

MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION: WORLD EXPERIENCE

LA MEDIACIÓN COMO UNA RESOLUCIÓN ALTERNATIVA DE DISPUTAS: LA EXPERIENCIA MUNDIAL

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abstract

The present paper is devoted to the application of mediation as an alternative dispute resolution procedure. It defines features of the legal regulation of mediation procedures in different countries and legal systems, such as United States, European Union, China, and Russian Federation. In addition, the main principles of mediation and their implementation in different legal systems are analyzed in this paper. Furthermore, the reasons for the emergence of this institution in these countries are determined and the circumstances hindering development of mediation have been identified. Moreover, conclusions concerning the degree of development of alternative dispute resolution have been formulated.

Keywords: Civil Procedure, Mediation, Alternative Dispute Resolution, ADR, Conciliation.

Introduction

Litigation is the traditional procedure for resolving the legal disputes. However, in recent decades, the alternative dispute resolution (ADR) has been more paid attention to. One way is mediation. Problems of using mediation are among the most frequently discussed issues in the scientific legal literature. Moreover, this is a global trend. Therefore, debatable issues of using mediation are discussed in countries of Anglo-Saxon legal system (for example, United States, and Great Britain), countries of the European Union, Asian countries, Russian Federation, and so on (Folberg, 2019; Goodin, 1999; Silvestri, 2012; Knut, 2013).

The increased attention to mediation is not an accident. Mediation involves the possibility of resolving a dispute between parties through engaging a mediator. In mediation, the neutral mediator assists parties in reaching a settlement; however, it does not have the authority to make a binding decision. Mediation can provide an effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of parties. Agreements resulting from mediation are more likely to be voluntarily complied and they are likely to preserve an amicable and sustainable relationship between parties. According to the international practitioner in the field of mediation, L. Sasskind, the need for stability in business relations with the inevitability of disputes in the field of business relations is the main factor in proliferation of alternative dispute resolution methods (arbitration, mediation) (Brown, 2009).

In addition, development of mediation forms of resolving legal disputes can help solve the problems of workload of the judicial system, need of increasing the number of judges, need of increasing budget for maintenance of the judiciary. For example, legal proceedings of the United States in recent years have considerably succeeded in solving this problem. The workload of judges was actually reduced and a system of participation of legal community in general administration of justice was created (Shabalina, 2016).

In Russia, this legal institution is at the initial formation stage. In this regard, a comparative analysis of Russian legislation in this area is required with legislation of the developed countries with a market economy.

METHODS

Various general scientific and logical cognition methods are used in the present work, including analysis and synthesis, as well as systemic,

functional and formal-logical approaches. The conclusions were easily developed by application of formal-legal and comparative-legal methods.

RESULTS AND DISCUSSION

Traditionally, competence of the judiciary was the resolution of legal disputes. Against this background, in contrast to court proceedings, mediation is described as alternative dispute resolution (ADR). Mediation procedure is cheaper and faster than litigation. It also helps preserve the personal and business relationships that will inevitably be corrupted during the trial. Thereby, people are using mediation to settle their disputes more and more. A successful mediation means that both sides come out from the process with a measure of satisfaction (win-win). The mediation is aimed at allowing parties to find a resolution to their conflict in a sustainable and self-determined way. One of the advantages of mediation is its procedural flexibility, allowing parties and the mediator to tailor mediation procedure to the needs of individual conflict. A mediation session can be designed in any way that parties' beliefs would be most useful to the resolution of their dispute.

About 80 countries and international organizations have simultaneously made mediation laws and established mediation service institutions to promote and support its use to resolve disputes on the one hand, with a view of satisfying the requirement of people and to dissolve negative effects brought about by the declining systems of litigation and arbitration on the other hand (Tang Houzhi *Worldwide Use of Mediation*, 2019).

Voluntariness is one of the essential features of mediation. For a successful mediation, it is necessary to have mutual desire of parties to discuss the problems with which the parties (or one of them) wish to go to court. If parties would like adopting mediation as a part of their contractual dispute settlement procedure, they can include mediation clause in their contract. Additional characteristics are procedure's confidentiality and mediator's neutrality.

