

Judicial Reconciliation is a New Direction in the Development of the Ideology of Peaceful Settlement of Disputes

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ABSTRACT

The article analyzes the new Russian arbitration process, the institute of judicial conciliation that appeared in the APC in 2019. Special attention paid to the new Russian law procedural figure – an judicial mediator, and study its functions. The positive aspects of the introduction of judicial reconciliation are also analyzed. The study is available in Russian and world practice experience in the application of alternative dispute resolution methods ways of further development of conciliation procedures in the Russian civil process: improvement of legal procedural mechanisms to improve the attractiveness of peaceful settlement of the dispute, the realization of the potential reconciliation of the parties by a judge hearing the case, the strengthening of informing parties about mediation procedures, involving representatives of the parties, including lawyers companies, lawyers in the conciliation procedures, etc. In the course of the research, general scientific and private scientific research methods were used: dialectical, systemic, formal legal, fragmentary historical and legal analysis, and fragmentary comparative legal analysis.

Keywords: *alternative dispute resolution methods, mediation, settlement agreement, conciliation procedures, judicial conciliation, judicial conciliator*

1. INTRODUCTION

In world practice, there are several dozen different types of conciliation procedures: negotiations, mediation, arbitration, mediation-arbitration (med-arb), conciliation, mini-trial, independent examination to establish the actual circumstances of the case, ombudsman, private court system, etc. Today, some foreign scholars share the view that traditional court proceedings, rather than conciliation, have become an alternative way to resolve a dispute. Court proceedings should serve as a last resort for resolving the conflict.

In the Russian legal reality of the XXI century was marked by the search for alternative ways of dispute resolution: the introduction of mediation, a preferential regime for settlement agreements in court, etc. 2020 – a new stage in this direction is the approval by Resolution of the Plenum of the Supreme Court of the Russian Federation 31.10.2019 No. 41 of the Rules of trial reconciliation (further - Rules). In 2020, lists of judicial conciliators were approved.

A judicial conciliator is a retired judge who is included in the list of judicial conciliators approved by the Plenum of the Supreme Court of the Russian Federation. The Plenum of the Supreme Court of the Russian Federation approved 342 judicial conciliators, based on the calculation for each subject of the Russian Federation from 1 to a maximum of

5 judicial conciliators. For example, for the Sverdlovsk region – 5 courts conciliators: two retired judges from the Sverdlovsk regional court, two from the Arbitration court of the Ural district, and one judge from the Central district military court. In the Udmurt Republic, three retired judges, all from the Arbitration court of the Udmurt Republic, became judicial conciliators; in the Republic of Bashkortostan, five judges, also all from the Arbitration court of the Republic of Bashkortostan.

The drawback is obvious even before the judicial conciliators start working: it is unlikely, for example, that two judicial conciliators from arbitration judges are enough to assist the parties in disputes in the Arbitration court of the Sverdlovsk region and the Arbitration court of the Ural district – this is 100,000 cases annually.

Conciliation procedures with the active participation of the court take place in various countries (in particular, in the Republic of Belarus, the Republic of Kazakhstan, Slovenia, Germany, the Netherlands, Canada, etc.). And Russia has its own traditions. In the middle of the XIX - early XX centuries, commercial courts in Russia used to attract conciliators from the court, along with non-state conciliators.

2. WHAT DETERMINED THE ADOPTION OF THE CONCEPT OF JUDICIAL RECONCILIATION?

Despite the efforts made to introduce mediation and encourage settlement agreements, 2% of cases in arbitration courts are completed with settlement agreements. Before 2014, the result in arbitration courts was slightly higher-3.5%. Even in courts where reconciliation has been cultivated for a long time, judges are trained in mediation techniques of settlement agreements are not enough. In 2019 in the Arbitration court of the Sverdlovsk region – 2.7%, and in the Arbitration court of the Udmurt Republic in 2020 - 2.6%. In courts of general jurisdiction, settlement agreements are concluded even less frequently: 0.5% of civil cases and 0.01 % of administrative cases.

