pela Administração Pública à regulamentação própria. De maneira acertada, o Senado Federal retirou este requisito da redação final para permitir de imediato o uso deste importante meio alternativo de solução de conflitos pelo Poder Público. A exclusão desta ressalva do §1º do art. 1º da Lei da Arbitragem não impediu, entretanto, que fossem – e ainda estejam sendo criadas – algumas normas em âmbito federal, estadual e municipal sobre o assunto.[1]

Antes mesmo da reforma à Lei de Arbitragem pela Lei nº 13.129/2015, a Lei Estadual de Minas Gerais nº 19.477/2011 trouxe importante inovação na ordem jurídica ao disciplinar que o Estado, os órgãos e as entidades das administrações estaduais direta e indireta integrantes da Administração Pública Mineira podem optar pela adoção do juízo arbitral para a solução de conflitos envolvendo direitos

[1] OLIVEIRA, Rafael Carvalho Rezende. A arbitragem nos contratos da Administração Pública. *Revista Brasileira de Alternative Dispute Resolution - RBADR*, v. 01, p. 101-123, 2019. MOREIRA, Egon Bockmann; CRUZ, Elisa Schmidlin. Notas a propósito do Decreto RJ nº 46.245/2018, da portaria AGU nº 320/2019 e do Decreto SP nº 64.356/2019. *In*: CUÉLLAR, Leila *et al*. *Direito Administrativo e Alternative Dispute Resolution*: arbitragem, *dispute board*, mediação e negociação. Com comentários à legislação do Rio de Janeiro, São Paulo e União sobre arbitragem e mediação em contratos administrativos e desapropriações. Belo Horizonte: Fórum, 2020. p. 256-257.

patrimoniais disponíveis, estipulando, para tanto, algumas regras a serem seguidas no respectivo procedimento arbitral.

Diversos debates foram iniciados, já a partir daquele momento, a fim de se refletir sobre a constitucionalidade da referida norma, tornando a competência legislativa dos demais entes federados que não a União para versar sobre arbitragem um tema de especial interesse para os estudiosos do assunto.

Uma norma sobre arbitragem pode conter em seu texto matérias que dizem respeito tanto ao direito processual quanto ao procedimento processual, daí surgindo a polêmica quando se tem em mente que tais matérias são, a rigor, a primeira de competência privativa da União e a segunda de competência concorrente dela com os Estados e o Distrito Federal, conforme dispõem, respectivamente, os arts. 22, I, e 24, XI, ambos da Constituição Federal.

O ordenamento jurídico constitucional adotou o princípio da preponderância dos interesses, pelo qual os pontos de relevância nacional, regional e local são, nessa ordem, de competência da União, dos Estados e do Distrito Federal e dos Municípios.

A aplicação deste princípio se observa com facilidade na edição de normas gerais e particulares sobre procedimentos em matéria processual pelos Estados e pelo Distrito Federal, havendo na doutrina entendimento unânime a esse respeito no sentido de que tais entes detêm ampla competência para atender às chamadas particularidades regionais ou peculiaridades locais, desde que as regras impostas pela União de cunho genérico não sejam contrariadas.

Registre-se, neste ponto, que o Supremo Tribunal Federal se pronunciou em sede de controle concentrado pela possibilidade de o Estado editar normas específicas para preencher vazios da lei federal, destacando a atribuição desta mesma competência aos Municípios.[2]

Assim como os demais entes da Federação, os Municípios também são dotados de capacidade de auto-organização e de autogoverno, consequentemente possuindo competências administrativas e legislativas próprias, sendo estas últimas definidas pela predominância do interesse local.[3] Aos entes municipais é conferida, ainda, a competência para suplementar a legislação federal e estadual no que couber (art. 30, I e II, da Constituição Federal).[4]

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2 STF, ADI 3.098/SP, Rel. Min. Carlos Velloso, Tribunal Pleno, *DJ* 10.03.2006, p. 6.

3 SARLET, Ingo Wolfgang. Da organização do Estado e da repartição de competência. *In*: SARLET, Ingo Wolfgang; MARINONI, Luis Guilherme; MITIDIERO, Daniel. *Curso de direito constitucional*. 8. ed. rev. atual. ampl. São Paulo: Saraiva Educação, 2019, p. 1350-1351 [*e-book*].

4 Ao tratar da competência suplementar, o Ministro Alexandre de Moraes ressaltou que os Municípios podem suprir omissões e lacunas da legislação federal e estadual, inclusive nas matérias dispostas no art. 24, também do texto constitucional, desde que não as contradite e que tenha como base o interesse local. MORAES, Alexandre de. *Direito Constitucional*. 20. ed. São Paulo: Atlas, 2006, p. 293.

Desta forma, é possível se chegar à conclusão de que a arbitragem envolve matéria inserida na competência legislativa concorrente de todos os entes da Federação,[5] devendo estes observarem que as normas (i) devem ser específicas em matéria de procedimento processual, e nunca contrárias à Lei de Arbitragem; (ii) devem estar voltadas para a tutela de sujeitos públicos relacionadas às atividades de formação, execução, acompanhamento e resolução de contratos administrativos que disponham de compromisso arbitral; e (iii) podem restringir, ampliar ou manter os critérios de uso da arbitragem previstos na Lei de Arbitragem, desde que esteja dentro dos espaços de permissividade encontrados neste diploma.

A título exemplificativo, um dos aspectos que se permite definir com maior clareza, à escolha de cada ente federado, corresponde à definição do conceito de arbitrabilidade objetiva, resguardados, é claro, os limites de disponibilidade do interesse público, tendo em vista que, como é sabido, o art. 1º, §1º, da Lei de Arbitragem tão somente indica que a Administração Pública pode se utilizar da arbitragem para dirimir conflitos referentes a direitos patrimoniais disponíveis.

Vê-se, assim, a pertinência na edição de normas regulamentares acerca da arbitragem a despeito de sua acertada dispensa pela própria Lei da Arbitragem, uma vez que, no campo regulamentar, podem ser especificados diversos parâmetros cujas escolhas cabem a cada ente em específico, dentre as quais se incluem, sem limitação, a modalidade do procedimento arbitral, a forma de escolha e de composição do painel arbitral, o meio de efetivação para se dar publicidade ao procedimento etc.

Com efeito, também é importante de se asseverar a constitucionalidade na elaboração de decretos para dispor sobre o tema, sendo esta a opção adotada, por exemplo, pelos Estados do Rio de Janeiro e de São Paulo.

Sustentamos, portanto, que as diversas regulamentações infranacionais responsáveis por tratar o uso da arbitragem para o atendimento às peculiaridades locais de cada ente federado não possuem, por si só, qualquer vício de inconstitucionalidade e merecem proteção do ordenamento por estarem contempladas no âmbito da competência concorrente a que se refere a Constituição Federal.

3 Breve histórico do advento de normas sobre arbitragem pela Administração Pública

A utilização da arbitragem pela Administração Pública não representa grande novidade, mas a edição de normas específicas sobre o tema recebeu tratamento normativo recente no ordenamento jurídico pátrio.[6]

[5] SARLET, *op. cit.*, p. 1351; OLIVEIRA, Rafael Carvalho Rezende. A arbitragem nos contratos da Administração Pública. *Revista Brasileira de Alternative Dispute Resolution - RBADR*, v. 01, p. 114, 2019.

[6] Registre-se que o STF, em precedente anterior à Constituição Federal de 1988 (Caso Lage), admitiu a arbitragem em relações fazendárias (STF, AI 52.181/GB, Rel. Min. Bilac Pinto, Tribunal Pleno, *DJ* 15.02.1974, p. 720).

Pioneira em dispor de uma base legal própria sobre o assunto, a Lei Mineira de Arbitragem (Lei Estadual nº 19.477/2011) consignou expressamente o uso do instituto pelo Estado de Minas Gerais, trazendo uma série de avanços no campo dos negócios jurídicos pactuados entre a Administração Pública e os particulares.

Tão logo a entrada em vigor da citada lei, questionou-se, dentre outros aspectos, a necessidade de os Estados, pelo dever de observância ao princípio da legalidade, também produzirem suas próprias normas para fazer uso da arbitragem a fim de dirimir conflitos decorrentes dos contratos administrativos por si celebrados.

Mesmo antes desta discussão ser superada pela reforma na Lei de Arbitragem pela Lei nº 13.129/2015, o Estado do Mato Grosso do Sul veio a editar, a reboque da Lei Mineira, a Lei Estadual nº 4.610/2014 para prever a opção do Estado pela escolha do procedimento arbitral, numa espécie de cópia fiel à norma geralista.

Pouco tempo depois se denotou pela alteração promovida sobre a Lei da Arbitragem que o legislador federal não teve por intuito definir os procedimentos e os limites objetivos da discricionariedade administrativa, mas tão somente afirmar, de forma genérica, o uso de arbitragem pelos entes públicos.

Essa generalidade propiciou o contínuo surgimento de outras legislações próprias sobre arbitragem, dado que a mera permissão legislativa não se propõe a esclarecer a forma e os meios pelos quais as normas jurídicas serão implementadas e executadas, daí cabendo justamente aos regulamentos dispor dos instrumentos para o alcance das finalidades instituídas pela lei.[7]

Sob este enfoque, ampliaram-se as legislações nos âmbitos federal, estadual e municipal para regulamentar de modo mais pormenorizado a participação da Administração Pública em conflitos arbitrais, delimitando-se (em alguns casos) as matérias que podem ser deles objeto, as particularidades administrativas do procedimento arbitral e a atuação dos agentes públicos tanto antes quanto ao longo e após o curso do processo.

Foi nesse sentido que, logo após a promulgação da Lei nº 13.129/2015, advieram a Lei Pernambucana de Arbitragem (Lei Estadual nº 15.627/2015) e o Decreto Federal nº 8.465/2015, este posteriormente revogado pelo Decreto Federal nº 10.025/2019, igualmente responsável em relação ao primeiro para tratar da aplicabilidade da arbitragem no âmbito do setor portuário, porém, sendo também contemplados neste último os setores de transporte rodoviário, ferroviário, aquaviário e aeroportuário.

Em sequência a tais normas, outros decretos e leis, estaduais e municipais, foram editados especificamente para tratar sobre o uso da arbitragem pelo Poder

[7] OLIVEIRA, Gustavo Justino de; ESTEFAM, Felipe Faiwichow. Regulamentos de arbitragem na Administração Pública: estudo de caso da minuta de decreto apresentada pela PGE-SP (2018). *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte: Fórum, ano 1, n. 1, p. 55-76, jan./jun. 2019, p. 57-58.

Público, dentre os quais podemos citar, exemplificativamente e sem desmerecimento dos demais atos normativos: (a) a Lei nº 4.007/2017 (RO); (b) o Decreto nº 46.245/2018 (RJ); (c) a Lei nº 10.885/2018 (ES); (d) o Decreto nº 64.356/2019 (SP); (e) a Lei nº 17.324/2020 (Município de São Paulo/SP), ora regulamentada pelo Decreto nº 59.963/2020; (f) a Lei nº 6.764/2020 (Betim/MG); (g) o Decreto nº 55.996/2021 (RS); e (h) o Decreto nº 9.929/2021 (GO).

Todas estas iniciativas legislativas e outras que certamente estão por vir notadamente constituem um importante avanço na consolidação do uso da arbitragem pela Administração Pública, em prestígio à célere solução de litígios decorrentes dos contratos administrativos. Isto não significa dizer, contudo, que tais regulamentações sejam imunes a críticas.

Adiantemos que uma crítica, se não a principal delas, diz respeito à ausência de definição mínima sobre o que alguns entes federados entendem por direito patrimonial disponível, conceito este que guarda subjetividades capazes de trazer inconvenientes aos particulares no momento de eventual instauração do conflito.

Percebe-se que parte das legislações em estudo se limitaram em muito a reprisar disposições genericamente já tratadas na Lei de Arbitragem, ao passo que o mais adequado teria sido preencher, tanto quanto possíveis e dentro da esfera de competência de cada ente federado, as lacunas deixadas pela lei federal.

4 Aspectos comparativos entre as normas arbitrais do Direito Brasileiro

Não obstante os avanços trazidos pela Lei nº 13.129/2015, a partir do amplo universos de regulamentações infranacionais sobre o uso da arbitragem pela Administração Pública, apresentaremos, na sequência, uma análise comparativa no tocante à arbitrabilidade objetiva, à modalidade do procedimento arbitral a ser adotado, aos critérios de escolha dos árbitros e das câmaras arbitrais, à responsabilidade pelo adiantamento e pagamento das despesas, ao dever de publicidade e à forma de pagamento pelo Poder Público.

4.1 Arbitrabilidade objetiva

De acordo com o §1º do art. 1º da Lei de Arbitragem, a Administração Pública pode se valer da arbitragem para dirimir questões que versem sobre direitos patrimoniais disponíveis.

Por guardar uma definição bastante ampla e sujeita a interpretações diversas, sustentamos a importância de os entes federados disporem de forma pouco mais categórica em seus regulamentos acerca de quais conflitos podem

se submeter à arbitragem para além da reprodução de que são arbitráveis as questões que versem sobre direitos patrimoniais disponíveis.

A mera repetição da redação utilizada na Lei de Arbitragem pode dificultar o bom funcionamento do compromisso arbitral firmado com a Administração Pública, ocasionando situações de insegurança jurídica e incompatíveis com os preceitos guardados pelo ordenamento, dentre os quais aquele estabelecido pelo art. 30 da Lei de Introdução às Normas do Direito Brasileiro.[8]

No caso das normas editadas por Minas Gerais (art. 2º da Lei nº 19.477/2011), Mato Grosso do Sul (art. 2º da Lei 4.610/2014), Espírito Santo (art. 2º da Lei nº 10.885/2018), Rondônia (art. 2º da Lei 4.007/2017) e Pernambuco (art. 1º da Lei nº 15.627/2015), por exemplo, nota-se a fiel reprodução do disposto sobre este ponto na Lei de Arbitragem, quando se poderia definir com maior clareza a interpretação que o ente regulamentador confere à disponibilidade do interesse público.

O Decreto Fluminense nº 46.245/2018, por sua vez, fixou no parágrafo único de seu art. 1º o entendimento do Estado do Rio de Janeiro sobre conflitos relativos a direitos patrimoniais disponíveis, correspondendo este às controvérsias de natureza pecuniária que não versem sobre interesses públicos primários. Ainda que dotado de maior assertividade, entendemos que o emprego de tal conceito no referido regulamento permaneceu com certa dose de indeterminação acima da desejada, não se esvaindo para o particular contratado o risco de uma intepretação restritiva pelo Poder Público na análise da arbitrabilidade do conflito eventualmente instaurado.

O art. 1º, parágrafo único, do Decreto Estadual de São Paulo nº 64.356/2019, sem conceituar ou exemplificar os "direitos patrimoniais disponíveis", estabelece quais conflitos envolvendo o estado certamente não são submetidos à jurisdição arbitral, a saber: (i) surgidos em função de projetos financiados por agências oficiais de cooperação estrangeira ou por organismo financeiro multilateral sobre os quais tais entidades já possuem regras próprias de arbitragem; ou (ii) cuja matéria já esteja regulamentada de maneira diversa em legislação específica. Caminho semelhante é seguido pelo art. 1º, parágrafo único, do Decreto Municipal de São Paulo nº 59.963/2020, responsável por regulamentar o art. 7º da Lei Municipal nº 17.324/2010.

Ressalte-se com bons olhos, a nosso ver, o rol não exaustivo de controvérsias referentes a direitos patrimoniais disponíveis estabelecido pelo Decreto Federal nº 10.025/2019 ao disciplinar o uso da arbitragem no campo dos setores portuário e de transportes rodoviário, ferroviário, aquaviário e aeroportuário.

[8] "Art. 30. As autoridades públicas devem atuar para aumentar a segurança jurídica na aplicação das normas, inclusive por meio de regulamentos, súmulas administrativas e respostas a consultas. Parágrafo único. Os instrumentos previstos no *caput* deste artigo terão caráter vinculante em relação ao órgão ou entidade a que se destinam, até ulterior revisão."

Ao aperfeiçoar a redação já bastante avançada do revogado Decreto Federal nº 8.465/2015, que se aplicava exclusivamente ao setor portuário, o Decreto nº 10.025/2019 trouxe em seu art. 2º as questões passíveis de serem objeto de arbitragem como sendo aquelas que tratam (i) da recomposição do equilíbrio econômico-financeiro dos contratos (inciso I); (ii) do cálculo de indenizações decorrentes de extinção ou de transferência do contrato de parceria (inciso II); e (iii) do inadimplemento de obrigações contratuais por quaisquer das partes, incluídas a incidência das suas penalidades e o seu cálculo (inciso III).

O bom emolduramento das matérias arbitráveis dado pelo já não tão novel Decreto foi aproveitado em grande medida no art. 151, parágrafo único, da Lei nº 14.133/2021 (Nova Lei de Licitações e Contratos Administrativos).

Nessa mesma linha de atuação legislativa se seguiram os Estados do Rio Grande do Sul (art. 2º, I, do Decreto nº 55.996/2021) e de Goiás (art. 1º, §1º, do Decreto nº 9.929/2021) ao editarem seus respectivos regulamentos, sendo que o decreto goiano abarcou as mesmas excludentes previstas nos regulamentos do Estado e do Município de São Paulo e inseriu mais uma hipótese de controvérsia arbitrável, dizendo respeito àquela advinda da execução de garantias contratuais.

Sem prejuízo da estipulação do que se entende por direitos patrimoniais disponíveis também nos contratos administrativos compostos por cláusula compromissória, quando o ente público traz a previsão deste conceito em seu próprio regulamento, não apenas em reprodução à Lei de Arbitragem, naturalmente se proporciona ao particular um grau maior de segurança jurídica, sendo este um aspecto a ser observado tanto pelos entes federados que já editaram e que podem aprimorar suas normas quanto aqueles que ainda estão para dar o passo inicial.

4.2 Modalidade do procedimento arbitral

Uma vez que a Lei de Arbitragem não especificou se o procedimento arbitral a que se sujeita o ente público deve ser *ad hoc* ou institucional, confere-se discricionariedade à Administração Pública para a escolha de qual modalidade lhe parecer mais adequada.

Muitos Estados brasileiros,[9] então, optaram pela arbitragem institucional, da qual também manifestamos nossa preferência por ser esta a que se presume dar maior segurança jurídica às partes e maior atendimento aos princípios da Administração Pública.[10]

[9] A exigência de arbitragem institucional pode ser encontrada, por exemplo, nos seguintes diplomas normativos: art. 4º da Lei Estadual nº 19.477/2011 (MG), art. 4º da Lei Estadual nº 4.610/2014 (MS), art. 3º da Lei Estadual nº 15.627/2015 (PE), art. 4º da Lei Estadual nº 4.007/2017 (RO), art. 2º do Decreto Estadual nº 46.245/2018 (RJ), art. 4º da Lei Estadual nº 10.885/2018 (ES), art. 2º, II, do Decreto Estadual nº 55.996/2021 (RS) e art. 4º da Lei Estadual nº 19.477/2011 (MG).

