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The Russian National Model of Conciliation Procedures: Ways to Reach

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ABSTRACT
The article reveals the idea of forming a Russian national model of conciliatory procedures, based on the development of a private and integrated model of mediation and negotiations. Authors invoke private mediation to be extended for pre-trial stage, following stage of the judicial process, including judicial review and enforcement proceedings. Moreover, the state could provide financial benefits for citizens who preferred mediation instead of the court. Also, the state policy may provide mediation as a type of judicial assistance. In addition, the business might be motivated by the state to include in contracts mediation agreements. A for integrated mediation, court workers and assistant judges, state and municipal servants, notaries and private lawyers could implement mediation techniques in their professional activity. The business begins to establish conflict management systems at enterprises and organizations. Negotiations also start to become a vital step as a conflict-solving method in conciliatory procedures.
Keywords: *civil procedure, commercial procedure, mediation, negotiations, ADR, notary, advocacy, conflict management*

1. INTRODUCTION

In order to improve the quality of justice, each state is interested in the development of conciliation procedures, such as negotiations and mediation. This problem is relevant for both the Russian legal system in general and the Russian judicial system in particular due to the increasing from year to year caseload.
Of course, steps on creating and improving the legislation are extremely necessary and important for the development of extrajudicial and pre-trial reconciliation. At the same time, it is necessary to take into account that this work will bring a positive result and be effective not only when conciliation procedures are used after a dispute has been filed in court (the latest novels of the procedural legislation are designed for this purpose), but also at other stages of the appearance and development of a legal dispute. These days, it is necessary to create a Russian National Model of Conciliation Procedures, which should be comprehensive and responsive to dealing with a legal dispute in various areas of legal activity.

2. METHODOLOGY

Authors of this article made an attempt to highlight the rule of law that currently regulate conciliation procedures in Russia and analyze this legislation in accordance with the needs of Russian citizens, Russian legal system, especially judicial system, and private practical lawyers. Identifying these needs the weaknesses in legal regulation were found as a basement of following legislation development.
The results of the legal experiments conducted in Sverdlovsk, Lipetsk and Perm regions on implementation mediation in civil procedure and the work of state and municipal servants were analyzed and approved for their high and stable results.
The authors also kept track of the foreign countries experience to use comparative law as a guide to identify pros and cons of particular steps in creating the Russian national model of conciliatory procedures [4, 5, 13].

3. RESULTS

The Chapter 61 of the Labor Code of the Russian Federation [6] regarding the settlement of collective labor disputes and the Chapter 15 of the Rules of Commercial Procedure of the Russian Federation [12] dealing with the regulation of conciliation procedures and also a settlement are supposed to be first Acts attempted at legislative consolidation of legal basis on conciliation procedures in Russia.
The adoption of Federal Law No. 193-FZ dated July 27, 2010 “On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)” [1, 3] was an important step in the development of the Russian system of conciliation procedures. The next significant step was the initiative of the Supreme Court of the Russian Federation, expressed in amendments to the Rules of Civil Procedure [11], the

Rules of Commercial Procedure, the Rules of Administrative Procedure [10] on further development of conciliation procedures in civil and commercial proceedings, as well as in administrative one. Nowadays we could observe a substantial interest in reforming civil procedure [7] that could include modernization of conciliation procedures in many ways.

4. ANALYSIS

The basis of the Russian National Model of Conciliation Procedures can be mediation and negotiations as special technologies for the legal disputes' settlement aimed at finding a mutually beneficial agreement in a legal dispute. There is reasonable number of advantages to implement conciliation procedures in legal activity. First, the state incurs minimum costs. Then, the percentage of voluntary execution of the reached settlement agreements is high: the experience of the Russian regions that actively use mediation in legal disputes indicates that the percentage of voluntary execution of mediation agreements is very close to 100%. Moreover, problems in the area of compulsory enforcement are excluded because filing to the court for receiving a writ for compulsory execution of a court settlement agreement based on mediation agreement are practically not encountered in practice. Furthermore, there is no need in the judicial review after conciliation procedures. Additionally, the caseload is reduced in view of the exclusion of grounds for going to court with new suits; clients does not go to court with new requirements after the parties have agreed in the framework of mediation. All these factors show the high efficiency of the application of these technologies in the settlement of legal disputes.

What could be the principle of the formation of a domestic model of conciliation procedures? Developing the Russian National Model of Conciliation Procedures as a system for the settlement of legal disputes, it should be assumed that mediation is specially organized negotiations with the participation of a special subject (a mediator) who assists the parties in resolving a legal dispute and developing a solution that meets the interests of each party. Due to this approach, mediation can be implemented both as a private model and as an integrated one. In the framework of this article, we will try to consider the main directions of development of both models, and the way how they can be implemented in the activities of the national courts, the bar and the notaries.

5. DISCUSSION

5.1. Benefits of realizing a private model mediation.

Firstly, it is necessary to expand the scope of mediation to all potential legal disputes. In particular, it should be possible to turn to a mediator not only at the pre-trial stage, but also at any other following stage of the judicial process, including judicial review and enforcement proceedings. Such a right must be established at the legislative level.

