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SOME IDEAS ON PRE-TRIAL DISPUTE SETTLEMENT IN BRICS COUNTRIES

REFLEXÕES SOBRE RESOLUÇÃO DE DISPUTAS PRÉ-JULGAMENTO NOS PAÍSES DO BRICS

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ABSTRACT

Objective: This article is aimed at outlining the approaches to the pre-trial (quasi-judicial) dispute settlement and the landmarks in the establishment and development of alternative dispute resolution (ADR) in the BRICS countries in the form of voluntary pre-trial dispute settlement with an emphasis on constructing the system of alternative procedures. The relevance of such a study is determined by its complex nature, giving an understanding of the ADR development vector in the BRICS format, based on relatively new legislation, which was not adequately reflected in scientific books, articles, etc. in the previous period. Thus, the present study fills this gap.

Method: Based on analytical reflections on information obtained from sources and literature indicated in the references, the article analyzes the provisions of normative acts and documents of the BRICS countries, creating patterns of ADR development and the potential for its use from the position of legal principles. Having characterized ADR in general, the author successively moves from the approaches of one country to those of another to clarify and outline general ideas in this field based on the foregoing information.

Results: The author's results are presented in a set of legal prescriptions and scientific provisions found in the current legislation with regard to the field of research, including from the perspective of contribution to the further improvement of the ADR concept in the BRICS.

Contribution: The theoretical and practical significance of the results is defined by the fact that foreign readers will be provided with up-to-date scientific information on the state of the legislation in the BRICS countries in the field under study, which in practical terms will favor understanding of the gap (or lack thereof) in the achievements obtained by Russian and foreign researchers and practitioners in this sphere in terms of their implications at the level of legislation.

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KEYWORDS: Pre-trial dispute settlement, quasi-judicial dispute settlement, BRICS, Brazil, Russia, India, China, South Africa.

RESUMO

Objetivo: este artigo tem como objetivo delinear as abordagens para a solução de disputas pré-julgamento (quase-judicial) e os marcos no estabelecimento e desenvolvimento de resolução alternativa de disputas (ADR) nos países do BRICS na forma de resolução voluntária de disputas pré-julgamento com ênfase na construção do sistema de procedimentos alternativos. A relevância de tal estudo é determinada pela sua natureza complexa, permitindo uma compreensão do vetor de desenvolvimento de ADR no formato BRICS, com base em legislação relativamente nova, que não se refletiu adequadamente em livros científicos, artigos, etc. no período anterior. Assim, o presente estudo preenche essa lacuna.

Método: Com base em reflexões analíticas sobre informações obtidas em fontes e literatura indicadas nas referências, o artigo analisa os dispositivos de atos normativos e documentos dos países do BRICS, criando padrões de desenvolvimento de ADR e as potencialidades de sua utilização a partir da posição de princípios jurídicos . Tendo caracterizado os ADR em geral, o autor passa sucessivamente das abordagens de um país para o outro para esclarecer e delinear ideias gerais neste campo com base nas informações anteriores.

Resultados: Os resultados do autor são apresentados em um conjunto de prescrições legais e dispositivos científicos encontrados na legislação vigente no que diz respeito ao campo de pesquisa, inclusive sob a ótica de contribuição para o futuro aprimoramento do conceito de ADR no BRICS.

Contribuição: O significado teórico e prático dos resultados é definido pelo fato de que os leitores estrangeiros receberão informações científicas atualizadas sobre o estado da legislação nos países do BRICS no campo em estudo, o que em termos práticos será favorecer a compreensão da lacuna (ou falta dela) nas realizações obtidas por pesquisadores e profissionais russos e estrangeiros nesta esfera em termos de suas implicações no nível da legislação.

PALAVRAS-CHAVE: Solução de disputas pré-julgamento, solução de disputas quase-judiciais, BRICS, Brasil, Rússia, Índia, China, África do Sul.

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INTRODUCTION

The irreversible process of globalization is changing the usual practice of cooperation from trade relations inside the countries to expanding international trade relations in the private-sector. Business, trade and economic cooperation between Russia and other BRICS countries is developing rapidly. The successful functioning of the system of business relations that are unfolding in this way requires new conditions, one of which is the operational resolution of emerging issues, including the rapid and at the same time high-quality settlement of arising disputes. In this regard, in many countries of the world, efforts have been undertaken in the alternative dispute resolution methods: they are less conservative, more flexible with regard to the formal procedure and the final decision making.

Since such methods of dispute settlement, comprising the toolkits used by various world arbitration institutions and institutions offering dispute resolution, are not alien to the BRICS countries, the author aims to outline the approaches of the mentioned countries to the pre-trial (quasi-judicial) dispute settlement and landmarks of alternative dispute resolution (ADR) establishment and development in the BRICS countries as voluntary pre-trial dispute settlement with an emphasis on constructing an alternative procedures system.