[10] OLIVEIRA, Rafael Carvalho Rezende. A arbitragem nos contratos da Administração Pública. *Revista Brasileira de Alternative Dispute Resolution - RBADR*, v. 01, p. 101-123, 2019.

Todavia, cumpre observar que em determinadas situações a arbitragem *ad hoc* pode se mostrar mais viável do ponto de vista prático que a arbitragem institucional. É o caso, por exemplo, dos municípios de médio ou de pequeno porte que queiram se valer da jurisdição arbitral sem, contudo, dispender recursos inerentes ao modelo institucional, como com o credenciamento de câmaras arbitrais e com os custos da administração da instituição, que tendem a ser superiores àqueles suportados na contratação direta do painel e do secretariado.

O modelo aparentemente mais adequado parece ser aquele previsto no art. 3º do Decreto Estadual nº 64.356/2019 (SP), segundo o qual a arbitragem institucional deve ser a preferencialmente escolhida, admitindo-se, porém, a opção pela arbitragem *ad hoc* mediante justificativa para tanto.

Esta também foi a opção escolhida pelo art. 3º, V, do Decreto Federal nº 10.025/2019 e, posteriormente, pelo art. 3º do Decreto Municipal nº 59.963/2020 (São Paulo/SP) e pelo art. 3º do Decreto Estadual nº 9.929/2021 (GO).

Chama-se atenção para o fato de que alguns regulamentos estabelecem que a eventual condução do procedimento arbitral sob a modalidade *ad hoc* fica condicionada por tais entes públicos ao uso das regras da *United Nations Commission on International Trade Law* (UNCITRAL) que estiverem vigentes no momento da apresentação do requerimento de arbitragem, o que está em consonância com as melhores práticas da arbitragem internacional.[11]

4.3 Critérios de escolha dos árbitros e das câmaras arbitrais

De acordo com a Lei de Arbitragem, os árbitros a serem escolhidos devem ser capazes e possuir a confiança das partes (art. 13), incidindo sobre eles as hipóteses de impedimento previstas no mesmo diploma legal (art. 14, *caput* e parágrafos).

Valendo-se cada ente de competência para disciplinar sobre o tema quando diz respeito ao uso da arbitragem pela respectiva Administração Pública, em cada ato regulamentar próprio são adotados critérios adicionais de escolha, a serem tratados a seguir.

A começar pelo art. 12 do Decreto Federal nº 10.025/2019, é permitida a escolha dos árbitros na forma estabelecida pela convenção de arbitragem, desde que aqueles eleitos (a) estejam em pleno gozo da capacidade civil (inciso I); (b) tenham conhecimento compatível (técnico) com a natureza do litígio (inciso II); e (c) não tenham relações que caracterizem hipóteses de impedimento ou suspeição ou outras situações de conflito de interesses, seja com as partes ou com o litígio (inciso III).

[11] Nesse sentido, por exemplo: art. 6º do Decreto Estadual nº 64.356/2019 (SP), art. 9º do Decreto Municipal nº 59.963/2020 (São Paulo/SP) e art. 6º do Decreto Estadual nº 9.929/2021 (GO).

Tal disposição foi reproduzida pelo art. 14 do Decreto Municipal nº 59.963/2020 (São Paulo/SP) e art. 12 do Decreto Estadual nº 55.996/2021 (RS), sendo possível aferir que tais requisitos, grosso modo, são os mesmos que aqueles ressaltados pela Lei de Arbitragem.

Nada obstante, pode-se dizer que a Lei Mineira foi a norma responsável por tornar mais amarrados os requisitos para o desempenho da função de árbitro na contenda privada com a Administração Pública. São estas as imposições encontradas no art. 5º da referida norma: (a) ser brasileiro, maior e capaz (inciso I); (b) deter conhecimento técnico compatível com a natureza do contrato (inciso II); (c) não ter com as partes, nem com o litígio que lhe for submetido, relações que caracterizem os casos de impedimento ou suspeição de juízes, na forma do Código de Processo Civil (inciso III); e, dada a escolha exclusiva pela arbitragem institucional, (d) ser membro de câmara arbitral inscrita no Cadastro Geral de fornecedores de Serviços do Estado (inciso IV).

Assim seguiram as Leis Estaduais nº 4.610/2014 (MS), 15.627/2015 (PE) e 4.007/2017 (RO), merecendo ser feita a ressalva de que o regulamento pernambucano optou por não incorporar o requisito cadastral precitado.

Ressalte-se, ainda, que algumas legislações estaduais estabelecem os chamados requisitos negativos para indicação de árbitros. Enquanto o art. 10 do Decreto Estadual nº 64.356/2019 (SP) e o art. 10 do Decreto Estadual nº 9.929/2021 (GO) impedem a nomeação daqueles que possuam "interesse direto ou indireto" no resultado da arbitragem, o art. 11 do Decreto Estadual nº 46.245/2018 (RJ) imputa limitação similar, dando, porém, preferência ao termo "interesse econômico".

O art. 12 do Decreto Estadual nº 46.245/2018 (RJ) ainda determina que, para a aferição da independência e da imparcialidade do árbitro, também é preciso que este informe a existência de demanda patrocinada por ele ou por seu escritório contra o ente federativo ou as entidades da Administração Pública indireta, ou, ainda, na qual se discuta tema correlato àquele que será submetido ao respectivo procedimento arbitral.

Essa previsão é reiterada pelos Decretos nº 64.356/2019 (SP),[12] 59.963/2020 (São Paulo/SP),[13] 55.996/2021 (RS)[14] e 9.929/2021 (GO),[15] neles ainda se exigindo que o árbitro comunique sobre eventual prestação de serviços que possa colocá-lo em conflito de interesses com a Administração Pública.

Segundo Egon Bockmann Moreira e Elisa Schmidlin Cruz,[16] a margem interpretativa do que se entende por "tema correlato" pode gerar armadilhas e

[12] Art. 11, parágrafo único.
[13] Art. 15, parágrafo único.
[14] Art. 13, parágrafo único.
[15] Art. 11, parágrafo único.
[16] MOREIRA; CRUZ, *op. cit.*, p. 270-271.

discussões perigosas para a validade da sentença arbitral contra os entes que adotam este termo. Não se pode descartar, neste caso, o risco de a autoridade pública, qualquer ela que seja, "guardar na manga" a alegação de impedimento do árbitro para buscar *a posteriori* a anulação da sentença arbitral.[17]

Por seu turno, cogitar que determinado árbitro presta serviços conflitantes com os interesses da Administração Pública também denota certa subjetividade. A rigor, não há impedimento para que um árbitro tenha participado de procedimento anterior ao que está sendo nomeado e no qual tenha sido proferida sentença arbitral desfavorável aos interesses do ente público. É de bom proveito salientar que isto, por si só, não pode ser motivo suficiente para impedir a sua designação.

Outro aspecto relevante a ser tratado sobre a escolha dos árbitros pela Administração Pública diz respeito à preferência que determinados entes públicos têm em competir tal decisão à sua respectiva Procuradoria-Geral. Nesse caso, a indicação é feita mediante justificativa, considerando o conhecimento técnico e a afinidade com a matéria, conforme previsto no art. 17 do Decreto Estadual nº 46.245/2018 (RJ)[18] e no art. 7º do Decreto Municipal nº 59.963/2020 (São Paulo/SP).

Passando-se à análise dos critérios de escolha das câmaras arbitrais, o primeiro ponto a ser observado é que os regulamentos estabeleceram requisitos diversos de cadastramento das instituições para assegurar uma atuação eficiente, previamente atestada pela tradição, experiência, respeitabilidade, especialização e elementos correlatos.

A Lei Mineira, por exemplo, estipulou, em seu art. 10, que as condições a serem atendidas pela câmara arbitral interessada em se habilitar seriam as seguintes: (i) ter, preferencialmente, sede no Estado (*caput*); (ii) estar regularmente constituída por, pelo menos, três anos (inciso I); (iii) estar em regular funcionamento como instituição arbitral (inciso II); (iv) ter como fundadora, associada ou mantenedora entidade que exerça atividade de interesse coletivo (inciso III); (v) ter reconhecida idoneidade, competência e experiência na administração de procedimentos arbitrais (inciso IV). Tais condições foram igualmente previstas no art. 10 das Leis Estaduais nº 4.610/2014 (MS) e 4.007/2017 (RO).[19]

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[17] CRUZ E TUCCI, José Rogério. *Impugnação de árbitro e preclusão temporal na jurisprudência.* Disponível em: https://www.conjur.com.br/2021-mar-30/paradoxo-corte-impugnacao-arbitro-preclusao-temporal-jurisprudencia. Acesso em: 3 jan. 2022.

[18] Veja-se, inclusive, que a Procuradoria-Geral do Estado do Rio de Janeiro editou a Resolução nº 4.212/2018, estabelecendo uma minuta padrão de cláusula compromissória, em que se determinou que o procedimento de nomeação dos árbitros será realizado em conformidade com o regulamento de arbitragem da instituição arbitral eleita.

[19] A previsão contida na Lei Mineira e acompanhada pelos outros dois entes quando se dá preferência por instituições locais que guardem relação estreita com entidade que exerça um tipo de atividade específico pode ser objeto de questionamento, uma vez que potencializa a reserva de mercado, com potencial afronta ao princípio da impessoalidade.

No que concerne ao prazo mínimo de constituição, que não vem a se confundir com pleno funcionamento, o art. 10, I, do Decreto Federal nº 10.025/2019, o art. 19, II, do Decreto Municipal nº 59.963/2020 (São Paulo/SP) e o art. 10, I, do Decreto Estadual nº 55.996/2021 (RS) também seguem os 3 (três) anos inicialmente definidos na Lei Mineira. Outros diplomas foram mais rígidos, com a fixação do prazo mínimo de 5 (cinco) anos de constituição, a saber: art. 6º, I, da Lei Estadual nº 15.627/2015 (PE); art. 14, II, do Decreto Estadual nº 46.245/2018 (RJ); art. 15, II, do Decreto Estadual nº 64.356/2019 (SP); e art. 15, II, do Decreto Estadual nº 9.929/2021 (GO).

Ressalte-se que todas as normas ora mencionadas trazem o requisito de idoneidade, competência e experiência na administração de procedimentos arbitrais. O art. 14, IV, do Decreto Estadual nº 46.245/2018 (RJ) adota, contudo, critério ainda mais objetivo ao dispor que tais elementos são comprovados pela condução de, no mínimo, 15 (quinze) arbitragens no ano calendário anterior ao cadastramento.

É compreensível o receio por parte do Poder Público em não designar para uma instituição inexperiente o poder de decisão sobre tema sensível ao seu patrimônio. De toda maneira, deve haver razoabilidade na definição dos quantitativos de procedimentos arbitrais que demonstrariam a experiência das câmaras arbitrais, uma vez que a prova de idoneidade, competência e experiência podem ser aferidas por outros meios que não necessariamente quantitativos.

O Decreto Fluminense ainda aponta como requisito a disponibilidade de representação (art. 14, I, c/c §§3º e 4º), que corresponderia à existência de local apropriado a possibilitar o recebimento de peças e documentos da arbitragem, bem como o oferecimento de serviços operacionais indispensáveis para o regular desenvolvimento da arbitragem, tais como local para realização de audiências, e secretariado, o que vem disciplinado de modo similar no art. 15, I, do Decreto Estadual nº 64.356/2019 (SP), no art. 19, I, do Decreto Municipal nº 59.963/2020 (São Paulo/SP) e no art. 15, I, do Decreto Estadual nº 9.929/2021 (GO).

Por certo, tal obrigação não implica para a câmara o "dever de propriedade" sobre um imóvel, o que seria desproporcional. Para o regulamento, é preciso que ela garanta um espaço adequado à prática de certos atos no curso do procedimento arbitral, de modo que a celebração de convênios com outras instituições ou contratos de locação com particulares já se mostra satisfatória.

Com o avanço da tecnologia, abre-se o caminho para o questionamento e a relativização da sobredita exigência em benefício da celeridade e dos princípios da razoabilidade e da eficiência, uma vez que até mesmo o Poder Judiciário tem se utilizado de audiências e atendimentos virtuais em resposta às necessidades que foram postas por decorrência da pandemia de covid-19.

Não foi por outra razão que algumas câmaras arbitrais de forte atuação no mercado buscaram adequar, ainda que em caráter temporário, a condução

de seus procedimentos pelo meio digital. Foi o caso, por exemplo, do Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá (CAM-CCBC)[20] e pelo Centro de Mediação e Arbitragem (CBMA).[21]

Nesse contexto, sem prejuízo da designação de encontros presenciais a depender da necessidade de cada procedimento, a possibilidade de haver uma arbitragem conduzida, no seu transcorrer, pelo ambiente virtual revela-se plenamente viável. Assim, não se vislumbra qualquer impedimento de ordem prática à condução de um procedimento arbitral no Estado da Bahia por câmara sediada no Estado do Rio de Janeiro, por exemplo.

Há de se examinar, ainda, os requisitos complementares lançados pela Portaria Normativa da Advocacia-Geral da União nº 21/2021, responsável por regulamentar o credenciamento de câmaras arbitrais para administrar procedimentos arbitrais dos conflitos de que trata o Decreto Federal nº 10.025/2019.

Além dos requisitos comuns às demais regulamentações citadas, a referida Portaria, em seu art. 3º, §3º, obriga que a câmara arbitral comprove (a) ter administrado, no mínimo, três processos arbitrais que envolvam a Administração Pública direta ou indireta ou ente de Estado estrangeiro, ainda que não sentenciados (inciso I); e (b) ter administrado, no mínimo, quinze processos arbitrais, nos últimos doze meses, ainda que não iniciados ou sentenciados no referido período, sendo pelo menos um com valor de causa superior a R$ 20.000.000,00 (vinte milhões de reais) (inciso II).

Conforme exposto anteriormente, a adoção de critérios desta natureza deve ser vista com cautelas, em razão do risco de restringir o leque de câmaras arbitrais que podem ser escolhidas sem que, necessariamente, isso resulte em uma preferência mais qualitativa.

Nada obstante, na comparação dos regulamentos são identificados diferentes responsáveis por escolher a instituição arbitral credenciada para a condução do litígio.[22]

O art. 11, *caput* e §1º, do Decreto Federal nº 10.025/2019 permite que a convenção de arbitragem preveja a indicação da câmara arbitral pelo contratado

[20] CENTRO DE ARBITRAGEM E MEDIAÇÃO DA CÂMARA DE COMÉRCIO BRASIL-CANADÁ. *Resolução Administrativa 40/2020*. Disponível em: https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/ra-40-2020/. Acesso em: 7 jan. 2022.

[21] CENTRO DE MEDIAÇÃO E ARBITRAGEM. *Resolução nº 1/2020*. Disponível em: http://www.cbma.com.br/arquivos/anexos/Resolu%C3%A7%C3%A3o_CBMA_n%C2%BA_1.2020_-_Funcionamento%20do%20CBMA%20-%20covid%20-19.pdf. Acesso em: 7 jan. 2022.

[22] Sobre o credenciamento de câmaras arbitrais nas arbitragens que envolvem a Administração Pública e a inexigibilidade de licitação, vide: OLIVEIRA, Rafael Carvalho Rezende. *Licitações e contratos administrativos*. 10. ed. Rio de Janeiro: Forense, 2021, p. 432-434; OLIVEIRA, Rafael Carvalho Rezende. *Inexigibilidade de licitação na escolha do árbitro ou instituição arbitral nas contratações públicas.* Disponível em: http://www.direitodoestado.com.br/colunistas/rafael-carvalho-rezende-oliveira/inexigibilidade-de-licitacao-na-escolha-do-arbitro-ou-instituicao-arbitral-nas-contratacoes-publicas. Acesso em: 2 jan. 2022.

e, em caso de objeção da Administração Pública, caberá ao requerente do procedimento arbitral, seja o Poder Público ou o particular, indicar outra câmara credenciada para a função.

De forma semelhante, o art. 8º, *caput* e parágrafo único, do Decreto Estadual nº 46.245/2018 (RJ) também estipula que cabe ao contratado definir a câmara arbitral responsável dentre as opções cadastradas. A escolha se dá no momento da celebração do contrato e, caso a câmara arbitral não esteja mais habilitada no momento da instauração do conflito, fica o requerente incumbido da seleção de outra instituição.

Ao conferirem ao particular a oportunidade inicial de escolha, mesmo que dentro de listagem pré-estabelecida, alguns entes da Federação vão bem em inspirar certa dose de consensualidade nesta etapa prévia à instauração do litígio.

O art. 7º do Decreto Municipal nº 59.963/2020 (São Paulo/SP), diferentemente, define que a escolha compete à Procuradoria-Geral desde o princípio.

De toda sorte, caso a escolha pela instituição arbitral venha a recair sobre a Administração Pública, o art. 7º, §3º, do Decreto Estadual nº 55.996/2021 (RS) prevê que tal função é da Procuradoria-Geral. O art. 7º, parágrafo único, dos Decretos Estaduais nº 64.356/2019 (SP) e 9.929/2021 (GO), por sua vez, conferem ao gestor público responsável pelo contrato em que prevista a convenção de arbitragem a opção de tal escolha, reservando à Procuradoria-Geral sua oitiva a respeito.

Cabe observar, ainda, que o art. 7º dos Decretos Estaduais nº 64.356/2019 (SP), 9.929/2021 (GO) e 55.996/2021 (RS), bem como o art. 10 do Decreto Municipal nº 59.963/2020 (São Paulo/SP), estabelecem que, na hipótese de ausência de indicação da câmara arbitral credenciada no instrumento obrigacional, o requerente deverá fazer a escolha no momento de apresentação do requerimento de arbitragem.

4.4 Responsabilidade pelo adiantamento e pagamento de despesas

Em geral, os regulamentos editados por diversos entes federados dispõem que a responsabilidade pelo pagamento antecipado das despesas oriundas da arbitragem de que façam parte deve estar previamente estabelecida no edital de licitação e no contrato administrativo.

Normalmente, as normas regulamentares existentes já preveem de forma objetiva a parte responsável por adiantar as custas do procedimento arbitral.

Por um lado, alguns entes da Federação definem que o adiantamento seria de incumbência exclusiva do contratado, como é o caso dos Estados de Minas Gerais (art. 11, parágrafo único, da Lei Estadual nº 19.477/2011), do Mato Grosso

do Sul (art. 11, parágrafo único, da Lei Estadual nº 4.610/2014), de Pernambuco (art. 7º, parágrafo único, da Lei nº 15.627/2015) e do Rio Grande do Sul (art. 5º, VII, do Decreto nº 55.996/2021), bem como do Município de São Paulo (art. 8º, V, do Decreto nº 59.963/2020).