On the one hand, compulsory execution is an area where legal relations are already indisputable because a dispute about the right to the time of enforcement proceedings has already been resolved by a court or other jurisdictional institution. On the other hand, despite the fact that the legal relationship has gained certainty, this does not always mean that the legal relationship between the people is indisputable and conflict-free. There is statistics that indirectly evidences about mediability of conflicts between parties of compulsory execution by the annual increase in the number of new enforcement proceedings and of the actual execution of judicial and non-judicial acts. The presence in the procedural legislation of the right to conclude a settlement agreement, including at the stage of execution, allows us to talk about the possibility of using mediation in enforcement proceedings. Even at present, the absence of detailed provisions on the use of mediation in enforcement proceedings in the Federal Law "On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (mediation procedure)" and in the Federal Law "On Enforcement Proceedings" should not be regarded as the lack of the possibility of mediation. The legislation in this case is formulated according to the "permissible type" (everything which is not explicitly forbidden by law is allowed), and not according to the "permissive type" (everything that is not allowed is forbidden). In addition, the experience of the Sverdlovsk, Lipetsk, Perm and some other regions testify to the successful use of mediation as part of compulsory execution.

Secondly, in order to inspire participants in a legal dispute to transfer a dispute for settlement from a court to mediation, a system of providing financial benefits should be developed and legislatively established. It should contain provisions on the return in full or in part of the state duty and execution fee. These measures, as international practice shows, are good incentives for contacting a mediator in order to resolve legal disputes. Even though the Russian state duty is rather low, for some commercial cases it still could be a reasonable argument to try to settle.

Thirdly, it is necessary to determine the legal nature of assistance in conducting mediation in legal disputes. According to the substance of legal regulation in the Law on Mediation and the reasons for introducing mediation into the Russian legal system, mediation should be considered as one of the types of judicial assistance. International practice follows a similar path. This approach allows us to solve the important task of guaranteeing this type of legal assistance from the state for poor citizens who cannot afford to pay the costs of mediation.

Fourth, the development of a national system of conciliation procedures and the inclusion of mediation assistance as a type of judicial assistance would create the conditions for introducing mandatory pre-trial mediation

in certain categories of cases, which would lead to a reduction in the caseload. In order for this idea to be realized in practice, the important issue of forming a professional corps of mediators who would have good legal training and could carry out activities in each region of the country should be resolved. Currently, the number of mediators in the regions of the country is unevenly distributed. There are areas where no professional mediators exist. To solve this problem, the potential of notaries and advocates should be used.

In particular, empowering notaries with competence to conduct mediation would be effective and not requiring organizational and financial costs [8]. There are all reasons and conditions for this. Thus, the notarial community of Russia has extensive experience in the development of mediation and conciliation procedures, which can be put into practice in a fairly short time. Since 2009, the Federal Notary Chamber has been implementing mediation courses for notaries. Currently, many notaries from different regions of Russia have already completed mediation training and can begin to exercise the powers of mediators.

The notary, as well as the advocatory community, are enough representative; there are at least 8,000 notaries in the country. Such a number of professional lawyers could cover the need for mediation practice if mediation is introduced as a mandatory pre-trial stage in the resolution of a legal dispute. Notaries as well as advocates carry out activities in each administrative region, their activity is close to the population, and they work even in those areas where there are no courts and mediators. The notarial and legal community has a clear organization, structure, governing bodies, which ensures the high quality of judicial assistance. In this regard, it will not be necessary to organize new structures. Expanding the corps of mediators through the inclusion of notaries and lawyers will increase guarantees for participants in the mediation process to provide qualified assistance, since there is a complex procedure for admission to the profession and high-quality standards of the activities are guaranteed. The activity of a mediator does not contradict notarial and advocate work; moreover, they have general principles of activity. Lawyers and notaries who wish to provide legal assistance in resolving legal disputes in the framework of mediation should receive additional education under the relevant program.

Fifth, it is necessary to unify substantive legislation regarding the suspension of the deadlines for going to court if the parties apply mediation instead of filing a suit. So far, such norms exist only in the Civil Code of the Russian Federation, but there are no similar rules in other codified acts (Labor, Family, Housing and other codes).

5.2. Prospects for the development of mediation as an integrated model

This model is used as a competence of jurisdictional institutions: court, notary or other public authorities. The potential use of mediation techniques lies in the area that those techniques can also be used by those entities that due to legislative restrictions, cannot be mediators, for example, judges, state and municipal employees). Often their professional activity is connected to reconciliation of the parties in a legal dispute.

Firstly, the further development of an integrated model of mediation in judiciary should be continued. As a beginning, the institution of judicial conciliator has been created and has started to work in 2019. Another way to develop integrated model of mediation is empowering conciliation conducted by assistant judges, who have undergone special training. Moreover, the judges might expand their functions of conciliation. In accordance with applicable procedural legislation, court workers and assistant judges plays an organizational role. At the same time, at the stage of initiating and preparing the case they could provide the parties with an assistance in reconciliation. Such experience is already available. In particular, in the practice of the courts of the Perm and the Lipetsk Regions, court workers who are engaged in the reception of citizens apply reconciliation technologies. As a result, at the stage of initiating a civil case the plaintiff withdraws the claim due to the settlement with the defendant.