From the viewpoint of *approaches* to achieving this goal, we proceed from a look at the subject of research from the perspective of the advantages provided by the mechanism of pre-trial dispute settlement in the BRICS countries over other methods of dispute resolution.

The *novelty* of the present study in this format is determined by an integrated approach to achieving the goal, both from the perspective of national legal sources of the BRICS countries chosen by the author for the research, and the very goal of identifying the approaches to regulating these relations and the landmarks of the ADR formation and development therein.

The theoretical and practical significance of the results is defined by the fact that foreign readers will be provided with up-to-date scientific information on the state of legislation in the studied sphere of the indicated countries in comparison with Russian one, which in practical terms will promote comprehension of the gap (or lack thereof) in the achievements obtained in this field by Russian and foreign researchers and practitioners in terms of their implications at the level of legislation.

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LITERATURE REVIEW

This study aims to define the approaches of the BRICS countries to the pre-trial (quasi-judicial) dispute settlement and to identify the milestones in the formation and development of the alternative dispute resolution as voluntary pre-trial dispute settlement with an emphasis on constructing alternative procedures. In this format, this study was carried out on the basis of expert data contained in the publications of Russian and foreign researchers engaged in a selected range of issues, because the ADR method under consideration has several advantages over other methods.

These are P.L. McDonald and R.W. Bivins, (1987), L. Riskin and J. Westbrook (1987), who devoted their research to the issue of correlation of out-of-court and judicial dispute settlement methods; R.Yu. Bannikov (2012), L. Somov (2004), E.I. Nosyreva (2007), B.D. Davis and M. Netzley (2001) regarding general ADR issues; T. Chandra (2019), Chernik I.D. (2012), concerning ADR in tax, land and other disputes, including from the standpoint of their activities as "quasi-judicial" bodies, for example, J. Barnard-Naude (2012), A.N. Kozyrin (1996), and A.B. Zelentsov (1997); and in the regional geographic aspect, for example, F. Engelmann (2015) and Ch.K. Poole (2011) in Brazil, Yu.A. Tikhomirov (2001) and others in Russia; R. Dhavan (2013), R. Dutta (2015), G. Relyea, and N.J. Bhatt (2009) in India; G. Kaufmann-Kohler, and Kun Fan (2008) and J.H. Young and Lin Zhu (2012) in China; P. Ampeire (2017) in South Africa; and K. Belikova (2012) covering all BRICS countries. These publications emphasize the different facets of competition and approaches to legal regulation thereof and the perception of corresponding changes by market participants, anti-monopoly authorities, the state, etc., they lack comprehensiveness. The author of this work tried to eliminate this gap at least partially.

The publications cited in the study were selected using keywords in the search engines and networks of Google Scholar, Research Gate, Science Direct, and Publons according to the following criteria:

- They were published in the last decade;
- They were published in the English language;
- There is an access to the full text of the publication.

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METHODS

Analytical considerations on information obtained from the cited sources provide support for the analysis of the provisions stipulated in normative acts and documents of the BRICS countries that create patterns of legal regulation and the development of pre-trial dispute settlement methods. The methodology is based on materialist dialectics; it implies collecting data through analysis of the legal acts and documents and employs descriptive approach to the legal regulations in the field under study together with reflective practice. Thus, the method of systematic analysis and reflection on the ideas provided in the aforementioned articles, book chapters, etc., along with such operations as induction and deduction, is used while considering the provisions of BRICS countries' legislation in the field under study.

The methods of formal and dialectical logic help understand the relationship between the needs of the parties to the dispute and regulatory settlement thereof; the materialistic view of the processes and phenomena of the external world as a whole make the study proceed from the fact that judicial dispute settlement is sometimes insufficient to balance the interests of the parties and achieve a favorable effect from protection by the rule of law.

RESULTS

Results obtained during the study and the undertaken analysis show and make clear the following. It has been established that in BRICS countries issues of pre-trial dispute settlement are resolved using the same mechanisms of negotiation and conciliation procedures, including mediation. It has been shown that these mechanisms can be implemented both by the parties to the dispute, and with the participation of third parties, which may be either interested in carrying out the procedures (trustees, legal representatives), or by independent mediators (professional intermediaries).

It has been revealed that in India and China, legislation provides for the possibility of suspending court proceedings (court trials) at the stage of the receipt of materials to the court and transfer thereof by the judge for pre-trial settlement using alternative methods: conciliation procedures involving independent intermediary (in India this is a professional, but in China this may be another judge); mediation (for example, this is people's mediation in China or "Lok Adalat" people's court in India), arbitration or other methods. It has been shown that in Brazil, Russia and South Africa, the use of mediation as a pre-trial dispute settlement procedure is

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practically not developed; however, mediation is recognized in these countries as an effective way to resolve disputes and is moving towards implementation in legislative and practical areas.