Não obstante as semelhanças, o Decreto Federal nº 10.025/2019, em seu art. 9º, §4º, se diferencia apenas por possibilitar que as partes convencionem em sentido diverso quando se diz respeito ao adiantamento dos custos relativos à produção de prova pericial, sendo aqui observado o entendimento do Superior Tribunal de Justiça, consubstanciado na Súmula nº 232.[23]

Com o intuito de fomentar a utilização da arbitragem, o art. 9º do Decreto Estadual nº 46.245/2018 (RJ) buscou, por sua vez, retirar do particular esta onerosidade pré-estabelecida ao disciplinar que o adiantamento de custas caberá ao contratado caso ele próprio instaure o procedimento arbitral. Note-se que, *a contrario sensu*, a Administração Pública Fluminense quem fica responsável por arcar com o adiantamento das despesas se for a parte requerente no litígio. Idêntica solução foi adotada no art. 4º do Decreto Estadual nº 64.356/2019 (SP) e no art. 4º, V, do Decreto nº 9.929/2021 (GO).

Dotado de certa singularidade, o art. 11, II e III, da Lei Estadual 4.007/2017 (RO) prevê que no próprio edital de licitação de obra e no contrato público constarão tanto a responsabilidade pelo pagamento dos honorários e das despesas com a arbitragem quanto a fixação dos honorários arbitrais.

Nada obstante, se por um lado certos entes públicos avançaram no tema ao não conferirem ao particular o dever absoluto de adiantamento de despesas, que não se negue, em contrapartida, que a instauração do litígio quase sempre advém do próprio particular, a fim de recompor o equilíbrio econômico-financeiro do contrato em face de ato praticado pela Administração Pública.

A imposição do dever de adiantamento ao contratado na hipótese de instauração da arbitragem pelo ente público pode gerar prejuízo à economicidade da contratação pública, uma vez que o particular incluirá os potenciais riscos e custos na precificação de sua proposta.

Em nossa opinião, uma alternativa possível seria a divisão igualitária entre o Poder Público e o particular na antecipação dos custos do procedimento arbitral, o que incentivaria a cooperação processual e a boa-fé de ambas as partes.[24]

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[23] Súmula nº 232 do STJ: "A Fazenda Pública, quando parte no processo, fica sujeita à exigência do depósito prévio dos honorários do perito."

[24] SCHMIDT, Gustavo da Rocha; FERREIRA, Daniel Brantes; OLIVEIRA, Rafael Carvalho Rezende. *Comentários à lei de arbitragem*. Rio de Janeiro: Forense, 2021, p. 21-22; CRUZ, Elisa Schmidlin. A dinâmica de custeio das arbitragens público-privadas institucionais: compartilhamento de despesas e incentivos de cooperação. *In*: CUÉLLAR, Leila *et al*. *Direito administrativo e* Alternative Dispute Resolution: arbitragem, mediação, *dispute board*, mediação e negociação. Belo Horizonte: Fórum, 2020. p. 173-191. Nesse caso, Flávio Amaral Garcia aponta como solução a constituição pelo ente público de fundo orçamentário com

4.5 Dever de publicidade

Resguardado o sigilo excepcional de certos documentos e informações,[25] toda arbitragem em que algum ente da Administração Pública esteja envolvido deve observância ao princípio da publicidade, na forma do art. 37, *caput*, da Constituição Federal e do art. 2º, §3º, da Lei de Arbitragem.

A Lei de Arbitragem não detalhou como o princípio da publicidade deve ser atendido na prática; deixa-se para os entes públicos, portanto, a preferência de tal tratamento.[26]

No caso do Decreto Federal nº 10.025/2019 (art. 3º, IV), que serve, neste aspecto, de modelo para os Decreto nº 64.356/2019[27] (SP), 59.963/2020[28] (São Paulo/SP) e 55.996/2021[29] (RS), fica estabelecido que as informações do procedimento arbitral serão públicas, excepcionadas aquelas relativas à preservação de segredo industrial ou comercial ou, ainda, aquelas consideradas sigilosas pela legislação brasileira.

O dever de publicidade incumbe, em princípio, à Administração Pública, que deverá promover a divulgação dos atos relacionados à arbitragem. Trata-se da publicidade ativa, com a divulgação das informações, independentemente de solicitação de interessados. É importante destacar que a instituição privada especializada, que administra o procedimento arbitral, é mera prestadora de serviço e, por consequência, na qualidade de contratada, não teria obrigação de dar publicidade aos atos do procedimento arbitral, mediante publicação em Diário Oficial.[30]

A definição da questão da publicidade (ativa e passiva), contudo, pode ser disciplinada nos respectivos regulamentos de arbitragem.

Assim, por exemplo, o art. 3º, §1º, do Decreto Federal nº 10.025/2019 e o art. 16, §1º, do Decreto Municipal nº 59.963/2020 (São Paulo/SP) atribuem à

a vinculação de determinadas receitas ao custeio das despesas das arbitragens das quais ele venha a participar. GARCIA, Flávio Amaral. *A arbitragem na administração pública estadual e o decreto do rio de janeiro*. Disponível em: https://revistaeletronica.oabrj.org.br/wp-content/uploads/2019/12/6.-Fl%C3%A1vio-Amaral-convertido.pdf. Acesso em: 7 dez. 2021.

25 COTTA, Rodrigo; CURY, Dina. *Arbitragem pode dirimir conflitos que envolvam governo de SP e suas autarquias*. Disponível em: https://www.conjur.com.br/2019-set-04/opiniao-arbitragem-dirimir-conflitos-envolvendo-governo-sp#:~:text=Arbitragem%20pode%20dirimir%20conflitos%20que%20envolvam%20governo%20de%20SP%20e%20suas%20autarquias&text=O%20volume%20das%20demandas%20perante,alternativos%20de%20resolu%C3%A7%C3%A3o%20de%20conflitos. Acesso em: 6 dez. 2021.

26 Diversos entes federados editaram normas que tratam apenas superficialmente da publicidade, sem o detalhamento sob o procedimento de divulgação e a respectiva responsabilidade (exs.: Minas Gerais, do Mato Grosso do Sul, de Rondônia, do Espírito Santo e de Sorocaba/SP). Destaque-se que a mesma fórmula foi seguida pelo art. 152 da Lei nº 14.133/2021 (Nova Lei de Licitações e Contratos Administrativos).

27 Art. 12.

28 Art. 16.

29 Art. 14.

30 SCHMIDT, Gustavo da Rocha; FERREIRA, Daniel Brantes; OLIVEIRA, Rafael Carvalho Rezende. *Comentários à lei de arbitragem*, Rio de Janeiro: Forense, 2021, p. 29.

câmara arbitral o dever de garantir o acesso às informações, salvo convenção das partes em sentido diverso. O art. 12, §2º, do Decreto Estadual nº 9.929/2021 (GO) também transfere às câmaras arbitrais a publicização dos atos do procedimento arbitral, com a previsão do descredenciamento da instituição em caso de inobservância da regra.

Por outro lado, o art. 13, §2º, do Decreto Estadual nº 46.245/2018 (RJ) dispõe que a Procuradoria-Geral do Estado disponibilizará os atos do processo arbitral mediante requerimento de eventual interessado.[31]

No Estado de São Paulo, o art. 12, §2º, do Decreto nº 64.356/2019 consagrou o dever de publicidade ativa (e não meramente passiva) ao impor que, independentemente de requerimento de interessados, a Procuradoria-Geral do Estado disponibilizará os atos do procedimento arbitral na rede mundial de computadores.

Fato é que, em geral, podem ser considerados atos do procedimento arbitral passíveis de publicidade as petições, os laudos periciais, o termo de arbitragem ou instrumento congênere e as decisões dos árbitros, devendo em alguns casos a câmara gestora, se consultada, comunicar a terceiros sobre a existência da arbitragem, a data do requerimento de arbitragem, o nome das partes, o nome dos árbitros e o valor envolvido no litígio.

Por fim, mais uma vez voltada a atenção ao Decreto Estadual nº 46.245/2018 (RJ), opta-se pela privacidade na realização das audiências arbitrais (art. 14, §3º).[32] Com essa regra, busca-se impedir uma abertura irrestrita a qualquer pessoa ao pretenso argumento de se atender a publicidade do procedimento. O art. 12, §3º, do Decreto Estadual nº 64.356/2019 (SP), o art. 16, §3º, do Decreto Municipal nº 59.963/2020 (São Paulo/SP) e o art. 12, §3º, do Decreto Estadual nº 9.929/2021 (GO) estabelecem que as audiências do procedimento arbitral poderão ser reservadas aos árbitros, secretários do Tribunal Arbitral, partes, respectivos procuradores, testemunhas, assistentes técnicos, peritos, funcionários da câmara arbitral e às pessoas previamente autorizadas pelo Tribunal Arbitral.

[31] O art. 13 do Decreto Fluminense amplia as exceções à publicidade, englobando todas as hipóteses legais de "sigilo, de segredo de justiça e de segredo industrial decorrentes da exploração direta de atividade econômica pelo Estado ou por pessoa física ou entidade privada que tenha qualquer vínculo com o Poder Público". De acordo com o referido Decreto, também se admite que o Tribunal Arbitral possa averiguar, a seu critério, outros casos que demandem sigilo.

[32] De acordo com Felipe Estefam, a confidencialidade não se confunde com a privacidade. Enquanto a confidencialidade diz respeito à obrigação de não divulgar informações sobre a arbitragem, "a privacidade refere-se à participação no procedimento arbitral das partes e os necessariamente envolvidos, facultando-se a participação de terceiros na medida do possível" (ESTEFAM, Felipe Faiwichow. *Cláusula arbitral e administração pública*. Rio de Janeiro: Lumen Juris, 2019, p. 60). De forma semelhante, vide: GRION, Renato Stephan. Procedimento II. LEVY, Daniel; PEREIRA, Guilherme Setoguti J. (Coord.). *Curso de arbitragem*. São Paulo: Thomson Reuters Brasil, 2018, p. 213-215.

4.6 Forma de pagamento do ônus sucumbencial pelo Poder Público: (in)dispensabilidade do precatório

A forma como os entes públicos dispõem em seus regulamentos acerca do pagamento dos valores definidos em arbitragem ainda é considerada conservadora.

De um lado, boa parte das normas infranacionais sequer possuem previsão sobre o tema (exs.: Minas Gerais, Mato Grosso do Sul, Pernambuco, Rondônia e Espírito Santo). De outro lado, diversos atos normativos dispõem que o ônus de sucumbência a ser suportado pela Administração Pública ao final do procedimento arbitral deve ser pago mediante precatório, por ordem cronológica de apresentação, ou via Requisição de Pequeno Valor – RPV (exs.: art. 15 do Decreto Federal nº 10.025/2019; art. 15 do Decreto Estadual nº 46.245/2018 – RJ; art. 9º do Decreto Estadual nº 64.356/2019 – SP; art. 13 do Decreto Municipal nº 59.963/2020 – São Paulo/SP; art. 15 do Decreto Estadual nº 55.996/2021 – RS; e art. 9º do Decreto Estadual nº 9.929/2021 – GO). Trata-se de analogia da sentença arbitral com a sentença judiciária, consoante o art. 100, *caput* e §3º, da Constituição Federal e o art. 515, VII, do Código de Processo Civil, que considera a sentença arbitral título executivo judicial.

No âmbito da doutrina arbitralista, existem autores que defendem tal equiparação,[33] sob pena de burla ao sistema de pagamento constitucionalmente estabelecido e de verdadeira situação de privilégio a uma pequena porção de credores do Poder Público, o que violaria, a rigor, os princípios da isonomia, da impessoalidade e da moralidade.

Outra parcela da doutrina aponta que o art. 100 da Constituição Federal fala da exigência do precatório em caso de "sentença judiciária", não sendo possível enquadrar a sentença arbitral nesta expressão, ainda que legalmente considerada título executivo judicial.[34] Assim como ocorre nos pagamentos espontâneos de valores relativos aos contratos e acordos em geral, que não decorrem de sentença judicial, o pagamento do valor definido na arbitragem independe de precatório, salvo se houver necessidade de execução judicial da decisão arbitral condenatória, que possui natureza jurídica de título executivo extrajudicial (art. 31 da Lei de Arbitragem).

[33] TIMM, Luciano Bennetti; SILVA, Thiago Tavares; RICHTER, Marcelo de Souza. Os contratos administrativos e a arbitragem: aspectos jurídicos e econômicos. *Revista de Arbitragem e Mediação*, São Paulo, ano 13, n. 50, p. 255-276, jul./set. 2016. Contudo, na opinião dos referidos autores, a aplicação do regime dos precatórios configura empecilho prático para a real efetividade dos litígios envolvendo a administração pública. Trata-se de um incentivo negativo, especialmente em razão da demora do pagamento.

[34] OLIVEIRA, Rafael Carvalho Rezende; MAZZOLA, Marcelo. *Poder público não burla precatórios com pagamento voluntário em arbitragem*. Disponível em: https://www.conjur.com.br/2016-dez-18/poder-publico-nao-burla-precatorios-pagamento-arbitragem. Acesso em: 10 dez. 2021.

A necessidade de observância ao regime de precatório ou da requisição de pequeno valor, de fato, acaba destoando da finalidade precípua da arbitragem de servir como um método alternativo de solução de conflitos rápido e eficiente. Os ganhos decorrentes da adoção do juízo arbitral pela Administração Pública acabam sendo consideravelmente prejudicados se o particular tiver de enfrentar a invariavelmente extensa fila de pagamento.

Melhor seria se os entes públicos definissem nas suas respectivas normas regulamentares e nos seus respectivos contratos que os valores fixados em sentença arbitral hão de ser suportados por fundos públicos ou privados criados para esta finalidade, garantidos os bens destinados a tal satisfação.[35]

É o que se vê, por exemplo, no campo das parcerias público-privadas, sendo permitida a implementação de um fundo garantidor para pagamento das obrigações assumidas pelos parceiros públicos no valor limite de seis bilhões de reais, conforme redação dada pelo art. 16 da Lei Federal nº 11.079/2004.[36]

O art. 15, §2º, do Decreto Federal nº 10.025/2019 estabelece, ainda, outras alternativas ao regime do precatório, com a possibilidade de acordo entre as partes para que o cumprimento da sentença arbitral ocorra por meio de: (a) instrumentos previstos no contrato que substituam a indenização pecuniária, incluídos os mecanismos de reequilíbrio econômico-financeiro; (b) compensação de haveres e deveres de natureza não tributária, incluídas as multas, nos termos do disposto no art. 30 da Lei nº 13.448/2017; ou (c) atribuição do pagamento a terceiro, nas hipóteses admitidas na legislação brasileira.

Ressalte-se, ainda, que ao Poder Público já é garantida a possibilidade de celebrar acordos, reconhecer dívidas e efetuar pagamentos espontâneos para o cumprimento de decisões administrativas.[37]

Assim, sustentamos que não haveria prejuízo aos beneficiários de precatórios ou ofensa aos princípios regentes da Administração Pública se o pagamento imediato da importância devida em razão da sentença arbitral fosse feito de acordo com dotação orçamentária específica. Nesse contexto, afigura-se recomendável que os entes federados passem a disciplinar por lei sobre a criação de um fundo específico para o pagamento das despesas com arbitragem, afastando-se, com isso, a necessidade de submissão ao regime de precatórios e de RPVs no cumprimento da sentença arbitral.

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[35] WILLEMAN, Flávio de Araújo. Acordos Administrativos, decisões arbitrais e pagamentos de condenações pecuniárias por precatórios Judiciais, *Revista de Direito da Procuradoria Geral*, Rio de Janeiro, n. 64, p. 133, 2009.

[36] SCHMIDT, Gustavo da Rocha; FERREIRA, Daniel Brantes; OLIVEIRA, Rafael Carvalho Rezende. *Comentários à lei de arbitragem*, Rio de Janeiro: Forense, 2021, p. 23.

[37] OLIVEIRA; MAZZOLA, *op. cit.*

5 Conclusões

Constatada a possibilidade de os entes federados elaborarem seus próprios regulamentos de arbitragem, verificamos uma série de legislações dessa natureza sendo editadas para a promoção do uso do procedimento arbitral pelo ente público de maneira mais efetiva e à luz dos interesses locais.

A regulamentação própria da arbitragem pela Administração Pública interessada tende a ampliar em sua jurisdição a segurança jurídica necessária para atrair mais investimentos do setor privado. Assim, vemos com bons olhos a iniciativa daqueles Estados e Municípios que se prestaram a disciplinar a matéria.

Não obstante o notável avanço, salientamos que algumas normas regulamentares acabam por disciplinar de forma um tanto precária certos conceitos e critérios deixados em aberto pela Lei de Arbitragem que poderiam ter sido melhor explorados para a satisfação ainda maior do interesse público.

Regulations of arbitration by the Public Administration in the subnational scope: a critical and comparative study

Abstract: This article addresses the relevant aspects of the arbitration standards that Public Administration entities have been edited. Due to its nature as a general law, Federal Arbitration Law allows public entities that wish to use this institute the specific treatment of concepts and criteria according to their particularities. Under a constitutional, historical and comparative analysis, we discuss the importance of such regulations for the consecration of legal certainty in applying arbitration by the Public Power.

Keywords: Arbitration; Public Administration; Subnational regulations

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Extrajudicial bodies for labor conflicts resolution

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Abstract: The article studies the legal status of extrajudicial bodies for the resolution of labor conflicts as well as the procedure of labor conflicts resolution. It also analyses domestic and foreign extrajudicial bodies experience in resolving labor disputes. The resolution of labor disputes is traditionally associated with the judiciary. However, due to the overload of the latter, the length of the judicial procedure of considering and resolving conflicts and the high level of court costs, the search for alternative extrajudicial solutions to labor disputes is highly in demand. On the other hand, alternative extrajudicial methods of resolving labor disputes will significantly reduce the workload of judicial bodies and the social tension among the participants in the process of resolving labor disputes. The comradely courts were endowed with the trust of the staff, acted as its willpower and were accountable to it. These courts turned into a kind of public courts which were created to consider and resolve minor legal conflicts that did not affect essential human rights. The main purpose of the newly created comradely courts was to educate people through persuasion and social influence. Their activity was based on such principles as production-territorial principle, that of expediency, election and accountability of judges. In addition, the

comradely courts, as a body of justice, operated on the same principles as courts of general jurisdiction, in particular, election and independence of judges, open and oral character of court proceedings.

Keywords: Extrajudicial bodies for resolving labor disputes; justice; alternative forms of resolving legal conflicts; labor conflict

1 Introduction

In the conditions of market economy development, emerging economic crises that affect the number of jobs, the level of wages affects the development of our society, the development of each person. The existence and standard of living of each of us depends on the specific field of work.[1] Therefore, work is central to everyone's life, and working relationships contain a high degree of conflict. The employer's desire to achieve maximum profit at a minimum amount of costs and, conversely, leads to disputes between the employer and employees, which grow into litigation, which does not contribute to a constructive settlement of disputes.[2] Analysis of the practice of resolving labor disputes in Ukraine showed that individual labor disputes focus on litigation in their resolution, and collective labor disputes on the contrary (except for collective labor disputes involving employees who are legally legalized). strikes), only out-of-court agreements and in fact deprived of the possibility of consideration in court, which makes the judiciary an ineffective tool for resolving labor disputes.[3]

According to the Constitution of Ukraine[4], everyone has the right to go to court to protect their rights. The trial can be long, expensive, psychologically stressful and stressful and does not always guarantee the proper execution of court decisions[5]. Therefore, everybody needs to know about alternative methods of resolving conflicts in pre-trial and out-of-court proceedings, which guarantee the participation of the parties in decision-making, save money and time and maintain social ties.