The development of an integrated model of mediation in litigation can go along with the active involvement of the judicial community in the heading of parties for mediation [9]. In this regard, the current procedural legislation should provide judges with the right to send participants to the mediation in those cases when they believe the parties have prospects to resolve their dispute in mediation. In this case, the parties will be required to go to the mediation procedure. It can be formalized that if mediation is carried out in the direction of the court, the state will bear the costs of paying several hours of mediator work, for example, two or three hours. A similar practice exists in foreign countries, for example, in the USA [5]. If during the period provided by law the parties did not come to some decision and did not express a desire to continue the mediation process, then the trial should continue. The party that did not comply with the court's order to mediate might be subject to sanctions. In foreign practice, in such cases all legal expenses are incurred on this side, even if the court decision is made in its favor.

Secondly, in addition to the development of an integrated model of mediation in judicial activity, it is necessary to pay attention to the realization of this model in other areas of legal activity in order to provide an integrated approach to the development of a Russian National Model of Conciliation Procedures. So, mediation organically fits into the notary of the Latin type. It is based on the active role of the notary in resolving disagreements, including those arising according to the performance of any notarial acts, such as registration of inheritance rights, resolving the issue of division of marital property, etc. Therefore, along with the authority to perform notarial acts and to conduct mediation, notaries can conduct conciliation procedures within the framework of the notarial process itself. Conducting a conciliation procedure will be an

exception to the general procedure for performing notarial acts - the "extraordinary" stage of notarial proceedings. Such a model should be implemented in the legislation on notaries.

If the parties agree to a conciliation procedure, then a suspension of notarial proceedings should be provided for reconciliation of the parties. There are several results reached in the conciliation procedure. The first is the settlement on disagreements that previously stopped a notarial act. In this case, the notary will resume notarial proceedings and perform notarial acts. The second is a failure to reach an agreement. Thus, instead of refusing to perform a notarial act and sending the parties to court, the notary will be able to propose a conciliation procedure as part of the notarial process, which will reduce the number of filing suits to the court. Therefore, the potential capacity of a notary can be used both for the development of a private model of mediation, when notaries can be mediators in any legal dispute, and for the development of an integrated model, when reconciliation of the parties will be one of the functions of a practicing notary. In both situations it prevents parties of the dispute bring a case to court.

Thirdly, conciliation procedures must be included in the activities of government bodies of the Russian Federation, government bodies of constituent entities of the Russian Federation, and local self-government bodies. Dispute resolution work should be carried out at different levels, including settlement of a dispute between citizens by the relevant authorities. Best examples to implement mediation in professional work are children's services commissions for minors. Also, mediation can be used in conciliation of disputes between authorities and citizens. For example, in the Perm Region, the mediation techniques were introduced and implemented in the activities of the state and municipal employees. After passing special training in the program “Mediation Techniques in the Activities of State and Municipal Servants”, it is noted that the number of complaints about the actions of authorities, as well as the number of legal issues settled with the participation of authorities without. going to court, increased significantly. The implementation of this model of mediation is also relevant in the activities of the Human Rights Ombudsman, the Rights of the Child Ombudsman, and the Entrepreneurs Rights Ombudsman.

Fourthly, an integrated mediation model should be incorporated into the conflict management systems at enterprises, organizations, including the business [2]. The implementation of this idea is to empower the legal departments and legal services of organizations with the mandatory pre-trial settlement of legal disputes. The rules on the mandatory pre-trial settlement of a legal dispute as part of the conciliation procedure can be provided in legislation of different branches of law, for example, on disputes arising from insurance contracts, bank loans, consumer protection, etc. Moreover, they could be reached as conditions of the contract. At the same time, the provisions of the procedural and substantive legislation should be unified in terms of the legal consequences of non-compliance with mandatory pre-trial mediation based both on the law or the contract. In such cases, the court should not initiate proceedings. However, the judge is obliged to return the claim to the plaintiff only if the plaintiff does not substantiate in it for what good reason, she cannot realize the possibility of pre-trial settlement of a legal dispute in mediation.

6. CONCLUSION

In addition to the development of mediation, it is necessary to use the potential of such a conciliation procedure as negotiations. Negotiations as a conciliation technique is a specially organized and managed procedure for the settlement of a legal dispute when the participants are “resources” for each other in achieving their goals and interests. To work in negotiations as a conciliation technique special training is needed [13]. The parties have the right to choose this type of conciliation procedure both instead of a trial at all or as a pre-trial stage of the settlement of a dispute. Nevertheless, negotiations do not exclude the possibility of settling a legal dispute by providing negotiations first and then mediation.

Thus, to reduce the caseload in courts, it is necessary to create the National Model of Conciliation Procedures, which would include mechanisms for implementing private and integrated models of mediation and negotiations. At the initial stage, these types of conciliation procedures would ground the foundation for the Russian National Model of Conciliation Procedures on the basis of which the further development would proceed.

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