Unlike court trials, which have an imprint of national characteristics and traditions, dispute resolution involving a mediator – mediation, taking into account the interests of the parties, is more flexible procedure, with a unique opportunity to establish and maintain long-term contacts not only at the level of official relations the states, but also at the level of legal actors subject to private law of the BRICS countries.

DISCUSSION

In scientific books, articles, etc. (McDOnald and Bivins, 1987; Bannikov, 2012) pre-trial dispute settlement is designated, for example, as a *mandatory non-judicial procedure*, which is established by federal law or by agreement of the parties, compliance with which is a prerequisite for the exercise of the right to sue, as well as subsequent consideration and resolution of the dispute by the court. This approach was valid in the Russian Federation until 1995, when the pre-trial dispute settlement was mandatory, for example, according to the 1992 APC of the Russian Federation.

In the new codes (CPC and APC of the Russian Federation of 2002) it was abandoned, except for some situations established by law, for example, disputes with a railway carrier, etc. Thus, according to paragraph 2, Part 1, Article 148 of the APC RF 2002 the arbitration court leaves the claim without consideration provided, after its-acceptance by court, it establishes that the plaintiff did not comply with the pre-trial procedure for settling the dispute with the defendant, if required by federal law or contract. The same is envisaged in the 2002 CPC of the Russian Federation: the court leaves the claim without consideration if the plaintiff has not complied with the pre-trial procedure established by the federal law for this category of cases or the dispute settlement procedure stipulated by the parties' agreement (Article 222 of the CPC of the Russian Federation) (Somov, 2004).

Thus, pre-trial, preliminary, or so-called "complaining" pre-trial dispute settlement, is mandatory per se in some cases when one party presents a complaint to the other party. In fact, one party, dissatisfied with the performance of a contract by the other party, writes a complaint thereto, and the latter must respond. Such a request and response procedure is a complaint procedure, or written negotiations. Unless this procedure is followed, that is, the parties failed

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to comply with the requirements of the law regarding pre-trial dispute settlement, the court does not consider the claim.

Similarly, the pre-trial settlement procedure, for example, for *tax disputes* in domestic scientific books, articles, etc., is defined as "a procedure that allows taxpayers and tax authorities to find out the contradictions and disagreements at the first stage of their occurrence in the period after completion of the tax audit or in the period after detection of a tax offense, without going directly to the arbitration court" (Chernik, 2012; Baistrocchi, 2012). In some cases, this order is mandatory. Thus, for example, in accordance with paragraph 1, Article 104 of the Tax Code of the Russian Federation prior to filing a lawsuit the tax authority *is obliged* to offer the taxpayer (other person) to voluntarily pay the amount of the tax sanction, by sending a claim or other document to all known taxpayer's (other person's) addresses. Otherwise, the goal set by the legislator will not be achieved – the possibility of resolving the dispute on the imposition of the tax sanction without filing a lawsuit. If the tax authority fails to fulfill its duty, then in a subsequent trial this will give the court grounds to refuse the tax authority to consider the claim.

This procedure performs four main functions: 1) determines the existence of a dispute; 2) concentrates court proceedings; 3) allows for dispute resolution; 4) makes it possible to minimize the costs of the parties.

In the absence of binding legal provisions making the parties claim pre-trial settlement of disputes, the parties themselves resort to negotiations within the framework of a voluntary procedure without any coercion, based on common sense. The parties can stipulate the need for a preliminary pre-trial procedure into the terms of the contract, according to which no one shall apply to court until the possibilities of the negotiation process are used. If the contract contains the wording that all disagreements of the parties before filing a lawsuit should be resolved through negotiations, this procedure is voluntary for the parties, and mandatory for the court (Internet Conference, 2004).

Such non-judicial (out-of-court, alternative) dispute settlement is applied in civil law, labor, tax and many other legal relationships.

It is noted that, unlike the judicial system, alternative procedures have advantages in terms of saving time and finances, the possibility of choosing a neutral person and confidentiality (Nosyreva, 2007); the alternative dispute resolution has "the advantage of being able to settle a dispute in a short time and low cost" (Chandra, 2019) and others.

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The system of alternative procedures is classified on various grounds. For example, they are divided into two groups. The first group includes conciliation and reconcilement procedures. The latter can be carried out with the participation of third neutral persons (i.e. mediation) or without third persons (i.e. negotiations). In this classification, the second group includes international commercial arbitration (ICA). The difference in arbitration procedure from non-judicial forms and its similarity to the procedure for considering disputes in courts is the reason for classifying it as a separate group. For the same reason, ICA in the ADR system occupies a special place (Nosyreva, 2007). Alternatively, three groups of procedures are identified (Riskin and Westbrook, 1987): adversary procedures (judicial process, administrative process, arbitration); consensual procedures (negotiations, mediation, reconciliation, Ombudsman, independent expert examination to establish the circumstances of the case); mixed procedures (mediation-arbitration, mini-court). Traditionally, all alternative forms of resolving legal conflicts are divided into basic (arbitration, mediation) and combined (med-arb, Ombudsman, "mini-court", etc.). Often the following procedures are referred to the basic forms: 1) reconciliation of the parties without third parties (i.e. negotiations); 2) mediation – with an independent and neutral intermediary involved; 3) arbitration court (arbitration) – with the help of an independent and neutral person – an arbitrator (or group of arbitrators) authorized to make a decision binding on the parties (Davis and Netzley, 2001; Stepan, n.d.).