From 2011 to 2017, conciliation procedures involving mediators were used in the consideration of 0.008 % of cases by courts of general jurisdiction and in the consideration of 0.002% by arbitration courts. In fairness, we can assume that the parties often turn to the mediator, but the courts do not have the relevant information. In 2019 only 11 mediation agreements were concluded in arbitration courts, and 1,200 for 19 million cases were concluded in courts of general jurisdiction.

These numbers are very small given the ever-increasing number of cases in the courts. A large workload in the courts is first of all a huge problem for the parties to the dispute.

For comparison, in the US Federal courts in 1962, 11.5 % of civil cases were considered in the court of first instance, in 2002, already 1.8%. As the author of the article from which this statistics is given, Mark Galanter, points out, the number of lawyers, legal literature, and documents is increasing, except for cases considered in court sessions. So, for each Federal district judge in 1962, there were 20.8 civil cases, in 2002 – 7.4! One of the reasons for this phenomenon, which the author of the article called "vanishing trials", which take place in connection with the appeal of the parties to alternative forms of dispute resolution, including mediation.

3. WHAT IS THE ESSENCE OF JUDICIAL RECONCILIATION BEING INTRODUCED IN RUSSIA

First of all, the functions of a conciliator are performed by a retired judge-a specialist in this field who knows the practice, which is especially important for arbitration disputes, where, without being an experienced lawyer, it is difficult to help in a difficult economic dispute.

The form of work of a judicial conciliator is negotiation, which is the basis of any form of reconciliation.

The analysis of the judicial reconciliation procedure shows that the proposed model is a mixture of arbitration and mediation.

The judicial conciliator is working:

1. With the circumstances of the case (in the civil procedure, we would say with the subject of proof): it establishes the actual relationship of the parties, the content of their relationships and claims;
2. With the evidence:
 - the judicial conciliator studies the case file with the consent of the judge;
 - examines evidence submitted by the parties;
 - invites parties to submit additional documents and materials;
 - invites the parties to conduct a reconciliation of mutual settlements;
 - discusses with the parties their understanding of the terms of the disputed agreement;
 - invites the parties to check the reasonableness of both claims and objections to them.
3. Discussion of options for an acceptable way for the parties to resolve the dispute.

It is important that the judicial conciliator has the right to terminate the judicial reconciliation before the expiration of the judicial reconciliation period, which will help to combat the abuse of the parties to the dispute, who sometimes only seek to delay the solving of the case in court. Parties' behaviour can be manifested in the following: do not observe the prescribed procedure and principles of judicial reconciliation; he or she does not come to the appointment with a court mediator; delay the holding of the court of reconciliation, to hamper activities of the judicial mediator; abuse their rights, as well as if there are other circumstances that prevent the conduct of judicial reconciliation (article 26 of the Rules). In addition, the judicial conciliator may conclude that the dispute cannot be resolved through judicial conciliation. In these cases, the judicial conciliator draws up a reasoned written refusal to conduct a judicial reconciliation, which is transmitted to the parties to the judicial reconciliation no later than the next day.

What is the advantage of judicial reconciliation for the parties:

- Judicial reconciliation is free for the parties. The payment procedure must be determined separately by the Government of the Russian Federation.
- Reconciliation is possible at any stage of the process and in the execution of a judicial act.
- Informal conciliation procedure, which is determined by the parties in agreement with the judicial conciliator, taking into account the

provisions of the procedural legislation and these Rules.

- The parties participate in the selection of a judicial conciliator and must agree with the candidate (paragraph 3 article 15 of the Rules).
- Principles of reconciliation (articles 2-7 of the Rules). Special mention should be made of voluntariness and confidentiality. Voluntary judicial reconciliation determines that reconciliation is carried out at the request of the parties (the party with the consent of the second party) or at the suggestion of the court (oral or written), but with the consent of the parties. The parties determine the judicial conciliator

Confidentiality of court reconciliation covers the provision stating that the parties, the judicial reconciliation and other persons present at the forensic reconciliation, is not entitled without the written consent of both parties to refer to in the proceedings in the court on the views expressed or suggestions made by a party in respect of a possible reconciliation; confessions made by one of the parties during the procedure; the willingness of one party to accept an offer of reconciliation made by the other party; the information contained in the document prepared solely for judicial reconciliation.

