THE MEDIATION PROCEDURE IN THE SYSTEM OF ALTERNATIVE CONFLICT RESOLUTION IN MODERN RUSSIA

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Abstract. Currently, there are many ideas about conflict and ways of resolving them. Development of different scientific and methodological approaches that have proved its existence in the late twentieth century contributes to the generalization and systematization of understanding of the conflict. In the legal information field while resolution of conflicts quite a lot of attention is paid to the problem of congestion of the judicial system. It is possible to help solving the problem by using extrajudicial (alternative to court) methods of conflict resolution that have become popular in our country thanks to the entry into force on 1.01.2011 the Federal Law No. 193 (on mediation). It is important to note several advantages of mediation to the rest of the extrajudicial methods, but in comparative with them, it is not without some flaws. Based on the experience of other countries where mediation has been used for several decades, it can be assumed that this type of alternative conflict resolution techniques will be the most popular in modern Russia. The article discusses the possibilities and prospects of mediation in Russia.

Key words. Non-judicial methods, alternative methods, conflict resolution, mediation, negotiation, court

1 Introduction

Modern society is a complex and multifaceted phenomenon. It is characterized by numerous conflicts. The legal system gives us the confidence that conflicts will be resolved peacefully. But legal mechanisms in conflict management are not always effective in modern society because of its complexity. In some situations, alternative methods of conflict resolution are more effective. The basis of technique unit of the process of alternative conflict resolution is the number of basic postulates that characterize their perception.

2 Materials and methods

First we need to determine the categorical apparatus used in conflict resolution.

It is important to understand that conflict is a normal manifestation of social bonds and relations between people, a way to interact in the collision of incompatible views, positions and interests, confrontation of two or more parties, interrelated, but pursuing their goals.

It is necessary **to distinguish clearly the conflict from other manifestations of contradictions** – absence of simple consent, mismatch positions, the opposites of opinions on one or another vital issue. Conflict is a process having the following phase dynamics: pre-conflict or latent phase, open phase or the conflict itself, the phase of resolution and the so-called post-conflict syndrome.

The term “conflict resolution”, which is removing the underlying contradiction, is binding, but in practice it is not always possible in the foreseeable future. In this case, efforts to resolve conflicts, as a rule, aim at creating favorable conditions to resolve gradually the contradictions that led to conflict, overcoming the post-conflict syndrome – the continuing high level of mistrust in the relations between previously conflicting parties. It is obvious that in addition to the objective causes of the conflict, the subjective psychological component is also important.

It should be noted, that the set of actions through which the warring parties can come out from conflict, is limited, in addition, the military option, in the logic of game theory "zero – sum game", can hardly be satisfactory. The winner imposes "rules of the game", profitable for him, thereby stimulating revanchist sentiments on the losing side. A complete cessation of contacts between conflict sides is possible not in all cases, trial and extrajudicial settlement remain (Besemer,2004).

The shortcomings of the judicial system (congestion of vessels, the duration of the trial, the high cost of lawyers and others) become the catalyst for the formation of alternative dispute resolution. You need to pay attention to another feature: the judicial decision is not always accepted by the parties, the discontent is driven into the back of your mind and emotions, creating the threat of a new outbreak and escalation of the conflict (Bercovitch,1996).

To the main methods of alternative conflict resolution (Alternative Conflict Resolution, the official abbreviation ACR) usually refer: arbitration in the form of arbitration, negotiation, mediation.

3 Results

In literal translation, "mediation" means intermediation. The terms are often used as synonymous, while intermediation is perceived to be much broader than mediation. It assumes that the mediator can advise and persuade the parties to adopt a decision. The mediator in accordance with the principles, guiding the effectiveness of the procedure (equality, voluntary participation, neutrality of the mediator (States’ Alternative Dispute Resolution Statutes State of Utah,2002) and privacy), has no right to do so.

