

Legal Opinions of Settlement Agreement by Procurator

Byvaltseva S.G.^{1,*} A.A. Kovalev¹

¹ Ural State Law University, Yekaterinburg, Russia

*Corresponding author. Email: russianeng@mail.ru

ABSTRACT

The article analyzes the right of procurator to the opinion of a settlement agreement with his participation in consideration of civil and arbitration cases by courts. Despite the fact that issues related to the matter and procedure for the opinion of a settlement agreement were subject of scientific analysis, not all aspects received proper coverage, such as the participation of procurator in the opinion of a settlement agreement. This fact, as well as various positions of civil and arbitration law on this issue, have created contradictions in judicial practice and science. Meanwhile, the procurator's right to enter into a settlement agreement would allow expanding the scope of resolving legal conflicts in the most preferable and effective way. To address this issue, the legal nature of the settlement agreement and the standing of procurator were studied. Based on undertaken a study, authors come to the conclusion that court practice and academic circles do not deny the possibility of opinion of settlement agreement by a procurator, on the basis of which such a legal approach can be perceived by the current legislation.

Keywords: *civil process, adjudicatory proceeding, settlement agreement, procurator*

1. INTRODUCTION

The opinions of settlement agreement is one of the forms of liquidation of a legal conflict, which has advantages over a court decision, creating a real possibility of voluntary performance of the obligation by debtor. It is noteworthy that according to the disposition principle of party are entitled to end the matter by settlement agreement at preparation the case for court trial if the parties' actions do not contradict the law and do not violate the rights and legitimate interests of others. Thus, goals of dispute settlement are achieved in the most economic mode.

Despite the fact that settlement arrangements that allow settling a civil case without a rendering of judicial decision are becoming more widespread, many issues of opinion of settlement agreement remain unadjusted and understudied. Meanwhile, the study of the legal nature and subject composition of participants in a settlement agreement is an extremely important issue, since it affects the correctness and timeliness of resolving civil cases. Supreme Court of the Russian Federation draws attention to this, pointing out to the courts the need to start preparing a civil case for trial with an analysis of legal relations and establishment of specific holders of rights and obligations. The issue of the parties in a settlement agreement, despite its apparent certainty, contains unresolved issues that are not regulated by current legislation. One of them is the issue of whether the procurator has the right to conclude a settlement agreement.

Procurator is a key player in civil and arbitral procedure, influencing its course, and in Chapter 5 of the Arbitration Procedural Code of the Russian Federation "Persons participating in a case and other participants in arbitral

procedure" governing the rights and obligations of persons participating in case, among them that procurator in accordance with Clause 3 of Article 52 of the Arbitration Procedural Code of the Russian Federation enjoys procedural rights and bear procedural obligations of plaintiff. If procurator has right to enter into a settlement agreement, it would be possible to expand the scope of resolving legal conflicts in the most preferable and effective way, therefore, the decision on whether the procurator has the right to enter into a settlement agreement is important for science and established practice in applying the law. It is necessary to analyze the legal nature of settlement agreement and the legal status of procurator in civil proceedings to resolve this issue, as well as a judicial established practice in applying the law. Selected aspects of matter under inquire have already been the issue of consideration in research letters. In particular, many scientists paid attention to the study of nature and specifics of a settlement agreement as a tool for the peaceful settlement of civil disputes and considered the application of settlement agreement in various categories of court cases. Also, in science of civil proceedings and procurator's supervision, attempts have been made to determine the status of procurator participating in civil and arbitration cases by courts, with an analysis of both the entire range of his powers and individual powers that are not sufficiently regulated by current legislation; such as the right to give an opinion. It is worth noting that neither the legal nature of settlement agreement, nor the legal status of procurator has not developed a single position. With regard to the study issue of the right of procurator on opinions of settlement agreement in considering civil and

arbitration cases, multicenter study on this issue have not been conducted, although it is worth noting that few studies on the issue of settlement agreement of procurator for certain categories of cases exist.

In these articles, the authors also might not agree on agreement of opinion of procurator to enter into a settlement agreement, which is due, as we can see, not only to the lack of a unified position on the issue of the essence of settlement agreement and status of procurator in civil proceedings, but also different approaches to regulating the legal status of procurator and scope of his powers in civil and arbitration procedural legislation.

On the basis of objectives of this article is to examine the currently available scientific standpoint, current legislation and litigation practice aspects regarding the essence of settlement agreement and legal status of procurator involved in civil and arbitration cases-handling to resolve the issue about the role of procurator at legal opinion of settlement agreement and development on basis of matter under investigation.