- The period for reconciliation is set by the court, but at the request of the parties, it can be extended or completed ahead of schedule (article 11 of the Rules);
- The ability to return to a judicial procedure that was previously either postponed or suspended;
- The result of reconciliation can be: a settlement agreement, a reconciliation agreement, or an agreement based on actual circumstances. A waiver of the claim or a recognition of the claim in whole or in part is also not excluded.

4. MEDIATION AND JUDICIAL RECONCILIATION ARE CLEARLY NOT ENOUGH TO CHANGE THE PICTURE OF RECONCILIATION BETWEEN THE PARTIES

4.1. It is necessary to constantly work on a procedural and legal mechanism that encourages the parties to reconcile.

In order for the spirit of reconciliation to prevail over the desire to sue, the entire procedural mechanism should encourage alternative ways of resolving disputes, not just

the institution of judicial reconciliation. Steps have also been taken in this direction:

- Increased the amount to be refunded to the plaintiff from the Federal budget 70% of the state fee paid when approving a settlement agreement in the trial, 50 % in appeal, 30 % in cassation and supervision instances.
- The possibility of a longer adjournment of the court session in order to reconcile the parties.
- Disclosure of evidence that allows the parties to weigh the prospects of the dispute and on this basis to enter into a settlement agreement, to reject the claim or to recognize the claim in full or in part.

Federal law No. 197 of 26.07.2019 was adopted, which amended the procedural codes taking into account judicial reconciliation, but not only:

1. There are three types of conciliation procedures (negotiations, mediation, judicial reconciliation) And a reservation is made about the possibility of applying other forms, if this does not contradict the law.
2. Options for the results of negotiations are Provided:
 - settlement agreement for all or part of the claimed claims;
 - partial or complete rejection of the claim;
 - partial or full recognition of the claim;
 - full or partial rejection of an appeal, cassation, or supervisory complaint (submission);
 - recognition of the circumstances on which the other party bases its claims or objections;
 - agreement on the circumstances of the case;
 - signing a letter of consent for state registration of a trademark.

Recognition of circumstances on which other party bases its claims or objections may be made in the form of unilateral declarations accepting the position of the other side or in the form of an agreement on the circumstances of the case (article 138.6 Arbitration Procedural Code of the Russian Federation).

3. The settlement agreement is extended to both types of third parties (to some extent), the limits of settlement agreements are extended-the circumstances are broader than in the adversarial documents. A settlement agreement may be entered into for legal expenses.

4. Witness immunity is extended to judicial conciliators.
5. Information about the attempted reconciliation shall be indicated in the adversarial documents.

4.2. We should not discount the need to develop reconciliation by the judges themselves in order to conclude amicable agreements between the parties.

Since all settlement agreements today are 99 % the result of the work of judges. As early as 1986, recommendation No. R(86)12 Of the Committee of Ministers of the Council of Europe on measures to prevent and reduce excessive workload on the courts indicated the need to promote reconciliation of the parties at the stage of proceedings in order to reduce the number of cases before the courts and improve the quality of the administration of justice. The Committee of Ministers proposed that as one of the main tasks, judges should be obliged to seek reconciliation of the parties and conclude a settlement agreement on all relevant issues at any stage of the proceedings.

For example, in California, the judge hearing the case can conduct a judicial reconciliation. If the parties were unable to reach a settlement agreement, the judge, after asking the parties whether they trust this judge to resolve their dispute, considers the case and makes a decision. If the parties do not trust the judge, the case would be solved by another judge.