The judicial and mediation are in common with the principle of equality of the parties and inclusion the third instance in conflict resolution. Parties in mediation have equal rights in the selection of a mediator, procedure, behavior, information, in assessing the acceptability of proposals, the terms of the agreement, etc. It is important for the Mediator to ensure parties of conflict with equal right to participate in negotiations and decision-making. Use of procedures of mediation and reconciliation of conflicting parties also requires substantial legal knowledge (mediation refers to the unauthorized practice of law), but the mediation is significantly different from the trial:

1. Membership of the disputing parties in the mediation process is voluntary, the mediator is also freely selectable (in this respect similar to mediation, the arbitration court). In state court, the parties cannot choose the judge, and forced to go to court at the place of residence. Participate in proceedings for the accused is not voluntary. Similarly, the adoption of the sentence is not left to the free discretion of the parties.
2. If the task of the court is to determine which of the parties is right and who is wrong (or share the blame between them), then mediation is initially focused on the search for agreement.
3. If the court development and decision – making means the judge, in mediation this is done by parties of conflict.
4. In court, the plaintiff and the defendant have a duty to obey a court decision even if one or both sides are not satisfied with this decision. During the mediation, all decisions are made only by mutual consent of the parties, and they voluntarily assume the obligation to fulfil their joint decision.

5. Unlike the court process, mediation is confidential, and each party may at any time refuse to continue the interaction. The termination of the proceedings in court is only possible in case, if the plaintiff refused the claim and refusal is accepted by court, privacy is impossible, because in court there is a mandatory list of documents that should be made public.
6. The process of mediation is relatively short, while litigation can take months and even years.
7. Mediation can cost less than traditional judicial procedures.
8. Most of the people who come to court, where they speak the language full of legal terms, some important issues may not be considered for ethical or legal restrictions (because the judicial process is usually public). In mediation, the parties may raise any issues relevant to the conflict. The mediation process is quite flexible and allows for a deeper analysis of the situation and ultimately to improve the efficiency of settlement.

Thus, in mediation the outcome depends on the parties of the conflict. The parties can accept unconventional solutions, in the sense that they are not obligated to comply with the prescribed norms. Of course, in the resulting mediation agreements they must comply with General conditions and take into account the decisions which can be appealed, otherwise the agreement will be short-lived. However, within the framework there are opportunities for specific, appropriate case resolution. For purpose are solutions in which everyone wins.

One of the main drawbacks of mediation is the inadequate enforcement of decisions and the use by one of the parties of information, obtained during participation in the mediation for a further escalation of the conflict. These "defects" can be eliminated if the mediator is competent in his work and will be responsible to perform the function of "extender of resource", that is, in advance (legally correctly) will prepare the necessary documents for the procedure or use the opportunity to invite parties to go to a competent lawyer (or notary) for the successful completion of mediation for authenticating signed documents.

The procedure of mediation appeared in the US in the 20-30th years of the twentieth century. Since 1960-ies in the United States the concept of mediation in its current form began to develop. Currently in the United States are more than 700 mediation centers. Some are public, others are independent and regard themselves as an alternative to the existing judicial system. In this country appeals to the mediator occur in 75-85% of cases of conflict situations and the agreements reached during the mediation, are performed in 90-95% of cases.

To date, mediation has become widespread in legal and public practices of the countries with different geographical location and cultural specifics, becoming a truly universal form of dispute resolution, conflict resolution. The researchers think that the future of mediation is with further institutionalization and improvement of technological methods and expand the scope of applicability. (Moore,2003)

In our country in the early 90-ies of XX century the need for research of conflict resolution for the first time have been recognized at the state level, but within twenty years of mediation in Russia had no legal basis. Currently in Russia the use of mediation in arbitration and civil courts is governed by the Federal law No. 193-FZ "On alternative procedure of dispute settlement with participation of mediator (mediation procedure)" came into force on January 1, 2011. Training of specialists is conducted in accordance with the Training Program for mediators (approved by order of the Ministry of education and science of the Russian Federation , 2011 № 187).(Training Program for Mediators (Order of the Ministry of education and science of the Russian Federation dated February 14,2011) The acquisition of technology involves not only the assimilation of knowledge (information), but the real change of thinking in the understanding of conflict and the role of the mediator in the negotiations.

