

# The Main Reasons for the Unpopularity of Alternative Dispute Resolution in Russia

Lazarev S.

*Ural State Law University, Ekaterinburg, Russia*  
Email: [f09.slazarev@arbitr.ru](mailto:f09.slazarev@arbitr.ru)

## ABSTRACT

The number of disputes resolved with the use of alternative dispute resolution in Russia is insignificant compared to other countries: mediation and arbitration practically are not used. The article considers the main reasons for the unpopularity of alternative dispute resolution in Russia: lack of a mechanism for choosing the appropriate dispute resolution method; paternalistic sentiments of most citizens; quick consideration of cases by the state court and increase in the consideration time of the case during the conciliation procedure in case of its failure; low cost of cognizance for the parties, imperfection of mechanisms for promoting out-of-court dispute resolution; preservation of a monopoly on the dispute resolution by the state for the purpose of social management; the use of conciliation by the parties in order to abuse the right. The use of alternative dispute resolution methods will increase in popularity when these reasons are eliminated.

**Keywords:** *mediation, arbitration, social management, abuse of rights*

## 1. INTRODUCTION

Walsh testifies that in states that use "best practices", more than 70% of civil cases end prior to trial on the merits [8]. I. V. Reshetnikova indicates that in foreign countries up to 95% of cases brought in court end with settlements [22].

The literature notes that there are currently more than 20 alternative dispute resolutions in Russia [11] (hereinafter referred to as ADR). However, Russia is significantly inferior to other countries in terms of the number of using ADR: "The difference in dispute resolution without a court order in the US, Europe, and Russia is significant".

V. V. Momotov testifies that "the mediation institution in the Russian legal proceedings does not function. Conciliation procedures involving mediators are used in less than 0.01% of civil disputes ... there is a steady tendency to reduce the number of settlements and their share in the total number of litigations. In 2015, settlements were concluded in total 121 thousand cases (0.8%) with the total number of civil and administrative cases examined by the courts reaching 15 million 800 thousand. In 2016, this indicator amounted to 103,573 settlements out of 18 million cases (0.7%), and in 2017 – 94 thousand settlements out of 20 million cases (0.5%)" [23]. The share of settlements in commercial courts is also decreasing. According to statistics, cases were terminated due to the approval of settlements in the court of the first instance in 2016 – 35.1 thousand cases (2.2%); in 2017 – 29.5 thousand cases (1.7%); in 2018 – 31 thousand cases (1.6%).

As a result of the implementation of the arbitration reform in 2015 through the adoption of relevant laws, only four permanent arbitration institutions remain, while according to some estimates, up to November 1, 2017, there were up

to 2.5 thousand permanent arbitration institutions [25]. According to a fair observation by V. M. Zhuykov, "an alternative method of defense in arbitration courts is virtually ruined."

Despite the fact that conciliation is a mandatory task of legal proceedings (Article 2 of the Civil Procedure Code of the Russian Federation and Article 2 of the Commercial Multifunctional dispute Procedure Code of the Russian Federation), the presence of special regulatory legal acts regulating arbitration and mediation, the number of disputes resolved using ADR in Russia is extremely small.

## 2. STUDY METHODOLOGY

Based on the analysis of the current Russian legislation, the practice of its application and judicial statistics, the author explores the main reasons for the unpopularity of alternative dispute resolution methods in Russia. These reasons are analyzed with the use of historical, comparative legal and formal legal methods. The author formulates his conclusions, starting from known facts and positions established in science.

## 3. STUDY RESULTS

We believe that the main reasons for the unpopularity of ADR in Russia are the following: lack of a mechanism for choosing the appropriate dispute resolution method; paternalistic sentiments of most citizens; quick consideration of cases by the state court and increase in the

consideration time of the case during the conciliation procedure in case of its failure; low cost of cognizance for the parties, imperfection of mechanisms for promoting out-of-court dispute resolution; preservation of a monopoly on the dispute resolution by the state for the purpose of social management; the use of conciliation by the parties in order to abuse the right.

## **4. DISCUSSION OF RESULTS**

Let's consider the main reasons of ADR unpopularity.

### **4.1. Information on ADR and choosing the appropriate method**

One of the reasons is the lack of knowledge among lawyers about the types and possibilities of ADR [26], and it is noted the need for focused work of the court in order to create the awareness of the conflicting parties and their representatives of the benefits of a peaceful dispute settlement compared to the usual procedure of legal proceedings, increase not only professional but also general education [15].