Out-of-court dispute settlement procedures may also include administrative proceedings (arbitration) in the form of a quasi-judicial procedure (adjudication) (Barnard-Naude, 2012).

Study and analysis of the legislation of the BRICS countries make it possible to talk about a developed system of bodies that resolve disputes in a quasi-judicial order.

India and South Africa are common law countries on this issue; therefore, the practice of one of these countries – the United States – is quite indicative. Similar proceeding (quasi-judicial procedure) is defined in paragraph 551 of the US Code: "adjudication" means agency process for the formulation of an order (clause 7). In addition, the "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing (clause 6). The above formula shows that administrative *proceedings* are judicial in nature. At the same time, it is known that operation of some institutions is not limited to consideration of applications (claims) of individuals, while others have a single function – consideration of disputes. The status of such institutions in dispute resolution is a characteristic feature that distinguishes them from the courts. If the court conducts the proceedings between the parties (including with the

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participation of a state authority) as an arbitrator, administrative institutions themselves are a party to the applications (claims) of individuals. Being *judex in propria causa*, such institutions have formed a special system of bodies of administrative justice (Kozyrin, 1996). Contestation of acts of administration is possible by administrative claims that are considered by the bodies and services of the active administration system (for example, appeals divisions of various ministries). They do not have jurisdictional functions and use internal investigation and consideration procedures in their work. In many countries, these departments are specialized, separated from the active administration and vested with the right to use separate judicial procedural rules for the consideration of claims, which leads to their transformation into quasi-judicial bodies (Zelentsov, 1997).

Since decisions of such bodies can almost always be appealed in courts, the administrative (quasi-judicial) procedure for the dispute settlement can be attributed simultaneously to the pre-trial dispute settlement, with a degree of conditionality.

In his speeches, the President of the Russian Federation repeatedly emphasized the importance of comprehensive development of alternative dispute resolution methods in the country that are widely recognized in the world: arbitration, pre-trial and judicial negotiations, conclusion of amicable agreements, and appeal to mediators (Pravo.ru, 2017; Rapsinews,ru, 2016; Kremlin.ru, 2012).

BRICS countries have also taken significant steps in the development of all these areas. Thus, most of the internal regulatory legal acts of these countries provide for the possibility, in case of disagreement between the parties in certain legal relations, to resolve the dispute in a pre-trial, quasi-judicial or out-of-court procedure. In the case when such a settlement does not succeed, the person whose interests have been violated has the right to file a lawsuit with the court (Belikova, 2015).

It is precisely in this format that this article discusses the main provisions of the legislation of the BRICS countries on the procedure and conditions for voluntary and mandatory pre-trial and quasi-judicial dispute settlement, applied for certain legal relations. Thus, let us outline some landmarks of ADR formation and development in BRICS countries as a voluntary pre-trial dispute settlement.

In *Brazil*, for many years, the issue of the judicial system reformation has been on the agenda, including solving the problem of the effectiveness of the judicial bodies and overcoming the crisis of public trust in national courts (Engelmann, 2015). Often the high cost of trial is an obstacle to the access to justice for some Brazilian citizens. Whereas mediation, as

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an alternative to trial, requires, as experts steadily presume, much lower costs, and agreement of the parties is reached faster than a decision is made in the process of court trial. In this regard, the need to introduce alternative, including pre-trial, methods for resolving civil and commercial disputes and enshrining the corresponding institutions at the statutory level is undeniable.

Because of the monopoly of the state on the administration of justice, currently stipulated in paragraph XXX, Article 5 of the Brazilian Constitution, this practice is not yet widespread in Brazil; however, today we can already consider some alternative methods that have become a frequent practice and are under development in Brazil. They include arbitration (arbitragem), mediation (mediação), and conciliation procedures (negotiation – conciliação/negociação) (Poole, 2011).

In case of a decision to conduct a conciliation procedure, the parties to the dispute (lawyers as their representatives) hold joint *negotiations*, during which they can come to a common opinion that judicial recourse in their situation is not the best way to resolve the conflict. However, the decision-making process during negotiations is very complicated because of the lack of neutrality of the parties and the confidentiality of the procedure, which prevents getting a balanced and fair decision. Therefore, according to Brazilian researchers (Poole, 2011), the legislation of their country still needs to establish an institution of a neutral person to resolve the dispute.