In our opinion, the creation of specialized labor courts, as proposed by V. V. Melnyk,[6] G. I. Chanysheva,[7] will only complicate the domestic judicial system and

1 RIBEIRO, 2021, p. 109-129.
2 PANKOVA; MIGACHEV, 2020, p. 119-147.
3 CAPUTO; MARZI MALEY; SILIC, 2019, p. 87-110.
4 Constitution of Ukraine, 1996.
5 KISIL; KISIL, 2021.
6 MELNYK, 2019.
7 CHANYSHEVA, 2020.

increase the amount of the State budget funding for the judiciary. The institution of comradely courts is not new for the domestic judicial system. The Decree of the USSR Council of People's Commissars of June 12, 1920 "On Labor Disciplinary Comradely Courts"[8] defined the order of their organization and activity, their structure and number of members, the rights and responsibilities of the latter, as well as the types of penalties applied to violators of labor discipline. The labor disciplinary courts mostly considered cases of the labor discipline violations, disruptions in the production process, and so on.[9] Subsequently, the responsibilities of these courts were expanded to consider cases of misconduct in public places and insignificant misappropriation of enterprises and institutions' funds. For committing such offenses, the courts could impose various penalties, such as a reduction in wages, a forced transfer to the overtime work in the hardest conditions, and even an imprisonment in labor camps. In the exceptional circumstances, the labor disciplinary courts could transfer a case to a military tribunal.

2 Analysis of the History of the Development and Formation of Comradely Courts

In the 30s of the twentieth century the comradely courts were infamous for harsh measures imposed on violators. These measures resulted in fewer absences, late appearances at work and other violations of working discipline. But they could not improve work results. The reason for the low productivity in this period of time was the lack of material or moral motivation for work results. During World War II, labor disciplinary courts did not operate. Later, by the Resolution of the USSR Council of Ministers No. 2563 of August 22, 1950, the Decree "On Labor Disciplinary Comradely Courts" was stated as expired.[10] In 1961, the Presidium of the USSR Verkhovna Rada, by its Decree of 15.08.1961, resumed the institution of comradely courts.[11] Mostly their activities were the opposite of labor disciplinary courts. In particular, the main task delegated to comradely courts was to prevent delinquency, educate citizens by persuasion under the influence of their social environment, and create intolerance to labor discipline violations or any anti-social acts in the society. The Regulation "On the Comradely Courts of the Ukrainian SSR",[12] as amended on March 23, 1977, provided the formation of two types of comradely courts, such as industrial (formed at the place of work or studying on the condition of the number of employees at the enterprise being no less than 50

[8] MAKHYNYA, 2020.
[9] SOTSKYI, 2021.
[10] Resolution of the USSR Council of Ministers No. 2563 ..., 1950.
[11] Decree of the Presidium of the Verkhovna Rada ..., 1961.
[12] Decree of the Presidium of the Verkhovna Rada, 1977.

people) and territorial (formed at the place of residence). The maintenance of the comradely courts functioning was entrusted to the administration of enterprises, institutions, organizations, housing and maintenance organizations, or associations of apartment buildings co-owners. The legal assistance to comradely courts was provided by the judiciary, the prosecutor's office and the courts. Legal literature, normative legal and legislative acts were provided to the comradely courts by the administration or the trade union committee of enterprises, institutions, and organizations.

The comradely courts consisted of 5 members and were completed with citizens who, according to their business and moral qualities, were able to successfully perform the tasks set before such courts. The candidates were elected for a term of 2 years by open ballot and by a majority vote of those present at the meeting of the enterprise labor staff. The chairman, deputy chairman and secretary of the court were elected from among the elected members of the court. At least once a year, the chairman reported on the activities of the court at the general meeting of the labor staff. The comradely courts members who had actively participated in considering cases, as well as in carrying out preventive work in the labor staff, among students of higher and secondary special educational institutions at the place of citizens residence, were rewarded by the trade union committee or the administration of the enterprise, institution, organization, or local government.[13]

The comradely courts had in their jurisdiction the following cases:

- violation of labor discipline: improper performance of work or delay due to an employee's improper attitude to his duties;
- non-compliance with labor protection requirements;
- loss or damage of equipment, inventory, tools, materials and other state or public property as a result of an employee's improper attitude to his duties on the condition that it did not entail criminal liability;
- unauthorized, especially for personal purposes, use of vehicles, agricultural machinery, machines, tools, raw materials and other property, belonging to a state enterprise, institution, organization, collective farm, other cooperative and other public organization, on the condition that these actions had not caused significant damage to these enterprises, institutions and organizations;
- immoral behavior in public places (drinking alcohol, petty hooliganism, petty theft of state or public property, etc.);

[13] INSHYN; VAVZHENCHUK; MOSKALENKO, 2021.

- first-time theft of low-value consumer goods and household items that were in the personal property of citizens, in the case when the person prosecuted and the victim were both members of the same staff;
- first-time insults, slander, calumny, beatings and light bodily injuries that did not cause a health disorder;
- non-fulfilment or improper fulfilment of responsibilities for the upbringing of children by their parents, guardians or custodians; indecent treatment of parents; indecent behavior in the family; indecent treatment of women; evasion of patients with chronic alcoholism from treatment in health care facilities.

Meetings of the comradely court, related to the case, were held during non-working hours. Cases were heard in public by at least three members of the comradely court, but in all cases their number had to be odd. The presiding judge and members of the comradely court were disqualified of participating in the proceedings if any of them was a victim, a participant in the civil dispute, a relative of the victim or a participant in the civil dispute, or a person being a subject to the comradely court, a witness, and under any other circumstances that gave reason to believe that the presiding judge or members of the comradely court might be personally interested in the results of the proceedings. In those cases, they were obliged to resign.[14] For the same reasons, the presiding judge and members of the comradely court might be challenged by a person brought to the court, the victim and any participants in that particular civil dispute.

The matter of satisfaction or refusal of the declared challenge was solved by the whole body of the comradely court considering the case. As a result of considering cases, the comradely courts could apply the following means of influence:

- oblige the defendant to publicly apologize to the victim or the staff;
- announce a comradely warning;
- announce a public condemnation;
- announce a public reprimand with or without publication in the press;
- impose a fine;
- transfer the person guilty of violating labor discipline to a lower-paid position, in accordance with the current labor legislation;
- submit to the head of the enterprise, institution, organization the issue of dismissal, in accordance with the applicable law, of the employee performing educational functions or work related to the direct service of monetary or commodity property, if given the nature of the offenses

[14] KUCHKO, 2021.

committed by this person, the comradely court found it impossible to further entrust the culprit with such work.

It should be noted that throughout the period of their activity, the comradely courts quite rarely applied to violators of the labor discipline such measures as submission to the management of the enterprise, institution, organization the issue of dismissal, or transferring the violator to another position.[15] As a rule, they applied measures of educational influence in order to reform offenders within the labor staff.[16] Another extrajudicial way to resolve legal conflicts is the commission on labor disputes, which, in accordance with Art. 224 of the Labor Code, is a body that operates at enterprises, institutions, organizations to resolve individual labor disputes arising between an employee and the employer or an authorized body, due to the violation of legal labor rights and interests.[17] The commission on labor disputes is formed by the general meeting of the labor staff of the enterprise which employs more than 15 employees. The general meeting of employees determines the election procedure, composition, number and term of office of the commission. The commission on labor disputes elects from among its members the chairman, his deputies and the secretary of the commission. The organizational and maintenance support of the commission is provided at the expense of the owner of the enterprise or his authorized body. An employee of the enterprise has the right to apply to the commission on labor disputes within three months from the day when he learned or should have learned about the violation of his rights. If the employee has missed the specified period for valid reasons, the commission on labor disputes has the right to renew the missed term.

The employee appeals to the commission on labor disputes by submitting an application which is subject to the mandatory registration. From the moment of the application being submitted and registered, the commission is obliged to consider and resolve the labor conflict within 10 days. A meeting of the commission on labor disputes is considered valid if it is attended by at least two-thirds of the elected members. A labor conflict can be considered both in the presence of the employee who submitted the application and, in his absence, (if the employee specified in his application an option of resolving the conflict in his absence), as well as in the presence of representatives of the owner or his authorized body. At the initiative of the employee, his interests in the commission may be represented by a representative of the enterprise trade union or a lawyer.

If the employee or his representative does not show at the meeting of the commission, the consideration of his application is postponed for the next

[15] MARAGNO, 2021, p. 21-32.
[16] Labor Code, 1971.
[17] Law of Ukraine No. 2134-XII ..., 1992.

meeting. In case of repeated non-appearance of the employee or his representative, the commission may withdraw the submitted application. Then the employee has the right to re-submit his application within three months. In the process of considering the application, the owner of the enterprise or his authorized body and the employee have the right to give a motivated challenge to the commission or one of its members. Applications for such a challenge are resolved by a majority vote of the present members of the commission, in the absence of the person to whom the challenge was filed. The commission on labor disputes has the right to involve witnesses, instruct experts to carry out technical and accounting checks, demand any necessary documents from the owner or his authorized body. Minutes are kept at the meeting of the commission on labor disputes, at the end of which the minutes are signed by the chairman of the commission or his deputy, and secretary.

3 International Experience of Organizing the Work of a Comrades' Court

In the Republic of Estonia, labor disputes are resolved extrajudicially by the Labor Disputes Commissions which operate under the Labor Inspectorates. According to Art. 4 of the Law "On Labor Disputes", the Labor Disputes Commission is an extrajudicial independent body that resolves labor disputes. The Commission consists of the head of an enterprise and a representative of the employees (the so-called juror), who must meet the relevant requirements. The head of the Labor Disputes Commission is appointed and dismissed by the Minister. The candidate for the position of the head of the Labor Disputes Commission must meet the following criteria:

- have a master's degree in law;
- know the labor law and the procedure for resolving a labor dispute;
- be professionally and morally qualified;
- have no criminal records;
- have never been removed from the position of a judge, notary, bailiff, or expelled from the bar.

A member of the Labor Disputes Commission (juror) must be an able-bodied Estonian resident who speaks Estonian at B2 level, has appropriate moral qualities and no criminal records, is not declared bankrupt and is in a satisfactory state of health. The Trade Unions Association and the Central Employers Unions compile their own lists of candidates for the position of the juror, which are approved by the Labor Inspectorate. From these submitted lists, the head of the Labor Disputes Commission appoints the members of the Commission, who are notified of the time of a meeting in advance so that they have an opportunity to review the documents

on the case. The members of the Commission (jurors) retain their main job and are remunerated for their work in the Labor Disputes Commission.

An employee can apply to the Commission in person or through a representative, and has the right to submit an application to the Labor Disputes Commission at the place of personal residence or work, or at the place of the employer's residence or location. An application for resolving a collective labor dispute is submitted to the Labor Disputes Commission at the place of the employer's residence or work, or to the Labor Disputes Commission at the location of the Employers Union or the Central Employers Union. The application indicates:

- personal data and identification number of the applicant;
- personal data and identification number of the person in respect of whom the claims are made;
- clearly stated claims of the applicant;
- evidence substantiating the claims;
- the elected Labor Disputes Commission;
- the type of the labor conflict consideration and resolution.

The Estonian law provides the following procedures for resolving labor disputes:

- conciliation procedure: the applicant may submit an application for resolving a labor conflict with its own proposals for conciliation before the Commission makes a decision. The conciliator is the head of the Labor Disputes Commission. The conciliation agreement must be signed within 10 working days from the date of the decision to initiate proceedings;
- written proceedings: they are carried out in the case of full confession of the person in respect of whom the claims are made. The head of the Labor Disputes Commission single-handedly satisfies the application for written proceedings;
- proceedings in the form of a meeting to consider and resolve labor disputes: they are carried out by the Commission consisting of 3 members in accordance with the Civil Procedure Code within 45 days from the date of receiving the application by the Labor Disputes Commission. The head of the Commission clarifies the circumstances of the labor dispute and notifies the parties to the conflict of the time and place of the meeting, their procedural status, rights and responsibilities, the consequences of non-appearance at the meeting of the Commission, and sends them copies of the documents.

The meeting of the Labor Disputes Commission is held in the presence of the parties to the conflict or their representatives, with minutes being kept in the process of considering the case. The minutes contains:

- time and place of considering the labor dispute and carrying out procedural actions, the number of the case under consideration;
- composition of the Commission for considering labor disputes;
- presence of the parties to the labor conflict, their representatives, and witnesses;
- explanation to the parties to the labor conflict of their rights and responsibilities;
- information on claims to the application, their merger or the allocation of the claims, counter-applications;
- recognition of claims, waiver of claims, compromise;
- explanations or objections of the parties, explanations of the witnesses;
- examination of the evidence;
- time of announcement of the decision;
- date of signing the minutes.

The minutes are signed by the head of the Labor Disputes Commission and the secretary who keeps the minutes. Based on the results of considering the case on labor conflict, the Labor Disputes Commission makes a decision by a majority vote in open voting. The head of the Commission is the last to vote. Members of the Commission have no right to abstain. The decision of the Commission must be lawful and reasonable, and announced within 10 working days after the meeting took place. The Commission notifies the parties of the time and place of the decision announcement in advance. Copies of the decision are handed over to the parties on the day of the decision being announced. The parties have the right to appeal the decision of the Labor Disputes Commission in court within 30 days from the date of receiving the decision.

The most successful example of the transition to extrajudicial means of resolving labor disputes is Japan. It was in this country that the transition from the formal (collective) regulation of labor relations to informal ones took place through joint consultations between employers and trade union bodies. The latter have made a significant contribution to the regulation of labor relations. It is their balanced and timely position on socio-economic and political changes that has given the relations with employers the character of concerted actions. The regulation of labor relations as collective negotiations appeared in Japan in the postwar period. The Law "On Trade Unions" of June 10, 1949[18] provided employees with the right to express the willpower of collective negotiating. In this way, the Japanese government and business owners wanted to gain control over the settlement of labor disputes.

[18] MOLODYAKOVA, 1997.

The collective negotiating aims at: improving the employees' working conditions; raising employees' economic and social status.[19]

The Japanese law guarantees the right of collective negotiating and trade unions operating, and business owners cannot refuse their participation without good reason, have no right to independently define or change working conditions, and negotiate with individual employees.[20] To carry out negotiations, a Labor Relations Commission is created, and it has the status of a legal entity.[21] The Commission may include representatives of the trade union, such as the main leaders,[22] representatives of the higher trade union body, ordinary members of the trade union, and those of the enterprise administration, such as middle managers and employees responsible for the staff work.[23] The negotiation procedure consists of the following stages: composing a written list of issues for a discussion, discussing them, coming up with counter-proposals, discussing the latter, and finally, decision-making (oral or written).[24]

In contrast to European countries, collective negotiating in Japan is held in order to settle labor relations at each single enterprise. Accordingly, the range of issues and problems to be negotiated is much wider and more diverse. It includes, in particular:

- issues of wages, working conditions, pension benefits, severance pay, working hours, employees' relocation or transfer to other enterprises, temporary dismissal;
- issues related to industrial safety, hiring workers, a strike notification, clarification of attitude towards persons who did not take part in the strike;
- conditions of trade union activity at the enterprise.

The management problems, production plans, financial situation, organizational structure of the enterprise, increasing production efficiency, introducing new production technologies are also the subject of collective negotiating because they affect the employment and working conditions.[25] The system of joint consultations between employers and trade unions is an alternative way to collective negotiating; they are held mainly to discuss management and production issues that are not within the competence of collective negotiating. Joint consultations are held in the form of explanations, questions and answers, exchange of views on various issue.[26]

[19] MELNYK-LYMONCHENKO, 2021.
[20] SLISARENKO, 2020.
[21] LUSPENYK, 2006, p. 62-66.
[22] KOT, 2017.
[23] Judgment of the European Court of Human Rights, 2011.
[24] KULINICH, 2016.
[25] SPASIBO-FATEEVA, 2021.
[26] KHARITONOV; KHARITONOVA, 2011.

The main purpose of joint consultations is to achieve mutual understanding between the business owners and trade unions. During collective negotiating, the dispute settlement procedure can lead to labor disputes, which, in its turn, can lead to strikes. In joint consultations the result, in most cases, is mutual understanding. The lack of mutual understanding during the joint consultations indicates the need for additional consultations or their transfer to a higher level.[27] In Japan, there is a four-level system of joint consultations:

- a production unit (shop, department): joint consultations are carried out in working order to agree on methods of labor organization;
- an enterprise: at this level, joint consultations are decisive and take the form of an employment agreement. Equal numbers of representatives of the trade union and the enterprise administration are elected to take part in joint consultations;
- a branch of economy: there advisory councils from among representatives of trade unions and business organizations operate;
- the national economy: there are government advisory committees which include representatives of the government, the national trade union center and the Federation of Entrepreneurs.

4 Conclusions

The system of joint consultations has become widespread in Japan as it meets the interests of employers and helps to avoid labor conflicts. Individual labor disputes can be resolved in Japan by an employee both in court and in an alternative manner. The latter includes: filing an application at the Labor Office and resolving the labor dispute through regulation, conciliation and mediation; appealing to the labor administrative offices at the Ministry of Health, Labor and Social Protection about the violation of individual labor law. The competence of these offices includes consultations and mediation services on labor issues. In case of detecting violation of labor legislation, the labor administrative offices transfer the case to the Labor Standards Inspectorate for further investigation. The Inspectorate has the right to issue recommendations to the defendant on behalf of the plaintiff or transfer the case to the Dispute Settlement Committee to represent the plaintiff and reconcile him with the defendant.

Thus, based on the analysis of the organization and activities of extrajudicial bodies for the settlement of labor disputes, it can be concluded that extrajudicial bodies are elected, independent and democratic bodies; proceedings for considering and resolving cases are open and in compliance with the requirements of procedural law; extrajudicial bodies can function both in the field of management and justice.

[27] NOVAK, 2021.