2. RESEARCH DESIGN

Present research conducted on the basis of special juridical cognition methods in particular, using the method of comparative law to determine the main aspects of legal status of procurator and technical method. It was also used a method of historical analysis of legal rules governing the opinion of settlement agreements; the method of system and structural analysis to study the individual components of the legal status of procurator involved in civil and arbitration handling- cases in courts.

Logical methods were used for the theoretical interpretation of empirical facts, such as deduction and collation to develop legal recommendations on the participation of procurator in the opinion of a settlement agreement.

3. RESULTS AND DISCUSSION

Based on the results of the research conducted, it can be concluded that the settlement of the dispute in a non-conflict form, more precisely, elimination of conflict by the will of parties was known to Russian law for a long time. Even the Council Code of 1649, fixed the practice of compromises at different stages of the judicial process. In the late 19th century, compromise was considered the preferred way of dispute settlement not only for the parties, but also for country, therefore, in Acts regulating civil proceedings, such as the Charter of civil proceedings and the Laws on civil proceedings, we can find not only rules that determine the procedure for concluding and approving compromises, but also provisions that establish the duties of judges to persuade the parties to compromise. It is worthy of note that civil law regulations of that period contained a provision for the return of duties and fees to the parties in the event of their compromise before the case

was resolved on merits. Position on establishment of the duty of judges to persuade the parties to compromise can be traced in modern judicial practice; for example, Supreme Court of the Russian Federation recommended that the courts explain to the parties the advantages of ending the case by opinion a settlement agreement, that the definition of approving a settlement agreement is not inferior to the court's decision and is also enforced .

Modern legislation also contains provisions on a settlement agreement as a willful way to resolve the conflict. Thus, the Code of Civil Procedure of the Russian Federation in Article 39, right to conclude a settlement agreement among the rights of parties. However, the court does not approve the settlement agreement if it violates the rights and legitimate interests of other persons or prohibited by law. The Arbitration Procedural Code of the Russian Federation in Chapter 15 "Settlement arrangements. Settlement agreement" regulates the procedure for concluding a settlement agreement, determines its form and content. However, current legislation does not define a settlement agreement, which leads to discussions about its essence and legal nature.

Analyzing litigation practice, we can see that the settlement agreement shall be considered as the agreement of parties about the dispute on basis of voluntary settlement of recriminatory claims and assertions of reciprocal adjustments, and one of the procedural means of protection of legal rights ; agreements to which in addition to the rules of civil law shall apply rules of procedural right, because it must be approved by the court ; civil procedural means of dispute settlement .

Speaking about the nature of settlement agreement, it can be noted that in opinion of most researchers that it is dual in nature [1] because along with the fact that it has a substantive component because it includes the obligations of parties to resolve a legal dispute, it cannot be denied its procedural-legal nature; because, in order for it entailed legal consequences, necessary set of procedural legal facts. Reasoning from this fact, although a settlement agreement is defined as " an agreement on the terms of resolving or terminating a civil dispute [2], or an agreement between the parties on terms of resolving a legal dispute on acceptable conditions [3], settlement agreement cannot be identified with a civil transaction, and therefore has significant differences.

Thus, in addition, the expression of will, when opinions of a settlement agreement, an executive directive of the court is required, which approves the expression of will. In addition, parties cannot terminate this agreement after approval by court. "Transaction" can only be revoked if the act of court by which it was approved is revoked. It is worthy of note that instituting legal proceedings for invalidating the settlement agreement approved by the court is also impossible.

In terms of subject composition of the participants in the settlement agreement, it can be noted that it is limited mainly by the parties. Procedural legislation that grants the right to perform procedural actions to other entities makes an exception for a settlement agreement. For some persons involved in the case, procedural legislation establishes an

absolute prohibition on the opinion of a settlement agreement. This prohibition is established, in particular for procurator in article 45 CCP of the Russian Federation, where it is explicitly said that procurator enjoys the procedural rights of a plaintiff, except for right to conclude a settlement agreement, third persons, not declaring independent requirements concerning a subject of dispute (Part 1 of Article 44, Part 2 Article 51 of the Arbitration Procedural Code of the Russian Federation). As for representative, may be noted that Article 54 of the Code of Civil Procedure of the Russian Federation regarding the powers of the representative in civil proceedings, and Article 62 of CCP of the Russian Federation point to the need to specifically stipulate the right of the representative to conclude the settlement agreement in the power of attorney issued by the represented person.

Decide the issue of procurator's ability to enter into a settlement agreement when considering civil or arbitration cases, it is necessary to analyze its legal status in civil proceedings.