In the United States, interest in alternative dispute resolution was raised in the 1960s. This period was characterized by strife, conflict, and discontent in American society in many ways. The court load had significantly increased; however, the court funding had been constant. At the same time, to resolve neighborhood disputes, the community-based mediation programs grew up outside the courts. In family law disputes, mediation was quickly found to be a valuable tool, and courts and litigants soon realized that using mediation was not limited to family disputes, but it could be extended to other civil disputes as well.

Some legal service programs began experimenting mediating and arbitrating in cases where neither party could afford lawyers. Soon, mediation, often conducted by lawyers in their own offices, became the most popular form of alternative resolution of various legal disputes (Folberg, 2019).

The Alternative Dispute Resolution Act of 1998 necessitated all federal district courts to establish an ADR program. As in many state courts, participation in some ADR processes, including mediation, may be compelled in federal courts. Mediation in the US is not easy to be categorized or described in general terms, since each State and local jurisdiction utilizes mediation as it deems appropriate for the local environment. Therefore, laws governing mediation vary from State to State within the United States (Alternative Dispute Resolution Act of 1998).

By the late 1980s, particularly at the beginning of 1990s, mediation has become an increasingly popular procedure in all types of civil cases. In fact, probably, it is now the most popular form of alternative dispute resolution used by litigants in civil cases in the United States. Moreover, due to its flexibility, it is increasingly used not only in civil disputes but also in criminal cases. Currently, mediation is often used in commercial disputes in the United States. Since mediation is private, there is no accurate data on national use (Goodin, 1999).

On May 21, 2008, the European Parliament and the Council approved Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008). As stated in Article 1, the Directive was mainly aimed at encouraging the use of mediation by “ensuring a balanced relationship between mediation and judicial proceedings”. In cross-border disputes, this Directive must be applied to civil and commercial matters. It shall not extend, in particular, to revenue, customs or administrative matters or to liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii* (Government’s right action)).

The principle of voluntary mediation is clearly implemented by the Directive. Article 5 states: “In Proportion to and concerning all circumstances of the case, a court before which an action is brought may invite the parties to use mediation in order to settle the dispute”. The court may also invite parties to attend an information session on the use of mediation provided that such sessions are held and are easily available.

The Directive is only applied to cross-border disputes. Several EU member states have gone further and enacted legislation that also caters for domestic mediations. Nearly all EU countries

have implemented the Directive, albeit in slightly different ways. Mediation is now better understood by businesses and organizations. For example, in England, resort to mediation within the heartland of commercial disputes has increased.

The active implementation of alternative dispute resolution procedures is currently taking place in Germany, France, and Italy.

In the modern civil procedure in Germany, laws are the same as provisions of the Russian legislation. The laws establish the duty of judges to perform actions to reconcile the parties. For instance, Article 278 of the Code of Civil Procedure of Germany (*Zivilprozessordnung* (ZPO)) (Code of Civil Procedure of Germany, 2019), prescribes the judge “to make maximum efforts to reconcile the parties”. In addition, the enactment Mediation Act (*MediationsG*), allows the judge to invite parties to a mediation session or other dispute settlement procedure. In France, Article 21 of the current Code of Civil Procedure prescribes with a similar duty for the judge to attempt to reconcile the parties (Code of Civil Procedure of France, 2019).

The rules of Directive 2008/52/EC are reflected in Italian law to the greatest extent. According to E. Silvestri, Italy is a clear example of a Member State implemented the Directive in connection with solving problems of a defective civil justice system. This is because the average duration of Italian civil cases is the longest one in Europe. The binding nature of mediation is the main feature of the Decree. In approximately 90% of civil and commercial disputes, mediation must be undertaken by the parties as a prerequisite for access to the courts. A multi-level system of material incentives, as well as a system of financial penalties, is designed to facilitate mediation. However, E. Silvestri notes that compulsory mediation has not been positively received by Italian society as a whole (Silvestri, 2012).