Órgãos extrajudiciais de resolução de conflitos trabalhistas

Resumo: O artigo estuda o estatuto jurídico dos órgãos extrajudiciais para a resolução de conflitos trabalhistas, bem como o procedimento de resolução de conflitos trabalhistas. Também analisa a experiência de órgãos extrajudiciais nacionais e estrangeiros na solução de conflitos trabalhistas. A resolução de conflitos trabalhistas está tradicionalmente associada ao judiciário. No entanto, devido à sobrecarga destes últimos, à morosidade do processo judicial de apreciação e resolução de conflitos e ao elevado nível de custas judiciais, a procura de soluções alternativas extrajudiciais para os conflitos laborais é muito procurada. Por outro lado, métodos extrajudiciais alternativos de solução de conflitos trabalhistas reduzirão significativamente a carga de trabalho dos órgãos judiciais e a tensão social entre os participantes do processo de resolução de conflitos trabalhistas. Os tribunais camaradas eram dotados da confiança da equipe, agiam como sua força de vontade e prestavam contas a ela. Esses tribunais se transformaram em uma espécie de tribunais públicos que foram criados para considerar e resolver pequenos conflitos jurídicos que não afetavam os direitos humanos essenciais. O objetivo principal dos tribunais camaradas recém-criados era educar as pessoas por meio da persuasão e da influência social. A sua actividade baseava-se em princípios como o princípio territorial-produtivo, o da conveniência, eleição e responsabilização dos juízes. Além disso, os tribunais camaradas, como corpo de justiça, funcionaram com os mesmos princípios dos tribunais de jurisdição geral, em particular, eleição e independência dos juízes, caráter aberto e oral dos processos judiciais.

Palavras-chave: Órgãos extrajudiciais de solução de conflitos trabalhistas; justiça; formas alternativas de solução de conflitos jurídicos; conflito trabalhista

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The Development of New Technology Intergration in E-commerce Dispute Resolution in Vietnam

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Abstract: Regulatory authorities all over the world are making plans to observe and advise cryptocurrency action in their countries in a responsible way. This is to ensure, among other things, market rate behavior, market economics, the implementation and regulation of tax laws, and consumer safety inside the distinctive attributes of the investments, all while encouraging the development of a profitable bitcoin economy. Vietnam is no different, especially as cryptocurrencies are known to be cross-jurisdictional, and as such, supervisory difficulties do not end at state boundaries. Recent developments in Vietnam indicate that they are moving toward cross-jurisdictional regulatory norms to promote regulatory clarity, remove loopholes, and prevent regulatory arbitrage, all while adhering to stringent currency control. There also has been some recent recognition of crypto-based inventions and efficiency in money and trade, notably for cross-border dealings. Some progressive examples in this paper are illustrated to develop dispute resolution mechanisms for e-commerce using new technology. Recommendations are made in respect to the use of viewpoints of a comprehensive cross-section of the Quadratic Voting /Smart Contracts with permission-based blockchain network as useful tools to assist Vietnamese controllers in emerging online dispute mechanisms towards a streamlined e-commerce economy.

Keywords: Quadratic voting; Smart Contracts; E-commerce; Blockchain; Online Dispute Resolution; Legal Framework

Introduction

Online dispute resolution (ODR) in Vietnam combines several technologies and methodologies, with blockchain being one of the most prominent tools. Quadratic voting is suggested as a way to arrive at a decision in an ODR. Smart contracts are suggested as a way to enforce decisions of ODR systems. In this paper, we shall also study: what issues/ disputes in commercial transactions such a technology will resolve; what challenges lead to it being a solution; how it can be used and what will help facilitate and promote its usage from legislations, regulations, caselaw, directions, and the 2019 Singapore Convention? Whether blockchain shall be used as an innovative and useful means of dispute resolution?

A blockchain is an essential component in a data structure that helps in ensuring that all the transactions are confirmed and performed within units or blocks. It is a shared electronic ledger that enables for verified transactions and data storage. The blockchain refers to the interconnecting blocks. The blockchain gradually improves with each lodge added. Blockchain is not a financial technology, but it is vital in today's internet generation, including public services, IOTs, energy management, and supply chain services. The Ministry of Technology and Communication of Vietnam[1] has identified blockchain as relevant in various fields of the country and offers exploitation of vital data and information. Blockchain technology has greatly aided Vietnam's economic growth, and firms greatly benefit from it. Blossey, Eisenhardt & Hahn (2019) stated that Blockchain is a general purpose technology that focuses on productivity enhancements and risk vindication, which excludes the assistances of better financial organization owing to original official provisions.

Methodology

To complete this paper, the authors have combined data collection and analysis. Data collection methods included written reflection and secondary source verification. The study has also introduced typical ODR models to be deployed in several countries in Asia. This article uses a normative legal approach to aaddress new issues in commercial dispute resolution.

Results and discussion

The usage of blockchain technology supports organizations in changing business operations and consumer interaction, such as storage to users (VU &

[1] HUNG, 2021, p. 112-250.

TRINH, 2021).[2] Accordingly, blockchain technology makes it easy for Vietnam to become democratic and transparent and lead as a heavy country in terms of research and development, among other services. It is to be noted that blockchain cannot be considered the solution to any problem; however, it plays a great role in improving financial services, public services, the Internet of Things, supply chain management, energy, and resources, among many others (Nguyen, 2019).[3]

Cryptocurrency used to be a controversial topic worldwide, but now it has become a popular one particularly among the Vietnamese youth. Despite Vietnam is graded as a little to a medium-salary state with a GDP per capita of USD 2,786 and ranked 119th out of a total of 176 countries in FY 2020 (DAO, 2021).[4] According to Chainalysis,[5] Vietnam is a good model of a nation whose economic standing is much behind its participation in bitcoin transactions. The Global Crypto Adoption Index from Chainalysis presented that Vietnam graded in the 10th spot out of a total of 154 nations in the Global Cryptocurrency Acceptance Index in 2020. In 2021, Vietnam was ranked first place. This is one of the rare situations where Vietnam even outperforms many more developed countries such as the US, UK, China, France, Germany, Japan, and Korea (DAO, 2021) showcased below in figure 1.

Figure 1 – The 2021 Global Cryptocurrency Acceptance Index

			Ranking for individual weighted metrics feeding into Global Crypto Adoption Index		
Country	Index score	Overall index ranking	On-chain value received	On-chain retail value received	P2P exchange trade volume
Vietnam	1.00	1	4	2	3
India	0.37	2	2	3	72
Pakistan	0.36	3	11	12	8
Ukraine	0.29	4	6	5	40
Kenya	0.28	5	41	28	1
Nigeria	0.26	6	15	10	18
Venezuela	0.25	7	29	22	6
United States	0.22	8	3	4	109
Togo	0.19	9	47	42	2
Argentina	0.19	10	14	17	33
Colombia	0.19	11	27	23	12
Thailand	0.17	12	7	11	76
China	0.16	13	1	1	155

Source: Legal Guild.

[2] VU & TRINH, 2021. *Applications of Blockchain in E-commerce*, p. 1278-1289.
[3] NGUYEN, 2019. *Blockchain-an indispensable development trend of the logistics industry in Vietnam: Current situation and recommended solutions*, p. 14-22.
[4] DAO, 2021.
[5] PHONG, D. T., 2021. *The Blockchain & Cryptocurrencies Framework in Vietnam. In Legal Guild.* Retrieved from: https://nearlegal.com/the-blockchain-and-cryptocurrencies-framework-in-vietnam/.

Vietnam is thriving in the bitcoin, blockchain-Gamefi, and metaverse industries. For example, Sky Mavis, a Vietnamese gaming studio, developed Axie Infinity, an NFT-based game (DAO, 2021).[6] However, despite the growing popularity of bitcoin in Vietnam, its use remains illegal due to a lack of regulation recognizing digital coins as legal assets. Currently, these payment instruments are not usable. The State Bank of Vietnam announced in 2017 that cryptocurrency, BTC, and Lite coin are not legal currencies and should not be utilized as payment methods in Vietnam (DAO, 2021). Due to the increasing number of Vietnamese cryptocurrency users, the Vietnamese government has begun to focus on its acceptability. In 2021, Vietnam had at least three important crypto-related laws:

- (i) Decision No. 942/QD-TTG, made on June 15th, 2021, approves the plan for the growth of e-government towards a public administration from 2021 to 2025. It is extremely pertinent since the government considered bitcoin study and use as one of the possibilities for developing the digital government.
- (ii) Decision No. 942/QD-TTG made Vietnamese investors think that this was a signal for the government's acceptance of the use of cryptocurrency.
- (iii) With Decision 942/QD-TTG showcased a more receptive view of the digital currencies making investors feel more comfortable using cryptocurrencies in Vietnam.

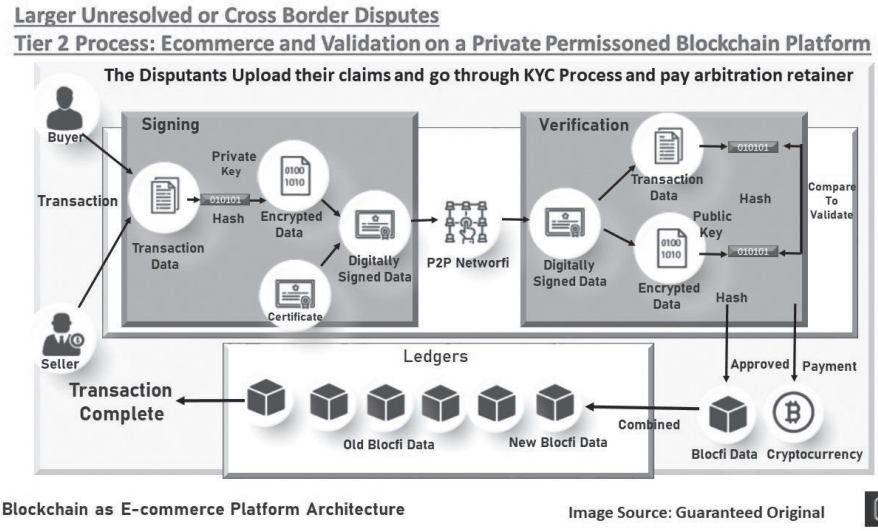
The Vietnamese Ministry of Finance announced in April 2021 that it has set up an investigation committee on digital resources and cryptocurrencies to develop a rule and a method for their use. It is currently drafting amendments to the Law on Information Technology 2006, Decree 71/2007/ND-CP, and associated legislation to provide a legal corridor for the growth of Vietnam's ICT business. Ho Chi Minh City[7] has also been granted the right to build a Digital Asset Management Center. This is the first of its sort in Vietnam, yet there are no official regulations or a TSS[8] license. Only Taurus SA from Switzerland has worked with this license type. It was the world's first independent regulated digital asset marketplace, authorized by the Swiss Financial Market Supervisory Authority (FINMA) (DAO, 2021).

[6] DAO, 2021. Vietnam has been a leader in cryptocurrency usage for the past few years. Despite the country's lack of legal framework for owning, trading, and using cryptocurrencies, the adoption rate of these digital currencies among its population has been among the highest worldwide. The majority of Vietnamese investors, especially younger ones, are aware of and have expressed positive sentiments towards cryptocurrencies as a type of investment.

[7] DAO, 2021. *Digital transformation meets national development requirements.*

[8] PHONG, D. T., 2021. *The Blockchain & Cryptocurrencies Framework in Vietnam.* In *Legal Guild.* Retrieved from: https://nearlegal.com/the-blockchain-and-cryptocurrencies-framework-in-vietnam/.

Exhibit 1 – Blockchain as E-commerce Platform Architecture



Source: L Ismanto *et al.,* 2019. J. Phys.: Conf. Ser. 1179 012114 *Journal of Physics*: Conference Series.

The Use of Blockchain Technology for E-commerce Dispute Resolution

There are a few known ways that most E-Commerce platforms use in case of a dispute, and most of them fail. From the time of negotiation to the time it reaches the courts of law, bureaucracy is involved. However, using blockchain technology provides a more reliable and trustworthy alternative for e-commerce dispute resolution.

Figure 2 – Disputes Resolution Modality & Methods

Organization	Dispute Resolution Modality	Method
Mattereum	Adjudication embedded into organisational structure	Adjudication as a standard governance protocol
LTO Network	Embedded in 'live contract'	Agreed 'deviations' in workflows and off-chain arbitration
Sagewise	Pre-agreed smart contract monitoring agent	Monitors and freezes smart contracts to pre-empt disputes
Kleros	Independent online dispute resolution mechanism	Crowdsourced jury system
Blockchain Arbitration Forum	Stand-alone dispute resolution service	Smart contract arbitration library and independent arbitration
Jury.Online	Embedded in smart contract	Randomly selected jury

Source: Darcy Allen; Aaron Lane; Marta Poblet. *The Governance of Blockchain Dispute Resolution,* January 2019, SSRN Electronic Journal.

Kleros Blockchain Technology

Kleros is a popular online dispute resolution platform that uses blockchain and crowdsourcing to resolve disputes quickly. The main goal of Kleros is to create a decentralized, flexible organization. It also ensures an affordable, transparent, and arbitrated dispute resolution process. Kleros also influences all blockchain technology used by the enterprise in creating economic incentives and aligning major benefits (HUNG, 2021)[9]. As a result, juror behavior can be predicted and evaluated. A randomly selected panel of jurors receives the disputes sent to Kleros and must resolve them. No one can tamper with the evidence or the jury selection because smart contracts automatically enforce their rulings. Although blockchain provides strong protection, data privacy becomes an issue when an independent third party, such as an oracle, is involved in dispute resolution. For Anil Changaroth of ChanAroth International Consultancy (CIC), Asia Pacific[10] (2022), e-popularity commerce's raises questions about platform usage. The Covid-19 protocols and new market trends require traditional dispute resolution systems to be revised. To connect ODR with people's emotional intelligence, business management,

[9] HUNG, 2021, p. 12001.
[10] *Ibidem.*

and client onboarding, CIC's subsidiaries ODRasia and ODRanz have developed ODR platforms. Permission or private blockchain can help (HUNG, 2021).[11] Table 1 shows the various types of online dispute resolution systems available in blockchain, along with their modes of operation.

RheaNet Blockchain Technology

RheaNet is the enterprise support streaming system that resolves disputes. This platform's main goal is to host and facilitate nautical transactions and disputes, similar to Vietnam's online dispute resolution. RheaNet is inspired by the 2021 Suez Canal Blockade and its effect on e-commerce logistics. It creates smart contracts to help manage maritime trade and contracts. An Oracle database provides real-time data on contract performance, allowing smart contracts to track steps such as compensation for completed work or dispute for work not completed (ALEX, 2021).[12] RheaNet also uses smart contracts to automate contract performance and maritime trade (EBNER & RAINEY, 2021).[13] Oracles were consequently integrated into the platform to give contractors with real-time data and increase contractual performance. As a result, it also directs further actions, such as payment of compensation or initiating a legal dispute. Each transaction's genesis block also contains documentation of the transaction, including pre-contractual conversations, shipping container temperature logs, and so on (BERGOLLA; SEIF & EKEN, 2021).[14]

The authors of this study recommend Kleros and RheaNet for resolving e-commerce conflicts. Unlike Kleros, RheaNet relies on quadratic voting from experts and professionals. Then it arbitrates. These two blockchain combined with Quadratic Voting, devised by researcher Glen Weyl,[15] may represent the ultimate e-commerce dispute settlement. Quadratic voting allows people to express their opinions rather than merely support or opposition. Participants can add another vote if they strongly support or oppose a choice (LEE, 2018).[16] In a system where the real leaders are unknown, decisions are made by individuals who are not accountable to democratic institutions or developers trying to enhance the protocol. Adding this to a blockchain ensures tighter network security because it

[11] Chan Aroth International Consultancy, 2022.

[12] ALEX, 2021. "*In RheaNet Digital Dispute Resolution Platform for Maritime Trade Finance*". https://devpost.com/software/rheanet.

[13] EBNER & RAINEY, 2021. "*ODR and Mediation. Rainey*".

[14] BERGOLLA, Seif & EKEN, 2021. *Kleros: A Socio-Legal Case Study of Decentralized Justice & Blockchain Arbitration.*

[15] LEE, 2018. https://www.forbes.com/sites/shermanlee/2018/05/30/quadratic-voting-a-new-way-to-govern-blockchains-for-enterprises/?sh=79547db96ef8.

[16] *Ibidem.*

helps regulate a blockchain more effectively. Attempts to take control will be easily spotted. It prevents anonymous assaults and unexpected blockchain interruptions (LEE, 2018).[17]

Unlike Kleros, there is no requirement to use or buy bitcoin in RheaNet (DYLAG & SMITH, 2021).[18] While Kleros employs a permission-based cryptosystem, RheaNet uses a non-permission blockchain. RheaNet also uses Quadratic Voting to establish a decentralized blockchain for e-commerce. Trokt, a RheaNet application, promises private blockchain usage with its many branches and perks. RheaNet ensures the authenticity of data by receiving, disseminating, and validating it all in one data format (TROKT, 2021).[19] Trokt's private blockchain is a patent-pending architectural advancement used in online dispute resolution to remove circumstantial exposures and other complexities. It also enables "n-party validation" without revealing sensitive data context.

Trout is a cloud-based platform designed to perform efficiently in complex and crucial scenarios (EBNER & RAINEY, 2021). It is expensive to protect public inventions and new businesses. Secrecy can help Vietnamese businesses safeguard their intellectual property and manage online conflicts effectively. According to Trokt (TROKT, 2021),[20] Trokt is a key player in e-commerce online dispute resolution in Vietnam. Trokt's thumb printing capabilities help businesses grasp internet conflict theories. Moreover, the Trokt non-public blockchain verifies the presence of secrets and facts without notifying all stakeholders (SCHMITZ & ZELEZNIKOW, 2021).[21]

Recommendations for developing models of E-commerce Dispute Resolution by the Vietnamese legal framework

Blockchain technology would be useful in disputes that need documents to be authentic and untampered with. Blockchain seems not to be a popular tool in resolving e-commerce disputes,[22] as it would create a rather cumbersome system, needing a lot of processing power and energy for commercial dispute resolution. Smart contracts, Robotic Process Automation (RPA) and Artificial Intelligence (AI)[23]

17 *Ibidem*.

18 See DYLAG & SMITH, 2021, p. 1-16.

19 TROKT, 2021. *The Promise of Nonpublic Blockchain* https://medium.com/trokt/the-promise-of-neopublic-blockchain-6993e7eba1d4/.

20 *Ibidem*.

21 SCHMITZ & ZELEZNIKOW, 2021, p. 2021-24.

22 Interviewed with Toh See Kiat, Goodwill Law Corporation, Singapore on January 31, 2022.

23 AI and RPA: What's the difference and which is best for our Organization?
"Artificial intelligence (AI) and Robotic Process Automation (RPA) are two of the most successful technologies for organizations to achieve the seemingly incompatible goals of increasing customer satisfaction and employee morale while reducing operational costs". www.nice.com.

might do a better job in quick and efficient resolution of e-commerce disputes. Given the curent Vietnam Civil Law system, there is not suitatble to have a crowd-sourced jury, that involve manpower and financial cost and time to resolve a dispute, as in reality, most e-commerce disputes will be low-value disputes. To develop models of E-commerce Dispute Resolution shall be a strategic legal framework of Vietnamese law makers in the coming time.