In member states of the Council of Europe, more than 30 procurator's offices have powers outside the criminal law sphere, including the function of procurator's participation in civil proceedings with different levels of authority, although in many of them it is significantly limited, such as in Germany, where procurator only represents in court the interests of a citizen recognized as dead [4]. In Russian civil proceedings, the procurator has broad powers similar to those of procurator in civil proceedings in France [5] and Kazakhstan [6].

At the same time, it can be stated that the Russian civil procedure law does not define the legal status of a procurator. Article 45 of the Civil Procedural Code lays down provisions in accordance with which procurator has the right to go to court in interests of a particular person, general public, interests of the Russian Federation, its subjects, municipal formations and in this case, the procurator has the procedural rights and obligations of plaintiff with some exceptions. Also, this article provides for the possibility of procurator entering into an already started case to give an opinion.

Article 52 of the Arbitration Procedural Code of the Russian Federation grants the procurator the right to appeal to the arbitration court with applications to challenge legal acts of government and local self-government bodies relating to the rights of organizations and citizens in economic domain; as well as with a claim to invalidate transactions that were made by authorities and local self-government bodies, state and municipal unitary enterprises, institutions and legal entities; with a claim to apply the consequences of invalidity of an insignificant deal made by these entities; with a claim for reclaiming state and municipal property from unlawful possession by other persons. It also provides for the right of procurator to enter the process in these cases to give an opinion.

It is worthy of note that the Arbitration Procedural Code of the Russian Federation, indicating that the procurator who appealed to the arbitration court, enjoys procedural rights and bears the procedural duties of a plaintiff, does not set

restrictions, as does the Civil Procedural Code of the Russian Federation. An important refinement of the Arbitration Procedural Code of the Russian Federation is that when the procurator comes into the case, which is considered by the arbitration court, procurator has procedural rights and duties of person, participating in the case, in order to law enforcement. CCP of the Russian Federation does not clarify this issue. Neither the Arbitration Procedural Code of the Russian Federation nor the CCP of the Russian Federation in addition to the above provisions, does not define the legal status of a procurator.

The uncertainty of the legal status of procurator in civil and arbitration procedural legislation has given rise to a discussion on this issue in scientific literature, and the existing legal provisions regarding his legal status have served as the basis for several main points of view.

The first of them has existed for a long time [7], and according to it, procurator involved in civil cases is the plaintiff, since the civil procedure law refers to the persons involved in case, procurator has the rights and obligations of plaintiff, with the exception of the civil process of right to conclude a settlement agreement and the obligation to payment of costs. Argument in support of position was served by the fact that the filing of a statement of claim the presence of a defendant on such an application, and since there is a defendant, there must also be a plaintiff, which in this case is procurator filing the claim and enjoying almost all the rights of plaintiff in case. According to scientists, "the relationship of court with procurator is determined in the same way as a relationship with the party, procurator and the individual act as co-plaintiff" [8].

It is an obvious point that procurator cannot be a plaintiff in the case since procurator has no material interest in resolving the dispute completely. Plaintiff in case will be the person, in whose interests the application is filed.

Another group of scientists pointed out that a procurator initiated the case with his statement is a plaintiff only in a procedural sense [10], thus referring it to the side of the process. Considering in this case also the concept of legal interest-material and procedural interest, supporters of this theory rely on the fact that procurator uses the procedural rights and obligations of plaintiff, but at same time procurator has no material interest in the outcome of case. Also, it is not subject to any consequences of court's decision.

However, appears that this position cannot be supported because the status of procurator not identical to status of plaintiff, and although the Civil and Arbitration Procedure Codes give him rights of plaintiff, CCP of the Russian Federation, however, assigns to the procurator of restrictions on disposal of certain rights and procurator does not answer the question of status of procurator in joining the process for giving an opinion.

Another position regarding the procedural status of procurator is based on the fact that procurator is a special participant in the process, whose status cannot be equated with a plaintiff even from a procedural point of view (some refer to this status as a "government agent"). One of the varieties of this position is the classification of procurator as a person involved in the case, in order to

protect the interests of other persons, as well as state interests. They also include state bodies, local self-government bodies, and other bodies [13]. According to the author of this position, only sign that the subject can be assigned to a group of persons involved in the case, maybe a procedural interest in it.

Circumstantial evidence in favor of this point of view can serve as a reference in Part 5 of Article 52 of the Arbitration Procedural Code of the Russian Federation, that procurator comes into the case "in order to provide of law" and based on fact that goal is a goal towards which established and operates the procurator's office as a public authority, the latter position seems most founded.

The wording of Part 3 of Article 45 of the Civil Procedural Code of Russian Federation, which defines that in civil proceedings, the procurator gives an opinion on the case in order to "exercise the powers assigned to procurator" is more unfortunate and generates various discussions in this regard.

