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Mediation in Russia: Law Enforcement Issues, Tendencies and Prospects

Mediación en Rusia: cuestiones de aplicación de la ley, tendencias y perspectivas

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ABSTRACT

The article is devoted to the problems of law enforcement, trends and prospects for the development of mediation in Russia, examing the place and role of the mediation procedure in the alternative dispute resolution system (ADR). According to L.A. Sungatullina, the legislation on alternative dispute settlement procedures in Russia, is undergoing significant changes. However, in general, we can talk about progressive trends in legal regulation. The authors conclude that the decision of the legislator on the possibility of acting as a mediator by retired judges is controversial.

Keywords: Alternative dispute resolution (ADR), business law, conciliation procedures, conflict resolution, legal problems.

RESUMEN

El artículo está dedicado a los problemas de la aplicación de la ley, tendencias y perspectivas, para el desarrollo de la mediación en Rusia, examinando el lugar y papel del procedimiento de mediación en el sistema de resolución de alternativas y disputas (ADR). Según L.A. Sungatullina, la legislación sobre procedimientos alternativos de solución de controversias en Rusia, está experimentando cambios significativos. Sin embargo, en general, podemos hablar de tendencias progresistas en la regulación legal. Los autores concluyen que la decisión del legislador sobre la posibilidad de actuar como mediador por los jueces retirados es controvertida.

Palabras clave: Derecho mercantil, problemas legales, procedimientos de conciliación, resolución de alternativas y disputas (ADR).

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INTRODUCTION

Conflict situations are an inevitable part of human activity. There are no guarantees of complete absence of conflicts, which are one of the aspects of life in society. Often, the opinion of each party to the dispute is subjective, since it is difficult to see, feel and accept the position of the other party in the relationship. The conflict can help establish an objective truth (Pinkevich&Artemov: 2020). If the conflict itself does not necessarily have an exclusively negative character, then the methods of its resolution can be completely different (Fedorenko et al.: 2017). Even the forceful method is a way to resolve a conflict situation, the only question is the degree of effectiveness and satisfaction with its resolution by the parties to the conflict (Isaacson et al.: 2020). We should note that the most common is a judicial method of protecting rights and settling conflict situations (Isaenkova: 2013, pp.9-29). At the same time, like any method of resolving a conflict, the judicial method has both pluses and minuses. Choosing this path can lead to unpleasant consequences (Arkhipkina et al.: 2020). It is no secret that the judicial system is imperfect, litigation can last for years, the decision taken can be unpredictable and not satisfy any of the parties to the dispute, moreover, open processes and free access to the bank of court decisions make the dispute public (Argunov et al.: 2015). In addition, after lengthy and energy-consuming processes, the conflicting parties will hardly be able to maintain good partnership (Lewis: 2020).

That is why the progressive society of developed countries actively uses alternative methods of resolving disputes, one of the most effective and flexible of which is mediation (Hendley: 2012).

METHODOLOGY

The methodological basis of the research is a set of scientific techniques and methods of studying phenomena and processes, including methods of analysis, synthesis, comparative jurisprudence, as well as a formal legal method. The use of the proposed methods seems appropriate for several reasons. The formal legal method allows, on the basis of legislation, to form the conceptual apparatus applicable in the study, to identify the signs and characteristics of the institution in question. The comparative legal method takes an essential place in the work and allows you to explore the possibility of implementing foreign experience in legal regulation.

RESULTS

Historically, mediation as an alternative way of resolving conflicts has existed for a long time. Primitive society already used primitive methods of resolving disputes (Spencer&Brogan: 2006). The ADR system includes 3 main stages: negotiations, mediation, and arbitration (Beldam: 2014). However, the most flexible of the existing alternative dispute resolution methods is, of course, mediation. Mediation (from Latin - "to mediate") is a way of resolving conflicts arising between citizens, entrepreneurs, business entities, the state (Folberg& Taylor: 1984). Mediation, unlike other types of mediation, has a significant difference - mediators may have expert knowledge in the area that is the subject of the conflict (Engberg et al.: 2018). Unlike the traditional mediator, who focuses on the parties' awareness of their behavior, the mediator is aimed at the future vision of events by the parties to the conflict, and not at the analysis of the past (Alexander et al.: 2017).

Issues of alternative dispute resolution are regulated in different ways by various legal orders (Sungatullina et al.: 2019, pp.826-829). In Russia, the rules of the mediation procedure are concentrated in the Federal Law of 27.07.2010 No. 193-FZ "On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure)" (hereinafter - the Law on Mediation). In order to resolve the conflict, the parties turn to negotiations or resort to mediation, which is a type of negotiation where a neutral person - a mediator - takes part.

Mediation, by its legal nature, is an extremely effective way of restoring normal dialogue and communication between the parties to a dispute. The effectiveness of the procedure is due, among other things, to the fact that each of the parties addresses the issues of responsibility for the conflict by agreement with the other (Mikhailov: 2014, pp.86-95).