Raising awareness of online commercial mediation via Vietnamese Law school curriculum

It is fair to say that law schools and faculties in Vietnam do not adequately teach mediation and bargaining, despite the country's significant expansion in e-commerce. Although online commercial conciliation is included in the "dispute resolution" portion of the Vietnamese law school curriculum, it is not used systematically in the colleges where future lawyers and entrepreneurs are educated. In light of the recent commercial mediation decree, which will be sent to over twenty law schools in Vietnam that are members of the clinical legal education network (CLE), a set number of credits for teaching ADR[24] and mediation in particular should be added to law school curricula.

Clear stipulation of evidence in mediation proceedings via codification of commercial mediation

To find conciliation choices that satisfy both parties' needs, will and interests, a commercial mediation proceeding involves repeated information exchanges between the parties, with the mediator's support, concerning solutions from the parties to problems that need conciliation. In order to reach a conciliation resolution, parties and mediators must communicate information, viewpoints, and even documents. Parties won't feel "comfortable" or "open" sharing information if their views expressed in papers they present in mediation can be used against them if mediation fails or if they are used as evidence. This is avoided by not accepting a party's information, papers, or viewpoints as evidence in later proceedings.[25] These rules encourage parties and mediators to share information and documents during the mediation process, bringing them closer together in terms of interests and improving the chances of agreement.

[24] The Prcom se of Nonpublic Blockchain: Trokt, 2021. https://medium.com/trokt/the-promise-of-neopublic-blockchain-6993e7eba1d4/.

[25] *Ibidem.*

Adopting the 2019 Singapore Convention

The 2019 Singapore Convention on Mediation establishes an international rule for the execution of agreements made through mediation, similar to the Convention[26] on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Contrary to popular belief, the Singapore Convention[27] on Mediation allows disputing parties to enforce and implement settlement agreements across borders.

The Singapore Convention also supports the outcome of business mediation. When a country joins the Convention, the mediator's success in one country is recognized and enforced in another. This goes on to advocate the effective use of dispute resolution processes to increase and enhance global economic cooperation opportunities. The 2019 Singapore Convention is significant because trade wars negatively impact global economic growth, global trade, and bilateral ties. The most prominent is the US-China trade war. The Vietnamese government must be enthusiastic about the 2019 Singapore Convention. Vietnam must expedite this process, updating and augmenting laws like the Civil Procedures Code and the Law on Civil Judgment Execution, among others. (SALMA; MATTEUCCI, VAN NAM, 2021).

Consideration to study and pursue the Glen Weyl quadratic voting system

The Glen Weyl quadratic voting technique can help organizations handle governance issues. Glen Weyl quadratic voting facilitates decision-making. It shows individual preferences against a construct, thus removing majority tyranny. Glen Weyl's quadratic voting requires people to pay for votes and then receive redistributed tokens to vote at the conclusion of the cycle Glen Weyl proposed:

> Quadratic Voting offers a better way to make collective decisions that avoid the tyranny of the majority by allowing people to express how strongly they feel about an issue rather than just whether they are in favor of it or opposed to it.

[26] AYED, Salma Ben; MATTEUCCI, Giovanni; VAN NAM, Tran, 2021. *Commitment To The Sustainable Development Goals.* Retrieved from: https://www.casadellibro.com/libro-compromiso-con-los-objetivos-de-desarrollo-sostenible/9788419045225/12798020.

[27] AYED, Salma Ben; MATTEUCCI, Giovanni; VAN NAM, Tran, 2021; *Ibidem*.

Exhibit 2 – Glen Weyl quadratic voting system

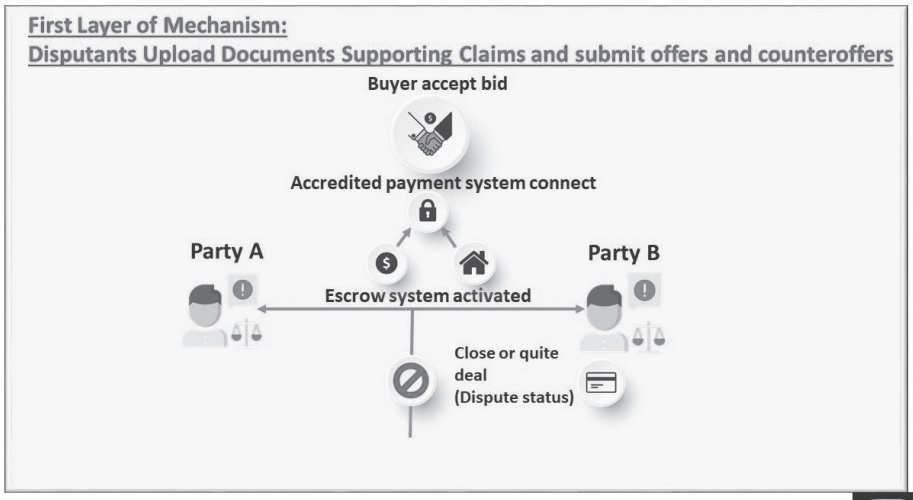


Image Source: Guaranteed Original

Exhibit 3 – Exim chain Governance (1/3) - Quadratic Voting

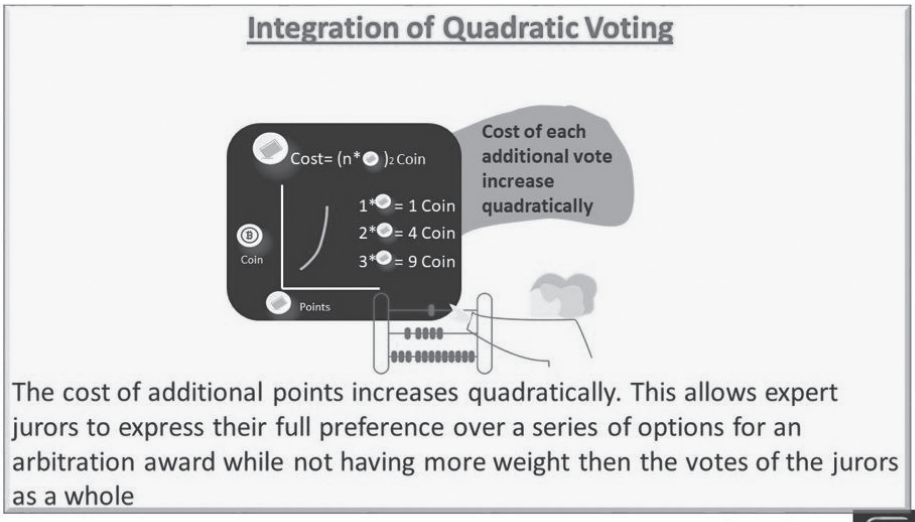


Image Source: Guaranteed Original

Exhibit 4 – Integration of Jury Pool Model

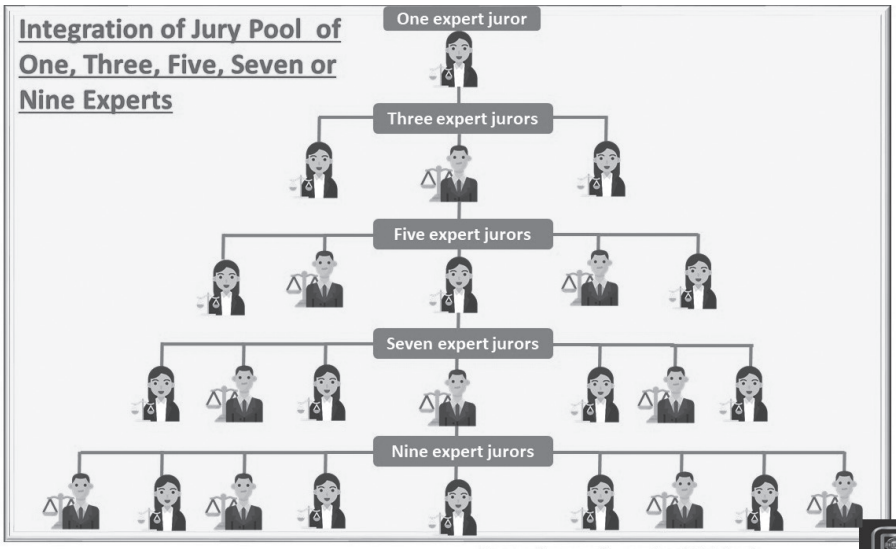


Image Source: Guaranteed Original

Conclusion

The study recommendds innovative models such as, Quadratic Voting; smart contracts with permission-based blockchain to deploy in Vietnam in digital era.

This study suggests that the Vietnamese government adopt smart ccontracts, commercial mediation, the 2019 Singapore Cconvention, and the Glen Weyl Quadratic Voting system to improve e-commerce dispute resolution. For smart contracts, Vietnam can leverage blockchain technology, where parties can upload their criteria for selling and buying things, all in one place. Trout is a recommended smart contract for verifying and rescanning files to resolve online buying and selling problems. The Vietnamese government should mandate ADR in law schools to promote online business mediation. As a result of the 2019 Singapore convention, the government will no longer be required to deal with issues involving parties outside its jurisdiction. Using this Convention, Vietnam should speed up the creation and regulation of the Civil Procedures Code and the Law on Civil Judgement. Glen Weyl's quadratic voting can also help in successful decision-making in disagreements and should be implemented into the country's dispute resolution systems. Also, private blockchain platforms like Kleros and RheaNet can use blockchain to resolve disputes, which will help the country's e-commerce dispute resolution. Finally, RheaNet and Quadratic voting can create a decentralized blockchain in Vietnam e-commerce and thus flourish in the e-commerce industry.

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Application of forms of alternative dispute resolution in Ukraine

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Abstract: Resolving legal conflicts is one of the main tasks of any state. This function is in most cases entrusted to the judiciary, but as experience shows, the court alone cannot ensure the effective functioning of the legal dispute resolution system. For every democratic state, the availability of an alternative is important, and the subject of law must be able to choose the ways of resolving legal disputes. Today in the world there are such alternative ways of resolving disputes as: arbitration, mediation, consultation, negotiations, intersession, conciliation procedure and others. The purpose of the article is to identify the advantages and disadvantages of alternative dispute resolution methods. The article analyzes the literature on this topic, and also presents the features of alternative ways of dispute resolution, which allows us to identify their advantages and disadvantages as a legal procedure. The existence in most countries of the world of alternative dispute resolution is to some extent positive for the parties to the conflict, because dispute resolution through arbitration, mediation, negotiation,

consultation and other alternative dispute resolution allows to resolve it without state intervention and they can be solved much faster. Alternative dispute resolution can to some extent be a source of savings money for the state, as they exist independently and do not require funds to provide them from the state, while in Ukraine the system of commercial courts annually requires a fairly large cost of maintaining such courts.

Keywords: Judiciary; civil law; arbitration; conflict resolution; state legislation

1 Introduction

In the world today there is a large number of conflicts, the emergence and cessation of conflicts, most of which are transformed into conflicts of a legal nature. At the same time, the basis for all conflicts in most cases is the following reasons: restrictions in the field of rights, deprivation of certain rights or non-compliance with relevant legal norms. Resolving legal conflicts is one of the main tasks of any state. This function is in most cases entrusted to the judiciary, but as experience shows, the court alone cannot ensure the effective functioning of the legal dispute resolution system.[1] For every democratic state, the availability of an alternative is important, and the subject of law must be able to choose the ways of resolving legal disputes.[2] Today in the world there are such alternative ways of resolving disputes as: arbitration, mediation, consultation, negotiations, intersession, conciliation procedure and others.[3]

However, in the scientific literature in Ukraine there is also another approach, according to which the state judiciary and alternative dispute resolution are the only dispute resolution system used in the complex of the parties of the dispute. Following this approach, it is impossible to talk about alternatives, because together the court and alternative dispute resolution are of a single entity.[4,5] Thus, the definition of the method of resolving legal disputes not as an alternative, but as a state is debatable, because the system of alternative dispute resolution does not exclude the judicial order, but may precede it and supplement it.[6] State proceedings and alternative ways of resolving disputes differ significantly in their essence, features and principles of operation. An alternative way of resolving

1 LYUBCHENKO, 2018.
2 MATVIEIEVA, 2021.
3 BENEDIKT; SUSŁO; PAPLICK; DROBNIK, 2020, p. 235-239.
4 KRESTOVSKAYA; ROMANADAZE, 2019.
5 GAIDUK; SENYUTA; BIK; TERESHKO, 2007.
6 KISLYI; STETSIUK; KOVALENKO, 2018.

disputes cannot replace the judicial procedure for resolving legal disputes. Judiciary is the main institutional element of the system of state dispute resolution, so each state in its legislation determines which disputes can be resolved exclusively by courts, and which - using alternative dispute resolution.

In Ukraine there was an attempt to determine the ways of solving the disputes and a law on arbitration courts was adopted,[7] but soon the situation changed and now we have only state economic courts to solve the disputes. The subjects of legal relations can use the methods of alternative dispute resolution as an additional option to protect their rights, to defend their interests. This possibility is particularly relevant due to the inefficiency of the judiciary, the growing number of cases in the courts, or the presence of other factors of an objective or subjective nature, which is to some extent observed in Ukraine. However, in Ukraine the issue of introduction of alternative dispute resolution methods, their proper legal regulation, expansion of the range of disputes that can be resolved using alternative dispute resolution methods is not on the agenda. As elements of the legal dispute resolution system, alternative dispute resolution and public justice are interdependent and competitive. Interdependence is that alternative dispute resolution may precede or supplement litigation (for example, negotiations between the parties) (for example, concluding a mediation agreement at the enforcement stage). At the same time, the practice of resolving legal disputes by the judiciary and the use of alternative dispute resolution methods indicates the existence of such competition. Legal dispute resolution is a kind of service, the customers of which are the parties to the dispute. Usually, those who provide a better service are approached. The purpose of the article is to identify the advantages and disadvantages of alternative dispute resolution methods.

2 Approaches to Understanding Alternative Dispute Resolution

Alternative dispute resolution can be used in different areas of law, depending on the purpose of the parties. Disputes that are resolved through alternative dispute resolution are impressive both in terms of subject composition and amount. Institutions that provide alternative dispute resolution services, interested in their own development, are concerned about their authority, and therefore are constantly improving the rules of procedure, recommendations on conflicts of interest, gathering evidence, reservations in the contract, precautionary measures. They care about their own reputation, as evidenced, for example, by the fact that during the entire period of the International Chamber of Commerce's arbitration, there have been no cases of arbitrators being accused of corruption scandals.[8] Therefore,

[7] Resolution of the Verkhovna Rada ..., 1991.
[8] Model Law on International Commercial Mediation ..., 2002.

alternative dispute resolution and public litigation in a kind of competition must be constantly improved, which will benefit the subjects of law. In general, the use of alternative dispute resolution should help to improve the legal dispute resolution system in Ukraine.[9]

In the scientific literature there are various definitions of alternative dispute resolution.[10] Black's Law Dictionary[11] defines alternative dispute resolution as a procedure for resolving disputes in ways other than judicial, such as mediation and arbitration. The Swiss Arbitration Association's Dictionary defines alternative dispute resolution as:

1. optional amicable settlement of the dispute by a third party, not including arbitration (in Europe);[12]
2. any settlement of a dispute involving a third party, with the exception of litigation, including arbitration (in the United States)[13]

Another legal dictionary defines alternative dispute resolution as a unifying term that describes methods that parties can use other than litigation, including negotiation, mediation, and many types of arbitration. Some researchers identify alternative dispute resolution as a way to resolve a dispute without going to court. One of the reasons for the large number of approaches to understanding alternative dispute resolution is that scholars and practitioners include different dispute resolution methods. For example, some researchers do not consider arbitration as an alternative way of resolving disputes. After all, arbitration has certain responsibilities for the parties involved. Other researchers point out that negotiations are not an alternative way to resolve disputes because only the parties' lawyers are present during the negotiations and there is no third party. Lord Wolfe, the founder of the reform of the English civil process, identified arbitration, administrative tribunals, pseudo-judicial proceedings, ombudsman proceedings and mediation as the main forms of alternative dispute resolution.[14] At the same time, many researchers do not refer to administrative tribunals and the ombudsman as a variety of alternative dispute resolution.[15]

Some scholars mistakenly call alternative dispute resolution pre-trial dispute resolution. This approach is incorrect, as it provides for litigation as a mandatory part of resolving a dispute. However, in different countries, many disputes are not resolved at all in national courts due to the fact that the agreement concluded on

9 Alternative Dispute Resolution ..., 2017.
10 GARNER, 2019.
11 GARNER, 2019.
12 BLAKE; BROWNE; SIME, 2014.
13 KARRER, 2009.
14 ARESTOVA, 2021.
15 Alternative conflict management, 2021.

the implementation of certain actions provides for the settlement of the dispute through negotiation, mediation or Arbitration.[16] Of particular importance are the issues of alternative dispute resolution in civil law. It should be noted that alternative dispute resolution is not always less costly than litigation. In addition, they are used not only to resolve commercial disputes. Other types of disputes can be resolved through arbitration, mediation, and negotiations.[17] Due to their universality, alternative dispute resolution allows for a wider range of disputes than national courts.

There is a point of view on the definition of alternative dispute resolution as "non-state procedures for the settlement of civil disputes", the main feature of alternative dispute resolution is that they are not carried out by public authorities. In general, an alternative dispute resolution is the application (for example, by an arbitral tribunal) of legal norms and the adoption of a binding decision for the parties, based on legislation and other possible sources of law. The "dispute resolution" method is used when resorting to alternative dispute resolution methods such as arbitration and international commercial arbitration. When using the "dispute resolution" method, the problem is resolved in relation to the existing rights and obligations of the parties (legal relations of the parties), and in the case of "settlement of the conflict" the parties seek to reconcile their interests and achieve mutually acceptable termination of the conflict. Thus, dispute resolution and conflict resolution are fundamentally different methods used in alternative dispute resolution.

3 Key Features of Alternative Dispute Resolution

According to research, there are the following signs of non-governmental procedures for settling civil disputes:

- no state intervention;
- recognition by public authorities;
- contractual nature of application;
- voluntary application of procedures;
- cooperation of the parties;
- confidentiality;
- relative formality;
- variability of procedures, their variety;
- participation of a third neutral participant, elected or appointed by mutual consent of the parties (this approach is generally correct, but some of these features are debatable).

[16] SMYRNOVA, 2021.
[17] PIRES FERREIRA, 2021, p. 21-36.

In general, alternative dispute resolution in most cases has the following features:

- non-state character;
- contractual nature of application, based on mutually agreed definition of procedures and implementation of decisions;
- universality, the disputes can be resolved both between individuals and legal entities, as well as between international organizations, states, or unions of states;
- legal nature, the dispute resolution is based on certain legal norms;
- flexibility in resolving disputes, various methods, means, procedures are used, which are independently determined by the parties, as well as they determine the conditions and procedure for their implementation;
- confidentiality, only the parties to the proceedings and the invited persons take part in the alternative dispute resolution.[18]

Comparing alternative dispute resolution and litigation, we can identify their commonalities and differences. The common ones include:

a) systematization – disputes are considered by the system of judicial authorities in accordance with the established jurisdiction, however, there is a system of alternative dispute resolution, as well as various institutions operating in this field and international organizations;
b) independence, the dispute is considered by an authorized person who is independent of the conflicting parties and acts impartially;
c) the plurality of parties;
d) the possibility of involving experts and specialists.