Issue of status of procurator entering civil process for giving an opinion is one of most problematic, since the Civil Procedural Code of Russian Federation, which determines that procurator, who filed the application, has the rights and obligations of plaintiff, does not mention the rights and duties of procurator, who joined the process for giving an opinion, and only attributing a code of attorney to persons involved in case suggests that in case, procurator has the appropriate rights and responsibilities. In contrast to the Civil Procedural Code of the Russian Federation, the Arbitration Procedural Code of the Russian Federation clarifies this issue, indicating that procurator, who entered the case before the arbitration court has the procedural rights and obligations of person participating in the case, in order to ensure legality.

According to the study of judicial practice, can conclude that the number of cases closed by a settlement agreement, is low – about 1.5-2% , and not the last role in this is insufficient knowledge and clarity in legal aspects of settlement agreement. In particular, with regard to the participation of procurator at opinion of settlement agreement, in accordance with the position expressed by the Supreme Arbitration Court of the Russian Federation in decree of the Plenum of Supreme Arbitration Court of the Russian Federation from March 23, 2012, No. 15 "On some issues of participation of procurator in arbitration process" , if the case was initiated at the request of procurator, it can be completed by opinion of settlement agreement, provided that it involves not only all commercial interest but the procurator.

4. CONCLUSION

The study allows us to propose new legal provisions regarding the participation of procurator in the opinion of a settlement agreement. Procurator is a special participant in civil and arbitration process, related to persons involved in case, in order to protect the interests of other persons, as well as state interests, and with certain exceptions, has the rights of plaintiff. Studying civil and arbitration procedural

Although this decision does not answer the question of procurator's rights in opinion a settlement agreement, fact that a special mention is made of the procurator's participation indicates a certain position of the highest court on the issue of procurator's role in opinion a settlement agreement if the proceedings were initiated on application.

Courts have interpreted this determination is ambiguous. Taking into account the position of Supreme Arbitration Court of the Russian Federation and provisions of Part 3 Article 52 of the Arbitration Procedural Code of the Russian Federation, according to which the procurator, who has addressed in arbitration court enjoys the procedural rights and bear procedural obligations of plaintiff, and the right to conclude settlement agreements, among others, belongs to the plaintiff (Part 4 of Article 49 of the Arbitration Procedural Code of the Russian Federation), some courts have interpreted it as a statement of fact about the possibility of the procurator to conclude a settlement agreement since the wording of Para. 4 Clause 11 of the resolution of the Supreme Arbitration Court of the Russian Federation No. 15 does not explain in what form the procurator takes part – whether he signs the settlement agreement directly or gives an opinion on the possibility of its conclusion, and concluded the case with the approval of the settlement agreement concluded between the procurator's office and the second party . In other cases, a procurator participated in the opinion of a settlement agreement in the form of giving an opinion on this issue, and the conclusion of the agreement itself was carried out directly by the parties .

Based on the above norms of the Arbitration Procedural Code of the Russian Federation, the trial ended with the opinion of a settlement agreement between the procurator and defendant before the adoption of the mentioned decision of the Supreme Arbitration Court of the Russian Federation .

Thus, can be seen that judicial practice does not deny the possibility of opinion a settlement agreement by a procurator. The scientific community does not deny this possibility. For example, a proposal is justified to give the procurator the right to enter into a settlement agreement on environmental cases initiated in connection with the procurator's appeal to protect the interests of the Russian Federation and an indefinite circle of persons, provided that all interested parties are involved in the process [14].

legislation, can conclude about the different approaches to the question of the possibility of procurator to conclude a settlement agreement; in particular, if the Civil Procedural Code of Russian Federation contains a direct reference to the absence of procurator the right to conclude the agreement, the Arbitration Procedural Code of the Russian Federation does not mention, just pointing out that procurator, who applied to the arbitration court, enjoys procedural rights and bear procedural obligations of plaintiff, and the right to conclude settlement agreements, among others, belongs to plaintiff.

Based on results of the analysis of judicial practice, it can be concluded that courts, based on above provisions of the Arbitration Procedural Code of the Russian Federation, come to the conclusion that procurator can participate in the opinion of a settlement agreement – in form of giving an opinion or directly signing a settlement agreement. It is submitted that this situation needs to be clarified, including at the legislative level. It is obvious that civil and arbitration legislation, as linked by a single concept of protection of civil rights, should contain unified rules regarding the legal status of procurator and powers, including the opinion of a settlement agreement by procurator.

One solution to this issue could be to include in the Arbitration Procedural Code of the Russian Federation provisions on the absence of procurator's right to enter into a settlement agreement, as done in the Civil Procedural Code of Russian Federation.