In *Russian* legal theory and practice, the stable phrase “alternative dispute resolution” and its abbreviation “ADR” firmly entered into circulation. The intensive pace of development of ADR methods and mechanisms in our country is caused by the fact that they often turn out to be more effective and efficient than traditional methods.

However, currently, the number of the most common forms of alternative, including pre-trial, dispute settlement in Russia includes negotiations, arbitration (arbitration), and mediation.

- *Negotiations*, used to resolve the largest number of legal conflicts, are a *voluntary pre-trial* dispute settlement method directly by the parties through mutual compromises without the participation of an intermediary. This mechanism makes it possible to establish, firstly, the position of each party; secondly, to determine the immediate subject of disagreement; thirdly, to reveal the desire of the parties to find a compromise decision; fourthly, to uphold their own approaches to solving the problem.

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Rather ambiguous definitions of the term "negotiations" are given in scientific books, articles, etc.: it can be treated as the interaction of social actors (their representatives) in the form of a direct (indirect) dialogue carried out with the aim of harmonizing the interests of the parties and neutralizing a potential conflict or settling (resolving) a real conflict (Belikova, 2015); as "a process of joint decision making by the interested parties on their further conduct" (Khudoykona, 2001); as a way to resolve (manage) conflicts and joint activities of the parties to identify a mutually acceptable solution to the problem (Burtovaya, 2002) and others. The above definitions do not, however, have a special legal content, they are applicable to many areas of human activities where conflicts may arise. Therefore, from a legal point of view, the definition of negotiations as an effective method to prevent and resolve legal conflicts, as a process by which the parties involved in a legal conflict discuss reaching a mutually acceptable agreement is more accurate (Tikhomirov, 2001). In this case, "the Russian negotiation mentality is a very strong approach, and a rather inflexible one, which to some extent ignores emotional and psychological considerations often discussed in negotiation theory" (Embahs.Skolkovo.ru).

It seems that the authors of these definitions declare different approaches, highlighting different facets of the concept of "negotiation"; at the same time, the only definition that remains common is the goal of resorting to this method of alternative dispute resolution: to reach a compromise solution that would suit the parties concerned and all participants involved in the dispute.

Negotiations, including preliminary ones, preceding the development of the final text of an agreement, can be cited as the most frequently encountered example. As a result of negotiations, the parties draw up a document, usually called a protocol of disagreement, which includes either two columns, each of which contains the wordings proposed by each of the parties, or three columns, while the third column contains the text of the contract article as amended by both parties, or marked "as amended by party A" or "as amended by party B". It seems that the protocol of disagreement, consisting of three columns, makes sense, since in this case it is more understandable which of the formulations the parties eventually agreed to. Currently, it is also possible to use various computer programs, for example, in the Word processing software (MS Office) in the reviewing mode, when all the changes made can be tracked and read in the comments, callouts, etc.

- *Mediation*, its origin and recognition in Russia, was reflected in the *Strategy for the development of the financial market of the Russian Federation until 2020,* approved in 2008; it is emphasized in the section of this Strategy titled "Development and Improvement of

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Corporate Governance" that "the problem of corporate conflicts between Russian companies is topical, as well as disputes involving foreign investors are. The judicial procedure for resolving such conflicts and disputes, because of its long duration and low efficiency, is unable to lead the conflicting parties to a relatively quick and mutually acceptable way out of the disputed situation. Lawsuits lasting for years result in an increase in expenses of Russian companies, cause direct and indirect harm to investors and reduce the investment attractiveness of the Russian economy. In this regard, it is necessary to support out-of-court forms of resolving corporate and other conflicts, stimulate the transfer of disputes to arbitration courts and consider the possibility of applying mediation, a new method for Russian business practice, to find solutions and overcome critical situations.

The advantages of this method, as noted in the Strategy, should include confidentiality, prompt dispute settlement and low costs, as well as the absence of the need for enforcement of a decision, since during the conciliation procedures the parties themselves work out a decision satisfying them and therefore are interested in its implementation. For the purposes of introducing mediation mechanisms when considering corporate disputes, it is necessary to develop a system of measures to stimulate their application, to give the appropriate authorized state body the necessary powers associated with the organization of this work and the accreditation of professional mediators. While the mediation mechanisms and institutions are developing, one should consider the feasibility of introducing a mandatory pre-trial phase of using mediation in the event of certain, the most difficult, categories of corporate disputes in the field of securities issuance, distribution of assets, mergers and takeovers and other cases that substantially affect the rights and interests of investors" (Belikova, 2016).

At present, the norms of laws create the legal basis for the possibility of applying ADR in Russia. Thus, Article 11 of the Civil Code of the Russian Federation establishes a judicial procedure for protecting violated or challenged civil rights not only in state courts, but also in arbitration courts; according to Article 401 of the Labor Code of the Russian Federation, a collective labor dispute may be considered by a conciliation commission, with the participation of an intermediary or in labor arbitration, etc.