Despite the obvious advantages over other methods of dispute resolution, the mediation procedure in Russia is not popular enough. Most often, the parties turn to the judicial system, because they rely on the reliability of the decision, backed by the strength of state power. There are undoubtedly categories of conflicts that are almost impossible to resolve peacefully, by finding a compromise and active interaction between the parties and the help of an independent mediator.

According to Article 1 of the Law on Mediation, since July 2019, the mediation procedure is applicable to disputes arising from civil, administrative and other public legal relations, including in connection with the implementation of entrepreneurial and other economic activities, as well as disputes arising from labor legal relations and family legal relations.

Thus, the legislator extends the scope of possible application of mediation to administrative and other public relations. Previously, the legislator did not provide for such an opportunity, but often in practice there was a need to settle disputes with state bodies out of court. In our opinion, this practice can be quite successful in the conduct of state control (supervision) over legal entities and individual entrepreneurs, in the event of disputes with the Federal Tax Service or the Federal Antimonopoly Service, for example, in the field of housing and communal services (Izmailov&Baryshev: 2019, pp.112-121).

At the same time, mediation in disputes with public authorities can be effective only when the purpose of the public authority is not to impose a fine at any cost, but to effectively settle disputes.

Article 3 of the Federal Law No. 294-FZ of December 26, 2008 "On the protection of the rights of legal entities and individual entrepreneurs in the implementation of state control (supervision) and municipal control" establishes the presumption of good faith of legal entities, individual entrepreneurs as one of the principles of protection of the rights of legal entities, individual entrepreneurs in the implementation of state control (supervision), municipal control. In our opinion, the use of mediation in a dispute with a government body during control (supervision) will be effective and possible only if this principle is observed by the government body (Gareev: 2020).

The results of the reconciliation of the parties in disputes arising from administrative and other public legal relations may be, in particular, recognition of the circumstances of the case, agreement of the parties on the circumstances of the case; the agreement of the parties containing the qualification of the transaction made by the person participating in the case, or the status and nature of the activities of this person; partial or complete waiver of claims, partial or full recognition of claims, including as a result of the parties reaching an agreement on the assessment of the circumstances in general or their individual parts; amicable agreement, if the law refers to the conclusion of amicable agreements to the powers of the corresponding administrative body participating in the case (Shestakova: 2020).

At the same time, effective resolution of dispute through mediation requires the possibility of concluding a settlement agreement by state bodies, otherwise the procedure itself may turn out to be meaningless.

The organization of the procedure and assistance to the parties in resolving the dispute is assigned to a special subject - the mediator. Mediators are individuals who carry out relevant activities on a professional or non-professional basis. In both cases, such activity is not entrepreneurial and does not require registration of the person as an individual entrepreneur. Activities in mediation do not require a license or other permits; self-regulation in the field of mediation is exclusively voluntary (Sungatullina et al.: 2018, pp.2214-2217)

In addition, Article 16 of the Law on Mediation was supplemented with clause 1.1, according to which retired judges can also act as mediators on a professional basis. Lists of retired judges who have expressed a desire to carry out the activities of mediators on a professional basis are maintained by the councils of judges of the constituent entities of the Russian Federation.

Thus, the legislator allows retired judges to act as a professional mediator. However, there is no mention of the need for these persons to obtain additional professional education on the application of the mediation procedure. At the same time, the role of the mediator is not to make a decision on the dispute between the parties, as the court does. There are certain principles of mediation, such as:

1. Voluntariness. The parties are free to decide to join the procedure and can draw away from the procedure at any time.
2. Neutrality. The mediator does not defend the point of view of either side and remains a neutral party to the dispute.
3. Equality. The parties have equal rights, there are not two sides. The parties are equal in their statements, the right to be heard, the right to ask questions, and are equal in the rights to pay for the mediator's services.
4. Confidentiality. The mediator is obliged to keep in secret things he has heard and seen.

Consequently, the mediator does not have the right to make a decision for the parties, suggest and/or impose on the parties his position and vision of the situation, risking violating the main principle of the procedure - his neutrality and impartiality. The purpose of mediation is to do everything possible so that the parties to the dispute themselves find a solution and work out an agreement.

The role of a mediator is to organize negotiations, conversations. The role of the parties is to find answers and resolve the situation in the best way for both of them. It is very important for the parties to independently come to an agreement. This is a huge difference between judicial and mediated dispute resolution. And therefore, any professional mediator needs special training. The experience of resolving litigation can certainly be useful, but at the same time, one should take into account the specifics of the mechanism for conducting the mediation procedure, the sequence of actions of the mediator.

The parties' agreement on the use of an alternative dispute settlement procedure is confirmed by a written agreement concluded before or after the dispute arises, including in the form of a mediation clause. At the same time, the method of resolving the dispute should be specified definitely and not be probabilistic. If the case is referred to the court, mediation is a reason to postpone the case for up to 60 days.