However, if the regulation of the procurator's participation in the opinion of a settlement agreement follows the path of denial of his participation proposed by the Civil Procedural Code of the Russian Federation, this will limit the possibility of resolving a legal conflict in a way that has advantages over a judicial decision. Based on the meaning and content of rules governing settlement arrangements (Chapter 15 of the Arbitration Procedural Code of the Russian Federation "Settlement arrangements. Settlement agreement"), as well as the tasks of arbitral proceedings (Clause 6 of Article 2 of the Arbitration Procedural Code of the Russian Federation), a court-approved settlement agreement is such a procedure the method of dispute settlement that entails the elimination of the dispute in full. The validity of the approach proposed by the Civil Procedural Code of the Russian Federation can be questioned, as remedial legislation, but restricts the ownership of the rights to certain entities in relation to the representative indicates the possibility of granting him authority to conclude a settlement agreement power of attorney issued by the represented person.

There is no unified position regarding the settlement agreement in civil proceedings based on fact that in science, namely in consideration of agreement of civil-legal transaction, and given the opportunity of exercising the right to opinion of a settlement agreement other persons, established by the Civil Procedural Code of Russian Federation, it is possible to optimize civil and arbitration process to interpret the provisions defining the conditions of realization of the right to conclusion of a settlement agreement by the representative in civil proceedings, taking into account characteristics inherent in procurator, as a representative of state and other interests, since this is position regarding its legal status that prevails in modern science.

Based on the results of study, the following legal model can be proposed: procurator, who filed the application shall enjoy all procedural rights and bear all procedural obligations of the plaintiff, except for the obligation to pay court expenses. When a procurator applies to protect the legitimate interests of another person, the procurator may

enter into a settlement agreement if there are no objections from that person or legal representative.

REFERENCES

- [1] S.K. Zagainova Correlation of mediation and settlement agreements: current issues of litigation practice, *Russian Juridical Journal*, 5 (2018), 92-96.
- [2] A.I. Zinchenko. Settlement agreement in legal proceedings (abstract for a doctorate, academic degree Doctor of Juridical Science), Saratov, 1981, P. 10; G.V. Voronkov. Judicial decisions on approval of the settlement agreements and protection of citizens' rights in Soviet civil proceedings. Saratov, 1962, p. 228.
- [3] R. Ghukasyan. Problem of interest in Soviet law of civil procedure. Privolzhsky book publisher, Saratov, 1970, p. 146.
- [4] M.I. Khavronyuk. Procurator's office in German: no law, but there is order [Electronic resource] Bill. Available at: http://www.zakonoproekt.org.ua/prokuratura-pominetsjki-zakonu-nemaje-a-ordnunch-je_.aspx (date of foreclosure: February 10, 2020).
- [5] Gilliéron G. Public Prosecutors in the United States and Europe. A Comparative Analysis with Special Focus on Switzerland, France, and Germany. Brig, 2014. p. 387. DOI: <https://doi.org/10.1007/978-3-319-04504-7>.
- [6] G.K. Sabyrbaeva Civil case on the prosecutor's appeal. "The Bulletin of KazATC" scientific Journal, 6 (91) (2014), 238-243.
- [7] M. S. Strogovich On the system of science of judicial law, *Soviet state and law*, 3 (1939), 66-67.
- [8] A.A. Ferenc-Sorotsky. Procurator in civil legal proceedings, *Bulletins of higher education institutes. Legal science*, 4 (1992), 91-95.
- [9] O.A. Gureeva. Problems of determining the legal status of procurator in civil proceedings *Arbitration and civil proceedings*, 8 (2010), 16.
- [10] Adjudicatory proceeding: textbook / responsible editor V.V. Yarkov. The second impression of the textbook. M.: Wolters Kluwer, 2003, pp. 129-130.
- [11] Review on the Arbitral Procedural Code of the Russian Federation (article-by-article) / responsible editor M.S. Shakaryan. M.: TC Welby, Avenue, 2003, pp. 128-129.

[12] T.K. Andreeva. Does procurator in the arbitration process require a mandatory pre-trial (claim) dispute resolution mechanism? *Bulletin of economic justice of the Russian Federation*, 4 (2017), 4-8.

[13] E.A. Treshcheva. Subjects of arbitration proceedings: Author's abstract Dr.Sc. Law. M., 2009, p. 8.

[14] S.F. Afanasyev, I.Yu. Zakharyashcheva. Settlement arrangements and settlement agreement on environmental disputes arising from civil relations *Bulletin of civil procedure*, 4 (2018), 62-73.