India's interest in developing alternative dispute settlement mechanisms in the country at the present stage is conditioned by several reasons. First, this is a crisis of Indian judicial system related to the long-lasting trials (for example, in 2010 the Bombay court held final hearings on lawsuits filed as far back as in the 1980s and 1990s (Dhavan, 2013)). Second, this is the rapid pace of economic development and an increase in foreign investment, which

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contributed to the development of international commercial arbitration as a reliable means of dispute resolution, which is most preferred for foreign counterparties.

Therefore, as early as in 1993, at a conference in New Delhi, chaired by the Prime Minister of India and the judge of the Supreme Court of India, a Resolution was adopted that enshrined the legality of resolving disputes not only in court, but also within the framework of institutions of negotiations, mediation, reconciliation and arbitration. The adoption of this provision was conditioned by the ongoing economic reforms in India, which actively included them in the international economic turnover, which resulted in the institutionalization of Indian centers for alternative dispute resolution. Thus, for instance, "recognizing the important role that mediation can play, the Supreme Court laid down in para 46 of the Srinivas Rao judgement (Supreme Court Cases), certain guiding principles of general importance for undertaking mediation" (Dutta, 2015).

In 1994-1996 on the initiative of the Supreme Court of India, Indian-American studies were conducted to identify the reasons for the delay in the consideration of civil and commercial disputes in courts, which resulted in the adoption of proposals for amendments to the CPC of India, 1908 on the admissibility of alternative dispute resolution. According to the CPC Amendment Act of 1999, Section 89 was incorporated in the CPC of India, giving judges the power to find out the possibility of resolving disputes by alternative methods (including mediation) during the legal process and to transfer the process of further dispute consideration and resolution to one of the ADR forms. These ADR methods include: conciliation, mediation, arbitration, Lok Adalat proceedings, negotiation; so-called con/med-arb procedure implying conciliation/mediation/arbitration; conciliation/mediation; mini-trial; and fast-track arbitration.

Accordingly, the CPC, 1908 establishes the legal basis of a out-of-court, alternative dispute resolution procedure in India with the norms incorporated therein with regard to the ADR procedure.

It should be noted that it provides for the possibility of alternative dispute resolution at the (pre) trial stage, when the court, after accepting the statement of claim, without considering the merits of the case, can offer the parties to resolve the dispute in other ways. Thus, according to Section 89 of the CPC, 1908, in cases where, in the court's opinion, there are grounds for resolving a dispute between the parties in an alternative manner, the court must set out in writing the conditions for the dispute resolution and submit them to the parties for consideration.

After receiving the parties' opinions on this issue, the court can reformulate the conditions set forth earlier and determine the following methods for resolving a dispute between

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the parties: 1) conciliation proceedings; 2) arbitration trial; 3) Lok Adalat proceedings; 4) mediation.

When resolving a dispute between the parties by the first two methods, the Arbitration and Conciliation Act of 1996 is applied.

In the 1996, Act the term "*conciliation procedures*" means a pre-trial process by which a conciliator facilitates the settlement of a dispute that has arisen between the parties. "Conciliation procedure" can be applied to all "disputes arising from legal relations", regardless of whether they are of a contractual or non-contractual nature. Conciliation procedures entirely depend on the will and desire of the parties and may be terminated by the parties at any time. A *settlement agreement* is a result of these procedures.

Compromise in disputes is ensured by considering them and rendering assistance to the disputing parties in the special People's Courts of India (*Lok Adalat*) operating under judicial bodies. *Lok Adalat* is a traditional Indian dispute settlement method (Releya and Bhatt, 2009).

It should be noted in this regard that up to now, in India, a country with a multi-layered culture and ancient traditions, a number of specific mechanisms of alternative dispute resolution continue to operate, and legal concepts and peculiarities that had taken root in the previous period were not abandoned, which is reflected in Article 372 of the Constitution of India. Thus, as early as in ancient India, community professional organizations (the Gulas, the Kulas, the Shrenis) were involved in the resolution of disputes; the first records of these bodies date back to the 5th century BC. And so far, the panchayats (five-member councils being at the head of a caste, temple organization, or rural cooperative) are still involved in resolving disputes in some areas of the country (Great Soviet Encyclopaedia, 1978). That is, although after gaining independence from Great Britain India remained within the British Commonwealth of Nations and in the common law family, in many respects Indian law in general is peculiar in comparison to the English law, in particular, in the matter at hand, just as the US law differs from the English law, remaining generally within the common law family (David and Jauffret-Spinos, n.d.).

The *Lok Adalat* system was introduced for the first time at the legislative level by the Legal Service Authorities Act, 1987, which entered into force in 1989 with the purpose of implementing programs to provide qualified free legal assistance to poorly protected segments of the population.