The Russian mentality, according to which the attitude to appeal to the court for a resolution of the dispute can not be discounted. A modern Russian plaintiff would rather go to court. In 1856, N. A. Nekrasov correctly reflected the Russian mentality-in the hope of power: "Here comes the master-the master will judge us". Many active judges successfully help the parties to reconcile, many modern foreign mediators started their way as judges.

Some figures: for 900 decisions on the termination of proceedings in the case due to reconciliation of the parties, only one is appealed to the cassation. Usually, every third or fourth judicial act of the court of first instance is appealed. In other words, in a settlement agreement, 1 appeal instead of 300. Moreover, the decision to terminate the proceedings in the case due to the conclusion of a settlement agreement can only be appealed to the cassation, passing the appeal. It is also convenient for the parties - the dispute is over in the court of first instance. There is no need to spend time and money on appeals and participation in court sessions of higher courts.

Another advantage of reconciliation is that it is voluntary enforcement. For example, about 20% of decisions on the termination of proceedings in the case due to the

reconciliation of the parties are issued writ of execution, which may not yet be presented for execution. Since settlement agreements are mostly concluded for award disputes, where Executive orders are supposed to be issued, in the above case 180 Executive orders were issued instead of 900, if there were no reconciliation.

When choosing a path, it is not a matter of literal compliance with the generally accepted idea of a mediator, but of introducing the desire for reconciliation into our legal culture. At the first stage of this path, such people can be and already are judges. It is a sin not to use a mechanism that is already working.

4.3. Support and development of all forms of reconciliation. Special attention is paid to the work of lawyers, business lawyers, and legal representatives.

Their work will contribute to reconciliation at both the pre-trial and trial stages. For these purposes, attention should be paid to conciliation procedures at the University stage, and then in the framework of professional development. Currently, psychologically, judicial representatives are focused on winning in court, rather than working to reach an agreement with the other party. This is also facilitated by the recently widely discussed issue of the rules for applying the "success fee". Unfortunately, in Russian practice, representatives of the parties are not always interested in developing a material solution to the legal dispute that is acceptable to both parties.

Meanwhile, international practice (especially in common law countries) has long known the concepts of Collaborative Law and Collaborative Practice. Collaborative law is considered as one of the ways of alternative dispute resolution with active interaction of the parties and their representatives (lawyers) without recourse to a mediator. In American law, negotiations are considered in two forms: an independent type of alternative method of dispute resolution; an integral part of any method of reconciliation. It is generally accepted that negotiations that are conducted to conclude an agreement are different from negotiations for the purpose of reconciliation. But they are based on the general theory of negotiations.

Since 2010, a participatory procedure similar in legal nature to collaborative practice has also appeared in the French civil procedure. The experience of reconciliation of the parties at the pre-trial stage with the help of representatives of the parties deserves attention and wide discussion for the development of similar mechanisms in the Russian legal system.

5. CONCLUSION

Another area should be the accumulation of positive information about reconciliation. Information for parties about the benefits of reconciliation needs to be accessible and to appeal to the court (in the media, on websites, on the websites of courts, chancery court, etc.), and in the proceedings before the court (for example, in the lobby of the Arbitration court of the Sverdlovsk region, where the persons participating in the case, awaiting a court session, located stands with aphorisms about the benefits of reconciliation, is the reconciliation centers). One of the measures could be for the court to explain to the parties the advantages of concluding a settlement agreement or applying conciliation procedures at the stage of preparing the case. For example, the Arbitration court of the Sverdlovsk region some time ago sent out a leaflet about the advantages of a settlement agreement with each definition of acceptance of the application. It is difficult to say whether it helped someone, but the information must accumulate in order to give the first results.

In general, it is necessary to develop all forms of reconciliation, among which acting judges, hearing cases, lawyers, lawyers of enterprises, as well as mediators, etc. can play a great role.

Only with the efforts of all interested parties, so to say "the whole world", can we promote the cultivation of peaceful conflict resolution.

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