However, there are differences between the resolution of disputes by public authorities and alternative dispute resolution methods mentioned earlier. Thus, we can say that alternative ways of resolving disputes exist in most countries abroad.[19] In Ukraine, from the very beginning of independence, an attempt was made to introduce an arbitration system to resolve legal disputes.[20] In 1991, the Arbitration Court Act was passed,[21] which to some extent introduced one of the main types of alternative dispute resolution that exists around the world. However, 10 years later, in 2001, a new law was passed that abolished the existence of arbitration courts in Ukraine and introduced the so-called commercial courts, which are state-owned and resolve all disputes arising on behalf of the state.[22]

[18] KATERYNIUK, 2021.
[19] SCHMIDT, 2021, p. 69-92.
[20] Holovatyi, 2015, p. 4-8.
[21] Resolution of the Verkhovna Rada ..., 1991.
[22] Law Of Ukraine "On commercial courts", 1991.

In order to implement the issue of arbitration courts to some extent, the Law of Ukraine "On arbitration courts"[23] was adopted in 2004, which is in force, but it is practically ineffective, as the vast majority of legal disputes are resolved by commercial courts. These courts are determined as the most corrupt branch of the judiciary in Ukraine. Thus, the state deprived the business entities of the opportunity to resolve disputes to use alternative ways of its resolution. As for other alternative ways of resolving economic disputes, such as mediation, negotiations, and consultation, they are also used to a rather limited extent in Ukraine. Commercial courts have thus established a kind of memorandum that only they have the right to resolve commercial and other property disputes.

The new Code of Criminal Procedure in Ukraine has significantly expanded the scope of alternative dispute resolution, combining elements contained in continental systems (exemption from criminal liability) and Anglo-American systems (institution of agreements), which has led to the humanization of criminal law in Ukraine and protection of rights participants in criminal proceedings.[24] In world practice are used a sufficient number of alternative methods of dispute resolution, including such procedures as: appointment of an expert, negotiations, negotiations with a mediator (facilitated negotiations or assistance), conciliation, mediation, litigation, mini-litigation, establishment facts, dispute commissions, private litigation, timely neutral assessment, multi-door court, pre-trial settlement conference, comprehensive jury trial, etc.

Alternative dispute resolution, which in its diversity represents a whole system of methods, means, methods of private settlement of relations between the parties. It should serve the purposes of justice, provide procedural guarantees for the protection of the rights and interests of the parties and improve the resolution of disputes. The urgent task of the modern judiciary of Ukraine is the effective and rapid resolution of conflicts. The development and application of various methods of alternative dispute resolution will help solve this problem.

4 Conclusions

The existence in most countries of the world of alternative dispute resolution is to some extent positive for the parties to the conflict, because dispute resolution through arbitration, mediation, negotiation, consultation and other alternative dispute resolution allows to resolve it without state intervention and they can be solved much faster.

[23] Law Of Ukraine "On arbitration courts". 2004.
[24] ROMANOV, 2021.

Alternative dispute resolution can to some extent be a source of savings money for the state, as they exist independently and do not require funds to provide them from the state, while in Ukraine the system of commercial courts annually requires a fairly large cost of maintaining such courts. Resolving disputes through alternative methods also speeds up their resolution, but in some cases the process itself can be more expensive.

Alternative forms of dispute settlement should be based on the following international principles: the principle of cooperation, which is to identify the common interests of the parties and which is based on mutual concessions and the search for understanding; the principle of differentiation, in which the parties to a legal conflict may use alternative means individually, in combination or in a certain order; and the principle of confidentiality, which establishes the secrecy of each alternative procedure. Alternative resolution of legal disputes and conflicts can be successful only if there is constant and close cooperation with civil society institutions. Such interaction will create an active civil position, increase public confidence in alternative dispute resolution, conflict resolution and contribute to the normalization of relations in various spheres of public life.

Formas alternativas de resolução de litígios e sua aplicação na Ucrânia

Resumo: A resolução de conflitos jurídicos é uma das principais tarefas de qualquer Estado. Esta função é, na maioria dos casos, confiada ao judiciário, mas, como mostra a experiência, o tribunal por si só não pode garantir o funcionamento eficaz do sistema de resolução de litígios. Para todo estado democrático, a disponibilidade de uma alternativa é importante, e o sujeito de direito deve ser capaz de escolher as formas de resolver os litígios jurídicos. Hoje no mundo existem formas alternativas de resolução de disputas como: arbitragem, mediação, consulta, negociação, intersessão, procedimento de conciliação e outros. O objetivo do artigo é identificar as vantagens e desvantagens dos métodos alternativos de resolução de disputas. O artigo analisa a literatura sobre o tema, além de apresentar as características das formas alternativas de resolução de conflitos, o que permite identificar suas vantagens e desvantagens como procedimento jurídico. A existência na maioria dos países do mundo de resolução alternativa de litígios é, em certa medida, positiva para as partes em conflito, porque a resolução de litígios por meio de arbitragem, mediação, negociação, consulta e outras formas alternativas de resolução de litígios permite resolvê-lo sem intervenção do Estado e podem ser resolvido muito mais rápido. A resolução alternativa de disputas pode, até certo ponto, ser uma fonte de economia de dinheiro para o estado, pois existem de forma independente e não exigem fundos para fornecê-los do estado, enquanto na Ucrânia o sistema de tribunais comerciais exige anualmente um custo bastante grande de manutenção de tais tribunais.

Palavras-chave: Judiciário; direito civil; arbitragem; resolução de conflitos; legislação estadual

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Conditions for conclusion an agreement in criminal proceedings with the participation of the victim's representative

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Abstract: The main task of this article is to study the essence and purpose of the institute of criminal proceedings "conclusion of an agreement in criminal proceedings", to reveal the application of this institute of criminal proceedings in practice, to determine its role in legal and social life and to study the conditions of conclusion of the above agreement for a peaceful resolution of the dispute between parties. Among the methods by which the problem of the given topic is studied it is possible to distinguish a dialectic method, comparative-legal, system method, historical-legal, formal-legal method,

method of analysis and synthesis. The authors studied the experience of foreign countries in combating corruption and proposed to introduce international experience in the national legislation for successful experience of entering into agreements in criminal proceedings, as well as for the effectiveness of these agreements and maximum compliance with the rights of the parties of the disputes. The study describes the current state of legal acts regulating the conclusion of agreements, the concept of agreements in criminal proceedings and their types and the main reasons for the conclusion of agreements, the terms of the agreement between the parties to criminal proceedings as a wat for a peaceful resolution of disputes, the stages and elements of the conclusion of agreements. The participation of the victim in the process of concluding the agreement was also investigated. On the example of international experience of development and application of this institute the establishment of the institute and its further development, as well as the conditions of conclusion of the agreement in such states are investigated.

Keywords: Agreement on reconciliation; representative; media; reconciliation; revial of justice

1 Introduction

Improvement of the legal system of Ukraine, the democracy explosion, Ukraine's approach to European integration require the adoption of effective reforms and improvement of the legislative base. In order to achieve the above results, a number of reforms are being adopted in Ukraine, including the reform of the Criminal Procedure Code of Ukraine,[1] which in turn includes changes and innovations in criminal proceedings. It is the approach of Ukraine to European integration that demands from our state adaptation of national legislation to international legislation and international standards. Special attention is paid to criminal proceedings, since it is during the criminal proceedings that the protection of constitutional rights and freedoms of the person and citizen takes place.

The agreement in criminal proceedings in Ukraine is the embodiment of restorative justice, so-called restorative justice. Restorative justice has become one of the major causes of the development of justice in the world, in the form in which it is currently available. The result of the application of restorative justice may be the conclusion of an agreement on reconciliation, which will satisfy the interests of the victim, as well as the interests of the suspect or accused in the conduct of illegal acts.[2] The latest international concept of human rights protection shows that most states refuse only from the punitive methods of counteracting criminal acts, because exclusively punitive methods cannot fully protect both the

[1] Criminal Procedure Code of Ukraine, 2012.
[2] TURNER, 2017.

rights of the victim and the rights of the suspect or accused.[3] That is why this has led to the emergence of a new approach to criminal proceedings, that is, the creation of the concept of restorative justice, which is realized through the conclusion of agreements in criminal proceedings.[4]

The history of restorative justice in Ukraine begins in 2003. Because it was the year that the development of practice of realization of restorative justice by public organizations began. First, the Ukrainian Center of Understanding on the basis of Darnytskiy District Court, and then other organizations that joined the movement for the restoration justice in both Kyiv and the regions of Ukraine. Among such organizations it is possible to distinguish: "Faith in the future" (Ivano-Frankivsk), Branch of the All-Ukrainian Foundation "Protection of Children's Rights" (Bila Tserkva), the Regional Development Agency "Harmony" (Chervonohvardiiskyi District, AR Crimea), the Lviv Charitable Foundation "Space without conflict", etc. The Resolution of the United Nations Economic and Social Council of 24 July 2002 on the basic principles of application of the programs of restorative justice was aimed at achieving the result of the above mentioned above. The importance of the recovery process is that any process involving the victim, suspect or accused or other persons affected by the unlawful act of the guilty party shall be jointly involved in the resolution of the conflict[5]. The most common types of restorative justice in the world are media, community justice or decision making, as well as conferences.[6]

The agreement on reconciliation between the victim and the suspect or accused, since its adoption at the legislative level, has gained important practical significance for the conduct of judicial proceedings in Ukraine. Since the inclusion of these agreements into the Criminal Procedure Code of Ukraine),[7] a positive result has been recorded in their application. From the statistical data, it is seen that for a month almost 3000 agreements are concluded, which are approved by the court, but the number of rejected transactions varies from 70 to 250 every month and has a slight tendency to increase. However, despite the positive dynamics of the conclusion of the agreements, this institute of criminal proceedings is a new mechanism of its application not yet fully investigated by scientists and not worked out by court practice. It is expedient to continue its improvement drawing attention to the appearance of all new formulas and approaches to the development of this institute.[8]

The purpose of this article is to systematically and in detail study on the basis of the national and international legislation of the institute of criminal proceedings.

3 SOFIEV, 2019, p. 230-236.
4 DUBOVYK, 2015, p. 2-4.
5 SEVERO, 2020, p. 67-82.
6 MINIX, 2017, p. 551-606.
7 Criminal Procedure Code of Ukraine, 2012.
8 Generation of the High ..., 2014.

There are conclusion of agreements in criminal proceedings, namely definition of the concept of agreement between the parties during criminal proceedings, conditions and the order of conclusion of the agreement between the parties, and consequences of non-fulfillment of this agreement. This article will cover the participation of the victim during the conclusion of the reconciliation agreement and its legal and procedural status.

2 Materials and Methods

The methodological tools of the research of this topic are based on fundamental, general scientific and special methods. Among the methods by which the research of this topic is carried out, it is possible to distinguish logical-semantics method and method of convergence from abstract to concrete. With the help of which the study and deepening of the intelligible apparatus is carried out. The dialectic method allows to determine the grounds, contents and order of conclusion of agreements during criminal proceedings, and also investigates the consequences of conclusion of this agreement and its non-fulfillment. The structural-logical method is used to clarify the procedure, grounds and conditions of conclusion of an agreement with the participation of the parties in criminal proceedings. This method is also used to clarify the main controversial issues of application of agreements in domestic and international criminal-procedural legislation. The semantics method, the main purpose of which is to delimit the concepts and terms to be used in this work, as well as to analyze the meaning of the criminal-legal categories. The formal-legal method of research, which is used in determining the role of participants (parties) of conclusion of an agreement in criminal proceedings.

Also among the methods by which the conclusion of an agreement in criminal proceedings with the participation of the victim's representative can be distinguished comparative-legal method. It allows to study the peculiarities of conclusion of an agreement between the parties of criminal proceedings in different legal systems and also determine forms of conclusion of agreements in criminal proceedings in different countries of the world. The historical-legal method is used for the study of the establishment and development of this institute of criminal proceedings, its adoption in Ukraine, as well as international experience of concluding agreements between parties of criminal proceedings.

Effective methods of investigation of conditions of conclusion of agreements in criminal proceedings should also be considered an axiomatics method. The task of which is to build scientific theory, at which some statements (axioms) are accepted without proofs and then used for reception of rest of knowledge under certain logical rules. The method of analogy, which provides knowledge about subjects and phenomena on the basis that they are similar to others, that is, it

can be argued that this method is aimed at analysis of conclusion of agreements and comparison of them with international conditions of conclusion of agreements in criminal proceedings. The formalization method that reflects the content of knowledge in the known symbolic content.

The hermeneutical method of research is used to reveal the essence of the concept of "an agreement in criminal proceedings" and the possibility of its realization in practice and the structural-functional method used to define the legal features of the conclusion of the agreement and to provide such an agreement of characteristics and features.

Also among the methods by which the regulation of anti-corruption activity is carried out. It is possible to distinguish a formal-legal method. The purpose of which is research and development of the content of norms of domestic legislation, which in turn constitutes the normative basis of application of provisions on conclusion of agreements in criminal proceedings. Also, the purpose of which is research of all means of grammar, logical, systematic and axiologic interpretation of the content of legal norms aimed at improving the institute of criminal proceedings – conclusion of agreements.

On the basis of the sociological method, the position of practical workers (lawyers, judges and prosecutors) regarding their attitude to the resolution of conflicts in criminal proceedings through the conclusion of an agreement on reconciliation has been studied, and the position on the solution of controversial issues related to criminal proceedings on the basis of the agreement has been investigated. Using the statistical method, the general research is carried out with the help of the sociological method.

3 Results and Discussion

The process of humanization and democratization in Ukraine has led to qualitative and positive updating of criminal-procedural legislation, in particular, a new way of resolving criminal conflicts has emerged. The conflict between the parties to criminal proceedings can be resolved due to the emergence of agreements in criminal proceedings, if the crime committed by the guilty person is not a major social danger. The development of an agreement in criminal proceedings is conditional on the following historical periods:

1. Pre-revolutionary period. The pre-revolutionary law of the conclusion of an agreement between the parties was possible in cases that were violated solely by a complaint of the victim, but for cases of private-public and private charges.
2. Soviet period. The Soviet legislation regulated the conclusion of agreements between the parties on cases of exclusively private prosecution, and the

conclusion of the agreement accordingly was possible only if the crime by the guilty person was committed for the first time. Such a provision artificially limited the application of such a method of reconciliation between the parties and the closure of the criminal case accordingly.

3. Modern period. In the modern legislation regulating the institute of conclusion of an agreement between the parties of criminal proceedings, the conclusion of the agreement is possible before the court enters the room of the conference, which is different from the pre-revolutionary and Soviet period, where the corresponding agreement could be concluded only before bringing a law into effect.

Criminal Procedure Code of Ukraine[9] regulates the activities related to the conclusion of agreements in criminal proceedings. This institute regulates two types of agreements:

1) an agreement on reconciliation between the victim and the suspect or accused;
2) an agreement between the prosecutor and the suspect or accused of recognizing the accused.

The first type of agreement will be considered in this regard, as it is directly connected with the victim's person and thus with the victim's representative, whose main task is to protect the victim's interests.

During the adoption of Chapter 35 Criminal Procedure Code of Ukraine,[10] a significant measure was planned to simplify the resolution of criminal conflicts, to speed up the procedure for the consideration of certain categories of cases, to reduce the length of detention, to reduce the burden on law enforcement and judicial bodies, to grant the parties a right to resolve the issue of dismissal of a person from criminal responsibility.

Most of the practical workers, lawyers, investigators, judges, are positively involved in the practice of conflict resolution through agreements. The survey, which was conducted among the employees directly involved in the administration of justice, showed that 93.72% of the court employees consider the conflict resolution to be positive by the institution, 83.15% of the investigators and 76.90% of lawyers follow the same view.[11]

The establishment of the institute of "conclusion of agreements in criminal proceedings" was also due to the adoption of recommendations, which are fixed in international legal acts. There are Recommendation No. 6 R (87) 18 of the

[9] Criminal Procedure Code of Ukraine, 2012.
[10] Criminal Procedure Code of Ukraine, 2012.
[11] TSILMAK; SCRIABIN, 2012, p. 155-163

Committee of Ministers to member states concerning the simplification of criminal justice,[12] Council Framework Decision on the standing of victims in criminal proceedings[13] and Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters.[14]

In Ukraine, the practice of the European Court of Human Rights is taken into account during the administration of justice.[15] The Criminal Procedure Code of Ukraine[16] states that in Ukraine criminal proceedings are carried out taking into account the practice of the ECHR, i.e., during criminal proceedings the practice of the European Court of Human Rights should be applied and taken into account. The importance of the European Court of Human Rights decisions is confirmed by Law of Ukraine No. 3477-IV "on the implementation of decisions and application of the case law of the European Court of Human Rights".[17] It is mandatory to implement decisions concerning Ukraine, as well as to adopt European standards in the course of justice in Ukraine for the full and comprehensive protection of human rights.

An agreement on reconciliation is an institution of criminal proceedings. The main purpose of which is a voluntary agreement between the victim and the suspect or accused. The content of which is to agree on the terms of responsibility of the suspect or accused in the event of his unlawful actions aimed at causing harm to the victim, and in connection with what compensation of such damage and renewal of rights of the victim.[18] Among the signs of the agreements on reconciliation in criminal proceedings, R. V. Novak[19] proposes to divide all features into socio-psychological and procedural. The socio-psychological features of the agreement on reconciliation can be attributed to confidentiality, voluntary, protection, compensation, self-determination. The Novak's procedural features include accessibility, unloading of the judicial system, optimization of criminal proceedings.

An agreement on reconciliation between the parties to criminal proceedings may be concluded with respect to criminal offenses, crimes of a minor or moderate severity and criminal proceedings, which are carried out in the form of private prosecution.[20] The question arises as to the legality of the principle of dispositivity, so the victim voluntarily intends to conclude an agreement on reconciliation with the person who has committed a serious or especially serious crime, but according

12 Recommendation No. 6 R (87) 18 ..., 1987.
13 Council Framework Decision ..., 2001.
14 Recommendation No. R (99) 19 ..., 1999.
15 ROZUMOVSKYI, 2022.
16 Criminal Procedure Code of Ukraine, 2012.
17 Law of Ukraine No. 3477-IV ..., 2006.
18 BELENOK, 2021.
19 NOVAK, 2015.
20 HLADII, 2021.

to the current legislation does not have the right to this. The essence of this provision lies in the fact that serious and especially serious crimes constitute a special increased danger for society and public order, so the conclusion of the corresponding agreements according to the law is not allowed.