In accordance with Section 22 of the 1987 Act, *Lok Adalat* is vested with the following powers: 1) calling and ensuring the appearance of witnesses; 2) examination of written or physical evidence of the case; 3) direct request for evidence, etc. That is, the procedure for

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considering a dispute by the People's Courts is similar to a court hearing (pleading, summoning and interrogating witnesses, providing evidence, etc.); however, the conditions for dispute resolution should suit both parties.

Lok Adalat may consider civil, labor, land and some other cases. The dispute shall be referred to *Lok Adalat* within an existing trial, either at the request of one of the parties, or at the discretion of the court (Section 1 of Article 20 of the 1987 Act). The parties may agree to transfer the case to the proceedings in *Lok Adalat* and out-of-court dispute settlement.

When considering cases, *Lok Adalat* is not guided by the provisions of the above CPC, 1908, and the Indian Evidence Act, 1872. Its activities are based on the principles of Mahatma Gandhi (Sharma, 2009). Therefore, the liability of persons conducting proceedings in the *Lok Adalat* is determined in accordance with Section 193, 219 and 228 of the Indian Penal Code 1860 and Section 195 of the Code of Criminal Procedure 1973.

As a rule, *Lok Adalat* consists of three authoritative people – former judges and junior members of the court – mainly of its administrative bodies, who are appointed for a certain term. In other words, the composition of this court is usually formed of current or retired judges, as well as other persons (Section 18, paragraph 2 of Section 19 of the 1987 Act).

Should one of the parties disagree with the proposed option of the dispute resolution, it is considered that the *Lok Adalat* failed to settle the dispute between the parties and the case is returned to the court (paragraph 5, Section 20 of the 1987 Act). Should the *Lok Adalat* succeed in resolving the dispute between the parties, a decision is adopted, which has the same legal force as the decision of any civil court (paragraph 1, Section 21, of the 1987 Act). Decision of the Lok Adalat is mandatory for the parties and there is no appeal, since it is deemed that the parties themselves had determined the conditions for the dispute settlement (paragraph 2, Section 21 of the 1987 Act).

The above advantages of the functioning and consideration of cases in the *Lok Adalat* proceedings have made this mechanism highly employable among the population of India. However, recognizing its merits, Indian researchers also point out the need for its further development to attract more qualified experts in resolving disputes, legislative consolidation of the dispute settlement procedure, in which one of the parties is represented by a government body, commercial disputes, etc. (Releya and Bhatt, 2009).

Thus, in India, the envisaged pre- and quasi-judicial dispute settlement procedure can lead to either a settlement agreement or to a compromise decision.

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According to a prominent comparativist René David (n.d.), the *Chinese* people are not interested in the norms that are contained in the laws, they do not go to court and regulate interpersonal relations as their sense suggests, following rather agreement and harmony than the law. This harmony is easy to restore because the Chinese have been brought up in such a way that they are looking for the causes of the conflict in their own mistakes, negligence, and oversight rather than in the evil will or inability of the rival. In an atmosphere where everyone is ready to admit their mistakes, people can easily be forced to make concessions and agree to mediation; fear of public opinion may make this consent coercive. The concept of out-of-court dispute settlement for the Chinese is a prerogative way of dispute resolution, in which preference is given to finding a way for a settlement agreement, while application of law is considered a major failure (David and Jauffret-Spinos, n.d.). This is one of the reasons why the state pays great attention to the development of alternative dispute resolution methods, the use of which has a long cultural tradition.

The Chinese legislation admits the use of such mechanisms and procedures for dispute settlement as 1) mediation/conciliation procedures; 2) arbitration (1994); 3) mediation in the arbitration trial (Arb Med) (Kaufmann-Kohler and Fan, 2008).

There are two ways to conduct pre-trial conciliation procedures in China.

The first method suggests the *mandatory* nature of conciliation procedures with the help of the People's courts of the People's Republic of China in accordance with the provisions of the Civil Procedure Code of 1991 (hereinafter – CPC, 1991), which contains Chapter 8 "Reconciliation" – the so-called judicial mediation, which implies carrying out procedures not only in the period prior to the trial, but also at the stage of the trial process. In this case, the judge conducting the pre-trial conciliation procedures, in the event of failure to achieve them, is not entitled to carry out court proceedings subsequently, and the judge conducting the conciliation procedures at the stage of the trial, in the event of their failure, continues to conduct court proceedings.

The second method suggests the *voluntary* nature of conciliation procedures carried out in accordance with the provisions of the People's Mediation Law, 2010 in People's conciliation commissions with the participation of People's intermediaries (there are other laws on mediation in China, for example, the Law of the People's Republic of China on the Mediation and Arbitration of Rural Land Contract Disputes No. 14 dated January 1, 2010; the Labor Dispute Mediation and Arbitration Law of the People's Republic of China dated December 29, 2007 and others (Young and Zhu, 2012) – the so-called *people's mediation*.