In general, its use is considered effective in more than 50% of cases. Approximately at a quarter of the cases it does not affect the course of conflict, and at 10% a negative trend is observed. Initially, much depends on the content of the conflict situation.

Before the beginning of negotiations, the parties and mediator should decide which strategy best fits their situation. The specialist helps the parties of conflict to identify interests, clarify long-term goals or to outline the possible in principle, the most probable and the acceptable solutions. It describes the main types of strategies for dispute resolution – competition, avoidance, adaptation, compromise and interest-based mediation and helps to identify criteria which the parties will be guided in the choice of strategies. The choice is carried out depending on time constraints, the nature of existing and desired relationship with the counterparty, on the balance of power and dynamics within the conflicting groups. One of the most important tasks of the mediator is to help the parties of conflict to coordinate their strategies, which can be repeatedly changed in the course of negotiations.

Which strategy will be implemented by the mediator is affected by: stage of conflict, the ability of the parties to resolve the dispute, the balance of power used in the negotiation procedure, the complexity of the subject of conflict, what the parties expect from the mediator. In developing the strategy, the mediator decides for what purpose, at what level and with what priorities will the intervention be implemented. He can concentrate on general problem solving or on specific issues; psychological, procedural or substantive aspects of the conflict.

4 Insights

It should be noted that mediation can be used for a variety of purposes: in order to indicate the subject of the dispute and the border of conflict more clearly and adequately; to develop rules of the game required for further dialogue between the parties about the final resolution of the conflict; to resolve the dispute and reach a mutually beneficial agreement; for a clear understanding of positions and interests of partners in the negotiation process at the conclusion of a contract; to prevent conflict; to develop a political solution taking into account the interests of the public. Such a wide range of applicability implies a diversity of approaches, techniques and methods, as well as the constant emergence of new and improvement of existing ones. We can conclude that the above-mentioned approaches in the national system of alternative resolution of conflicts in Russia will be set and settle down for a long period, since the Law on Mediation has entered into force only in 2011.

5 Conclusion

Six years have passed since the Federal Law № 193 "On alternative procedure of dispute settlement with participation of mediator (mediation procedure)" has come into force in Russia. The introduction of mediation as part of the system of alternative resolution of conflict is accompanied by certain difficulties.

We can assume that they will be identical in most regions of Russia, and their permission will be of a similar complex character. It includes: the legislative establishment of a category of cases in which mediation is obligatory before going to court; training of the judiciary competent proposal to the parties to mediation; creating the necessary conditions to promote this method of conflict resolution through the media; opening of Master's programs for mediation within the system of higher education. The practical implementation of the indicated points will contribute to a high efficiency of mediation in alternative conflict resolution in the Russian Federation.

One of such regions of the Russian Federation the Republic of Tatarstan, an example of which the features of development of mediation can be considered. A set of objects, the binder of which is conflictological activity can be called "conflictological cluster". So it can be divided into two types: educational and

applied part of the cluster. We'll try to enumerate the set of elements of each of them.

In the first part there are: the Center of Mediation, Conflict Resolution and Prevention of Extremism in Kazan Federal University (KFU); Department of Conflictology of the Kazan Federal University; Department of Conflictology of the Kazan national research technological University (Kazan chemical-technological Institute); Povolzhskiy Center of Legal Reconciliation (mediation) – Kazan University named after V. G. Timirjazeva; the Service of conflictological assistance KFU "1+1".

The University structure is the most wide niche in conflictological cluster of Kazan.

The second part of the cluster is: NP "League of mediators of the Volga region"; the Panel of mediators for conciliation procedures at the CCI of RT; ktsso "Trust."

Among the designated organizations an important role in the development of mediation in the Republic of Tatarstan plays a non-profit partnership "League of mediators of the Volga region".

Designated organizations occupy a significant place in conflictological cluster of Kazan. It is worth noting that there are such organizations, which ceased to exist due to lack of demand. It is important to understand that specialist of a new area should create the demand for his services to actualize the need of citizens in the use of conflictological help. Again, the obstacle is low awareness and mentality. Therefore, the first step is information work with the potential customers of the service, still new to Russia.

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