In spite of the significant advent of mediation institutionalization in European countries, the development of ADR in continental Europe is uneven in the United States and many other common law jurisdictions. Lawyers from civil law jurisdictions tended not to be as familiar as their law colleagues with mediation. They often have little understanding of mediation and how to use it (McFadden, 2015).

The unusual importance of mediation in resolution of disputes is one of the most striking features of the legal system of the People’s Republic of China. Mediation-based resolution has a long tradition in China. The importance of mediation can be traced back to the philosophy of Confucianism as well as the extra-judicial mediation gained acceptance in China due to the

socialist approach to involve the populace in solution of conflicts more directly, thereby having an educative effect on the people (Knut, 2013).

The form of judicial mediation for conciliation purposes is an integral part of the modern Chinese civil process. According to the Article 9 Civil Procedure Law of People's Republic of China, judicial mediation is based on two principles, legality and voluntariness (Civil Procedure Law of the People's Republic of China, 2019). Hence, if the conclusion of a settlement agreement becomes obviously impossible, the court must immediately decide on merits of the dispute. The due date for trial must be respected, too.

Experience shows the success and relevance of judicial mediation in China. The number of concluded mediation agreements tends to increase. Thus, according to the statistics of the Supreme Court of People's Republic of China, the percentage of cases examined in the framework of judicial mediation (of the total number of civil disputes) is rapidly increasing (Tai & McDonald, 2012). This is due to the certain advantages of judicial mediation, such as 1) an accelerated process of resolving a dispute between the parties and 2) the final nature of the mediation agreement that cannot be the subject of an appeal.

As an alternative dispute resolution procedure, mediation has relatively recently appeared in Russian legislation. The legal basis is the Federal Law of Russian Federation (2010) "On the alternative procedure for settling disputes involving an intermediary (mediation procedure)". Article 3 of this Act specifies the basic principles for regulating this procedure. Thus, the mediation procedure is carried out with mutual will of the parties and according to the principles of voluntariness, confidentiality, cooperation and equality of the parties, as well as impartiality and independence of the mediator. Under these conditions, the function of a mediator can be performed by organizations coordinating economic activity (Mityakina et al, 2018; Zare et al, 2014).

Over the past eight years, the mediation institution has passed the stage of initial development. The mediation procedure takes a certain place as an integral mechanism of out-of-court settlement of legal disputes. However, development of this mechanism in Russia is not fast. The demand for a mediation procedure and, therefore, the number of settled disputes are still quite low. There are groups of obstacles in the scientific literature, in particular including:

- Organizational (novelty mediation procedures, lack of qualified professional mediators, low level of educational work);
- Economic (high cost of services of professional mediators, lack of interest of judicial representatives);

- Psychological (high degree of conflict of relations in society, non-recognition of the mediator's authority, low level of legal culture) (Samokhvalov, 2016).

Overcoming these obstacles depends on the will of the state, the corresponding efforts and time.

CONCLUSION

Analyzing topic of this research showed the different degree of mediation development in various countries. As an alternative dispute resolution procedure in the legal field, mediation was originated in the USA in 1960s. This procedure has shown its efficiency, for example in resolution of commercial disputes. In the countries of the European Union, mediation has been actively introduced just in the current century. The Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters had a significant impact on mediation development. In most European countries, this Directive was the basis for development of national legislation regarding mediation. In its legislation, The Russian Federation has also included a special mediation act. However, this mechanism is not quickly developed in Russia.

We can also talk about different degrees of ability to accept the possibility of out-of-court dispute resolution by population of different nations. For example, China is historically and mentally predisposed to out-of-court settlement of disputes. Going to court in China is considered a major setback, and therefore extrajudicial (out-of-court) resolution of conflict situations takes precedence for the conflicting parties. The Russian mentality implies priority of resolving disputes by another person with authority. Consequently, mediation in Russia is developing hard.

CONFLICT OF INTEREST

The authors confirm that the information provided in the present paper does not contain a conflict of interest.

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