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The origins of the idea of alternative dispute resolution in *South Africa* should be sought in the adoption of the *Programs* (Law Commission Projects) on the most important legislative issues (paragraph 1, Article 5 of the 1973 Law), including Project No. 94 "Alternative Dispute Resolution" by the South African Law Reform Commission in 1997 within the framework of its powers and for the fulfillment of its objectives.

This Project includes a general description and recommendations on alternative dispute settlement procedure. In general, the Commission expresses the opinion that this procedure enables to resolve a dispute between the parties more efficiently and without extra costs and considers it necessary to develop this procedure at the legislative level. Although the outline of this process, for example, in relation to arbitration (which will be discussed below) can be found earlier.

The fact is that the exercise of the constitutional right to judicial protection by citizens meets in practice certain obstacles in South Africa due to the excessively high cost of court trial and the long duration of the process (as in other BRICS countries). Because of the heavy workload of the courts, the latter only investigate the evidence base in cases (the parties do not directly participate in the process), which affects the objectivity and fairness of court decisions. International practice over the past 20 years has shown an increased interest in alternative dispute resolution mechanisms worldwide based on *A Co-Existential Justice*, and South Africa is no exception. This form of justice has always been part of African or Asian (e.g. China, India) traditions, where conciliatory decisions looked more constructive than other legal remedies and often their application became a necessary condition (*sine qua non*) for survival.

In South Africa, the procedure for out-of-court dispute settlement is carried out through: 1) arbitration, 2) conciliation, 3) mediation, which are provided as an alternative way to dispute resolution in many legislative acts governing civil-commercial and public law relations.

There is no legislative definition of the term "conciliation" in South Africa, but a number of legal acts directly indicate the possibility of referring to this mechanism for resolving disputes between the interested parties (for example, Labor Relations Act No. 66 of 1995). The use of conciliation procedures in the consideration of commercial, labor and other disputes meets the objectives of justice, which include promoting the establishment and development of business partnerships between contractors, employees and employers, etc.

In practice, objective legal conflicts often arise when determining the differences (advantages and disadvantages) of such forms of ADR as the conciliation procedure and mediation. Undoubtedly, both forms of ADR turn to a consensual dispute resolution mechanism

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with the assistance of a neutral person (intermediary); however, there are fundamental differences. Thus, the intermediary is not authorized to make independent decisions that are binding on the parties. The intermediary's functions are limited to rendering assistance when determining the most acceptable way for the parties to resolve the dispute by familiarizing themselves with the written materials submitted thereby, hearing of the parties, proposing possible solutions to disagreements, etc. Thus, the decision, if it is reached, shall be accepted by the parties themselves, but with the assistance of an intermediary.

The Commission for Conciliation, Mediation and Arbitration, hereinafter – CCMA and Commission) is one of the mechanisms designed to achieve this goal. In the *Guidelines for Respondents*, which were developed by the Commission based on the aforementioned Labor Relations Act 1995, and supplemented with the CCMA Rules, the following advantages of the conciliation procedure are emphasized: voluntary participation of each party in all its stages, cost effectiveness, confidentiality and the ability to resolve the dispute in less time. All decisions reached between the parties in the course of conciliation procedures must be recorded in writing, and failure to comply with this peremptory norm entails the deprivation of the right of the parties to refer to the results of the compromise achieved in future.

Conciliation procedures may result in the conclusion of a *settlement agreement*, which is final and binding on the parties, and the issuance of a certificate of the conciliation procedure results by the Commission. The parties to the settlement agreement may apply to the court with a statement on its approval if one of the parties evades the fulfillment of the obligations stipulated by the agreement. However, reaching the agreement does not always become a basis for completion of the conciliation procedure. Thus, if the parties within 30 days could not reach a mutually beneficial compromise and did not agree to extend the term for conciliation commissions, the CCMA commissioner issues a certificate of results, based on which the parties turn to the arbitration procedure or directly to the court.

In general, conciliation procedures as an alternative way of overcoming disagreements are of growing interest in South Africa (Ampeire, 2017).

CONCLUSION

What can be said about the idea of ADR development, practical implementation thereof, and the benefits to the parties, the state and others? Undoubtedly, the courts of major contemporary states are loaded, overstretched, with regard to the current time, when justice has

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become even more accessible because of the development of cutting-edge communication technologies that make it possible to bring cases to court via the Internet, etc. Under these conditions, they seek to redistribute this burden based on the provisions of the Constitution and law. Entering into force and existing laws provide for a wide variety of out-of-court dispute settlement methods, which have both their advantages and their disadvantages. Some institutional constraints appear during their development (lack of premises that are separated from the courts; lack of qualified mediators, intermediaries, etc.); there are also psychological constraints in the form of the inability of society and the population to adopt a different procedure for protecting their rights, ignorance of the basics of ADR, etc. Nevertheless, in our opinion, this process cannot be stopped, it will only gain momentum, and the rest (judges, the public, etc.) only need to get used to and find ways to interact as successfully as possible in the new changing conditions.

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