To conclude an agreement on reconciliation during criminal proceedings, there are several conditions, among which are:

1. Volt. The main purpose of this condition of conclusion of the agreement in criminal proceedings is that the parties to the conflict, on their own will, voluntarily, without any pressure or violence, conclude this agreement.
2. Subjective. The offense committed by the suspect or accused should relate to private (property or personal) interests of the victim, physical or legal, and in no way relate to the state and communal enterprise or institution.
3. Compensation. This agreement is intended to ensure that the suspect or accused fully indemnified the damage to the victim, as well as restore his violated rights.
4. Category. An agreement on reconciliation between the victim, suspect or accused during criminal proceedings may be concluded in cases involving minor or moderate offenses, criminal offenses and criminal proceedings in the form of private charges.
5. Temporal. The initiation of an agreement on reconciliation can take place at any time, after the person who has committed an unlawful act has been informed of suspicion, before the court is brought to the meeting room for pronouncement court sentence.

The following elements should be included in the agreement on reconciliation between the parties to criminal proceedings:

1. Parties to the agreement. The agreement on reconciliation shall specify the party's name, surname, name, patronymic, date and place of birth, place of residence, citizenship, taxpayer identification number, code from the Unified State Register of individuals. There entrepreneurs and legal entities for legal entities. Failure to sign the parties to the conciliation agreement may result in the court's refusal to sign the agreement.
2. Formulation of suspicion or accusation and its legal qualification. This element of the agreement includes information about the time and place of the unlawful act and other circumstances that may be involved in the act. It is not possible to consider the true and correct agreement, i.e. to conclude an agreement in which the information is absent, and in which there will be no formulation of suspicion or accusation and will not indicate the legal qualification of the actions of the guilty person.

3. Significant for criminal proceedings. Such significant circumstances may include the presence of a person who has committed an unlawful act and who is a party to the case, the presence of an unheard or unredeemed conviction or the presence of an uncommitted penalty in such person, and also the possibility of postcriminal behavior, cooperation with the investigation and other circumstances, which play an important role in the conclusion of the agreement.
4. The amount of damage to the injured person caused by the unlawful act and the period of its compensation. In the agreement on reconciliation of the mark, which is compensated to the victim and in what size. If the agreement specifies material damage, it should be clearly stated, in whole or in part, in which order and in what time it should be reimbursed to the suspect or accused.
5. Approval of punishment for the consent of the parties to his appointment. The agreement on reconciliation must be signed by the parties.
6. Consequences of the agreement on reconciliation between the parties of criminal proceedings. The parties to the criminal proceedings in the agreement on reconciliation with their signatures testify that they are acquainted with the consequences of the conclusion of the respective agreement.
7. Consequences of non-fulfillment of the agreement. The main consequence of non-implementation of the agreement on reconciliation is the cancellation of the court decision, which was approved by the given agreement and in this case the person who does not fulfill such agreement may be criminally liable. In accordance with the practice of the High specialized Court of Civil and Criminal cases, it would be appropriate to familiarize the suspect or accused with the liability that occurs in the case of non-fulfillment of the reconciliation agreement.[21]

The conclusion of an agreement on reconciliation between the parties to criminal proceedings can be divided into four stages:

1) the stage of initiation of the agreement on reconciliation between the parties;
2) the stage of preparation of the agreement for conclusion and directly the process of conclusion of the agreement;
3) the stage of approval of such an agreement by the court;
4) the stage of implementation of the reconciliation agreement.

During the first stage of the conclusion of a deal, the parties initiated the process, namely, the victim, the suspect or the accused. At this stage, the will of the parties to conclude the agreement should be voluntary, that is, there should be

[21] Generalization of the High ..., 2014.

no pressure or violence from the third party. The second stage of the conclusion of a deal includes a certain list of actions of the parties to criminal proceedings, which are entitled to participate in this procedure of reconciliation of persons on the basis of the agreement, and includes discussion of the contents of the reconciliation agreement and other actions directly related to the future reconciliation agreement. Negotiations on the conclusion of the agreement, at this stage, have the right both to the parties of the proceeding, and their legal representatives or defenders and other persons, except the prosecutor, investigator or judge. The third stage of the agreement on reconciliation is characterized by the court's decision, which approves the agreement and appoints the appropriate measure of punishment to the person who has committed unlawful acts. The last stage of the agreement on reconciliation between the parties to criminal proceedings is the implementation of the agreement. In case of failure to comply with such an agreement, the victim and the prosecutor may appeal to the court demanding the cancellation of the decision, and persons who do not comply with the agreement may be prosecuted.

In criminal proceedings, the investigator or the prosecutor are obliged to notify the victim, suspect or accused of their rights to conclude an agreement on reconciliation, as well as to ensure the realization of the right and to obstruct the conclusion of an agreement on reconciliation between the parties to criminal proceedings. One of the features of the reconciliation agreement is that the judge is obliged to make sure that the suspect or accused is able to fulfill the obligations he has undertaken, as specified in the agreement on reconciliation, that is, whether he has a material possibility of compensation for damage to the victim or to perform any other actions specified in the agreement on reconciliation.

The agreement on reconciliation is not a unilateral expression of will by one of the parties to the proceedings, but a mutual decision by both parties to the proceedings aimed at peaceful resolution of the conflict between them, i.e., the initiators of the agreement may be either the victim or the suspect or accused. The agreement on the conclusion of the agreement on reconciliation can be made by the victim, suspect or accused, and by the representative or defender of the victim or other person chosen by the parties to the proceedings, the so-called media.[22]

Neither the judge, the prosecutor or the investigator can participate in the negotiation of the agreement on reconciliation. However, there are authors who follow a different point of view, in particular, O. O. Dudorov believes that the agreement on reconciliation can be initiated by law enforcement agencies.[23] D. Lupeco[24] argues that the failure of the prosecutor to include a criminal prosecutor in the reconciliation agreement is a mistake, since the prosecutor, both during

[22] TURMAN, 2017, p. 273-277.
[23] LYASH; KUBRAK, 2017, p. 153-157.
[24] LUPECO, 2012, p. 21-25.

the pre-trial investigation and during the trial itself, has all the necessary powers, which can contribute to a more effective process of reconciliation between the parties to the proceedings. However, it is difficult to agree with this opinion, since the provision on prohibition of initiation of agreement on reconciliation between judges, prosecutors and investigators is aimed primarily at counteracting abuse of these officials by the authorities and counteracting any acts of corruption in connection with the conclusion of agreements on reconciliation. The judge, as one of the key person in the criminal proceedings, shall not be entitled to initiate or participate in any way during the agreement of the parties on the conclusion of the agreement, since its main obligations are to settle the case on the merits and make a legal decision, however, regardless of whether a conciliation agreement is concluded, during pre-trial proceedings or directly before the court, the judge is obliged to check whether the agreement was concluded without threat or any violence or other circumstances than those provided for in the agreement.

According to the Criminal Procedure Code of Ukraine,[25] the representative in criminal proceedings is a person who has the right to be a defender. A representative of a legal entity that acts in criminal proceedings of the victim may be the head of a legal entity or another person who is authorized by law or the statutory documents of such legal entity, as well as an employee of a legal entity for a trust, as well as a person who has the right to be a defender in criminal proceedings.

According to Decree of the Plenum of the Higher Specialized Court of Ukraine on Civil and Criminal cases No. 13 On practice of carrying out by courts of criminal proceedings on the basis of agreements",[26] the agreement on reconciliation can be concluded with a legal entity, if it is a victim, regardless of its organizational and legal form, provided that such legal entity as the injured party, the actions of the suspect or accused were caused by property damage. A representative of a legal entity (the head of a legal entity, another person authorized by law or by statutory documents, an employee of a legal entity on the order of the head of a legal entity for the power of attorney for representation, and a person who has the right to be a defender in criminal proceedings, in accordance with the agreement concluded with it for representation) may represent the interests of such legal entity. During criminal proceedings, documents confirming the authority of the relevant person to represent the interests of the legal person as the injured party, as well as in the agreement on reconciliation and in the court decision are obligatory when referring to the representative of the legal entity which confirms the legality of certain actions on behalf of such a legal entity.

[25] Criminal Procedure Code of Ukraine, 2012.
[26] Decree of the Plenum ..., 2015.

An agreement on reconciliation in criminal proceedings shall also be entered into if an infant is a party or one of the parties. In this case, the relevant agreement will be concluded with the participation of a legal representative or a defender of an infant. If a minor who is a party to the proceedings has reached 16 years, he/she may enter into an agreement on reconciliation on his/her own, but with one condition that the legal representative of such a person has agreed. The consent of the legal representative shall be specified in the agreement and such consent shall be evidenced by their signatures. It is not allowed to conclude an agreement in criminal proceedings where one of the parties is a minor, if it has not been agreed[27]. Based on the above, it can be argued that a person who is a party to the case and who has not reached the age of 16 may, on his own motion, initiate an agreement on reconciliation make his legal representative.

The Criminal Procedural Code of Ukraine does not contain the definition "mediation" and "mediator". However, at the legislative level, there is the Law of Ukraine "on mediation", which defines the term "mediation" and "mediator". According to this Law, mediation is out-of-court activity aimed at settling a conflict by means of negotiations between the parties to the conflict and by means of one or more media organizations; The mediator, in his turn, is a person who acts as a specially prepared mediator whose main task is to assist the parties to the conflict in regulation and settlement of the dispute between them through a structured negotiation process.[28] The Criminal procedural Code of Ukraine does not contain a provision on the media, and accordingly does not regulate its status as an intermediary between the parties, which means that the process of development of the agreements on reconciliation between the parties of criminal proceedings is impeded, since, as a rule, the victim and suspect or accused are not competent in legal matters and cannot reach agreement without the intervention of an uninterested party. In order to improve this institute of criminal proceedings it is possible to adopt the experience of foreign countries, namely England, France and Finland, and to establish in criminal proceedings the statute of the media, determine its rights, duties and powers.[29] In addition, it can take into account Recommendation No. R (99) 19 of the Committee of Ministers[30] of the Council of Europe on the media in criminal cases, which states media needs professional training, that is, the person who is a medical professional must be qualified and must have accredited education. This, in turn, will allow for more effective and

[27] Decree of the Plenum ..., 2015.
[28] Draft Law ..., 2012.
[29] LYASH; KUBRAK, 2017, p. 153-157.
[30] Recommendation No. R (99) 19 ..., 1999.

effective enforcement of the rights of the parties to the proceedings to conclude agreements on reconciliation in criminal proceedings.[31]

Implementation of the institute "conclusion of agreements in criminal proceedings" in practice causes several problems, since the use of these agreements to resolve the conflict between the parties of proceedings introduces some principles of criminal proceedings, namely the principle of competition of the parties, i.e. ensuring realization of this principle, since then the participation of the defender in criminal proceedings is not obligatory; to some extent, the principle of establishing an objective truth is violated, since there is a lack of agreement on legal regulation of the moment from which it is possible to initiate an agreement in criminal proceedings to resolve the conflict between the parties.

However, the adoption of this institute and its introduction at the legislative level helps to solve a number of problems during criminal proceedings. There are guarantee of providing the victim full and prompt compensation for damages caused to him by unlawful actions of the suspect or accused. This type of agreement provides a significant process economy during criminal proceedings; this institute of criminal proceedings in the shortest possible time allows to realize the main tasks of criminal proceedings, restoration of rights violated, punishment of guilty persons and compensation of damages; conclusion of agreements in criminal proceedings allows to save budgetary funds.[32] The conclusion of agreements on reconciliation in criminal proceedings allows for effective and efficient resolution of the conflict between the parties to the proceedings and serves as a peaceful means of settling the conflict.

Many countries of the world use this institute for effective implementation of criminal proceedings. Among such countries can be distinguished Great Britain, Belgium, Italy, France, Poland, Germany and others,[33] however, the Institute of Criminal proceedings was known and widely used due to the United States of America. This can be done by reading case studies or even watching films where conflicts can be resolved by concluding an agreement on reconciliation between the parties to the process or initiating a peaceful resolution of the dispute between them. The United States of America is one of the countries in which the United States is legally regulated by the Institute of Criminal proceedings. It was there in 1839 that Reimond Moly introduced this institute and merged agreements and justice.[34] The precondition for this was the move, after the civil war, Americans and immigrants to the city, and due to this the level of crime began to grow. To combat

[31] Recommendation No. R (99) 19 ..., 1999.
[32] GUSAROV, 2014, p. 142-146.
[33] KRAUSOVÁ; LÁNÍKOVÁ, 2021, p. 203-229.
[34] LEONENKO; KOTSAR, 2013, p.153.

crime, the courts began to use the agreements in the form and form they currently exist. If we compare the United States of America and Ukraine and in the United States, as noted above, the reason for the introduction of agreements in criminal proceedings was the relocation of Americans and immigrants to large cities, which led to increased crime, in Ukraine the main reasons for the introduction of this institute were also the increase in crime rate, as well as absence of effective result from existence and application of the aral means. Following the introduction of this institution, the main task and purpose of justice was not to punish the guilty, but to eliminate the harm caused by illegal actions, to restore the violated rights and to reconcile the parties to the conflict.

The development of crime, and together with it and the loading of judges led to the fact that in 1920, 88% of all cases in New York and 85% of the case of Chicago began to be decided by the conclusion of agreements.[35] And in 1968, the US Supreme Court legislatively recognized the conclusion of agreements, however, in specific cases, thus recognizing their constitutionality.[36] In 1989, Frank Sander developed alternative ways of conflict resolution, for which he received a prize in the future. He developed a concept called "multi-door court", the essence of which was that the party to the proceedings, having consulted with the specialist, could choose a solutio.[37] Among the options for resolving the case can be identified mediation, judicial review, independent arbitration, mini-court.[38]

In the United States of America, regulation 11 (Federal Criminal Code), which provides guarantees for the protection of parties to criminal proceedings[39] is legally established. The introduction of an agreement in the USA guarantees fulfillment of the main tasks of the criminal process: Disclosure and punishment of the guilty, disclosure of the crime and prompt resolution of the case.[40] United States prosecutors have developed model agreements that differ between themselves and the type of act committed by the guilty party. Such model agreements are also so-called "price lists" by which the option of requalifying criminal charges can be chosen. After the investigation and agreement of all the terms of the agreement, the parties to criminal proceedings submit such an agreement for approval to the court, and the court in turn should approve, reject or postpone the decision to study the preliminary conclusion of the Commission on trial terms, i.e. the investigation and conclusion of the agreement by the special Commission, which is engaged in the execution of criminal penalties in the form of probation.

35 WALSH, 2017.
36 VLASOVA, 2013, p. 84.
37 ALEXANDRENKO; TITKO, 2013, p. 95.
38 FERREIRA, GIOVANNINI, GROMOVA, da ROCHA SCHMIDT, 2022, p. 6.
39 FEDERAL RULES ..., 2021.
40 KUCHYNSKA, 2014, p. 313.

Both US and Ukrainian laws provide for the right of the court to refuse to conclude agreements if such an agreement would contradict the interests of the victim. The US. law provides for a repeated application of the agreement in one criminal proceeding, which is different from the legislation of Ukraine, where the repeated application of the agreement in the same criminal proceeding is prohibited. Despite the widespread and long-standing nature of the Institute of conclusion of agreements in the United States of America, such conflict resolution practices have been repeatedly criticized for reducing the legitimacy and fairness of criminal justice, and all because of the fact that in the conclusion of agreements suspected and accused persons refuse from most of their rights by choosing a non-transparent process, which is almost devoid of competition.[41] In the criminal proceedings of European countries, conciliation and juicios rápidos are applied in Spain, the models "abbreviato" and "pattegiamento" in Italy, "absprachen" in Germany, "reconnaisance 41 preventable de coupabilité" in France.[42] This is explained by the similarity of the legal proceedings in these countries. These countries do not provide for negotiations on the terms of the agreement, everything is at the level of the law and within the limits determined by the law.

Thus, on the basis of the above mentioned, it can be argued that in 2012 the Criminal Procedure Code of Ukraine was renewed, which legally established the new institute of criminal proceedings – an agreement in criminal proceedings. Chapter 35 of the Criminal procedural Code of Ukraine regulates this institute and establishes two types of agreements: The agreement on reconciliation and the agreement on recognition of the guilty. A good article was carried out to study the agreement on reconciliation between the parties of criminal proceedings.

4 Conclusions

An agreement on reconciliation is an institution of criminal proceedings. The main purpose of which is a voluntary agreement between the victim and the suspect or accused. The content of which is to agree on the terms of responsibility of the suspect or accused in the event of his unlawful actions aimed at causing harm to the victim, and in connection with what compensation of such damage and renewal of rights of the victim. The basic conditions of the agreement on reconciliation were also studied, among which are: Free, subjective, compensatory, categorical and temporal. The main structural elements of the agreement on reconciliation are its parties, formulation of suspicion or accusation, the amount of damages with the indication of the period of its compensation, agreed punishment and consequences

41 TURNER, 2017.
42 MA, 2002, p. 22-55.

of the agreement conclusion and approval, as well as the consequences of failure to implement such agreement.

It is determined who can initiate an agreement on reconciliation, in particular, it may be injured, suspected or accused, which in turn deprives the reduction of the corruption component and abuse of power, if the initiators of the agreement could be the prosecutor, investigator or judge. The victim's representative was also analyzed and studied during the conclusion of the agreement on reconciliation between the parties to criminal proceedings. The participation of the victim's representative in certain cases contributes to the observance of the rights of such person. International experience in the conclusion of reconciliation agreements has been studied, in particular, the experience of the United States of America has been highlighted to a greater extent, since it is this state that was one of the first to develop the institute of conclusion of agreements in criminal proceedings. It can be argued that since the establishment of the institute of conclusion of agreements, Ukraine is ready to change the concept of criminal proceedings to the relevant European standards.

Condições para celebração de acordo em processo penal com a participação do representante da vítima

Resumo: A principal tarefa deste artigo é estudar a essência e finalidade do instituto do processo penal "celebração de acordo em processo penal", revelar a aplicação deste instituto do processo penal na prática, determinar o seu papel na esfera jurídica e social. vida e estudar as condições de celebração do acordo acima. Entre os métodos pelos quais se estuda o problema do tema em questão é possível distinguir um método dialético, jurídico-comparativo, método sistêmico, método jurídico-histórico, método jurídico-formal, método de análise e síntese. Os autores estudaram a experiência de países estrangeiros no combate à corrupção e propuseram introduzir a experiência internacional na legislação nacional para a experiência bem sucedida de celebração de acordos em processo penal, bem como para a eficácia desses acordos e o máximo cumprimento dos direitos das partes ao processo. O estudo descreverá o estado atual dos atos jurídicos que regulam a celebração de acordos, o conceito de acordos em processo penal e seus tipos e as principais razões para a celebração de acordos, os termos do acordo entre as partes no processo penal, as etapas e elementos da celebração de acordos. A participação da vítima no processo de celebração do acordo também foi investigada. A exemplo da experiência internacional de desenvolvimento e aplicação deste instituto são investigados o estabelecimento do instituto e seu posterior desenvolvimento, bem como as condições de celebração do acordo em tais estados.

Palavras-chave: Acordo sobre reconciliação; representante; mídia; reconciliação; revival da justiça

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