In accordance with Article 12 of the Law on Mediation, the results of the application of the mediation procedure are formalized in a written mediation agreement, which must contain information on: the parties; the subject of the dispute; the mediation procedure carried out; the mediator; obligations agreed by the parties, conditions and terms of their fulfillment.

The legislation provides guarantees for the execution of the mediation agreement by the parties. A mediation agreement reached by the parties as a result of the mediation procedure carried out after the dispute has been submitted to a court or arbitration tribunal may be approved by the court or arbitration court as a settlement agreement in accordance with procedural legislation or legislation on arbitration courts, legislation on international commercial arbitration (Donada: 2020).

If the parties have used mediation before filing an application to the court, the mediation agreement can be formalized as a civil contract. A mediation agreement on a dispute arising from civil relations, reached by the parties as a result of a mediation procedure carried out without referring the dispute to a court or arbitration court, is a civil law transaction aimed at establishing, changing or terminating the rights and obligations of the parties. Such a transaction may be subject to the rules of civil law on compensation, on innovation, on writing off a debt, on offsetting a homogeneous counter claim, on compensation for harm. Protection of rights violated as a result of non-performance or improper performance of such a mediation agreement is carried out in the ways provided for by civil law. A mediation agreement is a civil-legal transaction and violation of its terms by the parties may entail consequences provided for by civil law for non-fulfillment or improper fulfillment of obligations.

DISCUSSION

The mediation agreement concluded following the mediation process must be real, enforceable and legal. The settlement of a dispute through the mediation process, regardless of its results, does not diminish the rights of the parties to seek judicial protection.

One of the main issues that reduce the popularity and effectiveness of the mediation procedure has always been the execution of the mediation agreement. Due to the amendments made to the Law on Mediation, the notarized mediation agreement reached by the parties as a result of the mediation procedure carried out without referring the dispute to a court or arbitration tribunal, has the force of an executive document.

Thus, without filing a claim in court, the parties to the dispute can contact the mediator, jointly develop the text of the mediation agreement, and then certify it with a notary. If the party does not comply with this agreement, you can contact the bailiff by providing a notarized mediation agreement. The mediation agreement will need to be certified by a notary with the obligatory participation of a mediator in accordance with the agreement of the parties on the mediation procedure. If the agreement of the parties on the conduct of the mediation procedure provides for the participation of several mediators, the mediation agreement is certified with the obligatory participation of at least one mediator who carried out activities to ensure the conduct of the mediation procedure. Such a mediation agreement must contain information on the participation of the indicated persons in its certification and their signature.

This change seems to be useful and extremely important for the development of the institution of mediation in Russia. Practice has shown that mediation is still an unusual way to resolve disputes and conflicts. The parties who resort to mediation want guarantees of the execution of agreements.

The execution of the mediation agreement is distinguished by the voluntariness of both parties to peacefully resolve the conflict. The guarantee of performance will be a mediation agreement certified by a notary. Prior to these changes, it was necessary to clarify that a mediation agreement as a civil contract can be challenged in court on the basis of non-performance. This means that it was necessary to apply to court, go through the process of judicial review, where it was necessary to confirm non-performance with evidence, wait for the court's decision and receive a writ of execution for compulsory execution.

In this case, the relevance of mediation as an alternative way of resolving a dispute was lost. After the changes, an individual or a legal entity no longer needs to think about a lengthy trial if there is a notarized mediation agreement on the form, timing and method of resolving the dispute. Such an agreement has the force of an executive document. A mediation agreement, certified by a notary and having the force of an executive document, should change the perception of the parties to the mediation procedure and increase its popularity as a truly effective way of resolving a dispute.

In Russia, the parties to the dispute still prefer to receive a document sealed by either a court or a notary. And giving legal force to the mediation agreement will become an important guarantor and advantage for its use.

Based on our study of the problems of law enforcement, trends, and prospects for the development of mediation in Russia, we can draw the following conclusions:

1. Legislation on alternative dispute resolution procedures in Russia is undergoing significant changes. The attention of the legislator is aimed at increasing the competitiveness of the mediation procedure, increasing the spread of this procedure and increasing the number of cases of using this procedure. Not all of the changes introduced are absolutely indisputable, but, definitely, we can see general progressive trends, and over time, their results will become obvious in practice.

2. Mediation, by its legal nature, is an extremely effective way of restoring normal dialogue and communication between the parties to a dispute.

3. Effective resolution of dispute arising from public legal relations through mediation requires the possibility of concluding a settlement agreement by state bodies, otherwise the procedure itself may turn out to be meaningless.

4. The decision of the legislator on the possibility of acting as a professional mediator by retired judges without establishing additional requirements looks controversial.

5. The possibility of enforcing the mediation agreement as a writ of execution is an important guarantee of its enforceability and a competitive advantage of the mediation procedure.

CONCLUSION

Our research allows us to identify trends in the development of legal regulation of the mediation procedure as an alternative way of resolving disputes, to identify the problems of law enforcement and development trends of this institution.

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