The spread of ADR is, certainly, influenced by directed advocacy and outreach. However, only data on possible ADR methods are not enough. We believe that the current problem is the need to correctly choose the ADR method appropriate for the conflict.

F. Sander put forward the idea of multiple doors in dispute resolution [6], which consists in using various forms of dispute resolution, depending on the criteria according to which disputes should go through those doors that are suitable for resolving a particular dispute. It should be noted that, despite the fact that the idea of multiple doors for dispute resolution is simple, it is not easy to implement, because "determining what matters should go through a particular door is not an easy task" [2].

For decision of this task multifunctional dispute resolution centers are currently operating in many countries.

Thus, the ADR effectiveness directly depends on determining the appropriate dispute resolution method, rather than simply communicating ADR information to the parties.

### **4.2. Society of litigants or paternalistic society**

The low percentage of conciliatory procedures allows us to hypothesize that Russia is a litigious society. However, this assumption is refuted by statistical data, according to which in the event of conflict, difficult or controversial situation, "to tolerate" is the usual strategy for solving problems for 53% of the Russian population; 31% of people will "complain", seek help from higher authorities or deputies; 29% of citizens seek professional legal assistance, go to the prosecutor's office or court [12]. Accordingly, in reality, much fewer people who face

problems that require a court decision appeal to the courts. That is, half the population suffers problems and humbles itself, and a third instead of court appeals tries to seek protection through other paternalistic institutions.

So, three quarters of Russians respond negatively over the years to the question "Will most people in Russia be able or not able to live without constant care, guardianship by the state?"

It should be noted that the courts are in tenth place among ways of resolving conflicts, playing a smaller role in the lives of ordinary citizens than the President, the FSB, the armed forces, the presidential administration, the government, "oligarchs" bankers, financiers, the media, prosecutors.

Development and active use of ADR require the presence of initiative, taking responsibility for their actions. The indicated qualities do not appear as a result of the stroke of the pen of the legislator, but at a certain stage in the development of civil society.

### **4.3. Speed of judicial review**

According to the World Bank, in 2016, the average review time of commercial dispute in Moscow was 310 days, in St. Petersburg – 300 days, while the average review time in Europe and Central Asia was 481 days. In 2019, according to World Bank estimates, it will take 340 days to resolve a commercial dispute in Moscow, 330 days – in St. Petersburg, while the average time for Europe and Central Asia is 496.3 days.

The literature notes: "The commercial courts of Russia are one of the "high-speed" courts not only in our country but also in Europe and in the world."

We found no evidence that the trial in a state court is faster than using ADR. However, in the event of an unsuccessful attempt to use ADR, the period of protection of the violated right is extended by the corresponding period. Compliance with a mandatory pre-trial or claim procedure is required for most civil disputes. A claim is often regarded as a "duty" document, one of the conditions for the exercise of the right to claim. The unsuccessful experience of one conciliation procedure is projected onto other ADR methods, for the use of which the parties prefer not to waste time.

### **4.4. Low cost of judicial review**

The literature notes that the presence and size of state fees can stimulate the plaintiff and defendant to a peaceful settlement of the dispute [13]. The said proposal is based on the fact that if the payment for trial is higher than for the dispute resolution in another way, then, acting reasonably, the parties will find another forum for resolving their conflicts – mediation, arbitration, etc.

The argument in favor of increasing the state duty is foreign experience. So, the minimum state duty in the Republic of Belarus when filing a lawsuit was increased

15 times, as well as the deadline for the case consideration, was increased 2 times (from one to two months), which are considered as a means of making the conciliation procedure even more attractive [18]. A significant increase in the rates of court fees in England led to an increase in the popularity of alternative dispute resolution (mediation, arbitration) [5].

However, despite this evidence, the dependence of the state duty size and the number of cases in the courts is not unambiguous. Thus, according to the analysis of statistical data, Finland has high court fees and a low rate of court appeals. Denmark and the Netherlands have low court fees, but the number of lawsuits is also low. Romania has significant court fees, and the number of lawsuits is also high. Thus, there is no direct correlation between the rates of state duty (court fees) in various countries and the number of court appeals in these countries (at least until court fees become barrage).

#### **4.5. Insufficient legislative promotion of ADR**

In a particular state, the set of incentives for the use of conciliation procedures may vary. So, according to Subclause 3 of Clause 1 of Article 333.40 of the Tax Code of the Russian Federation, a proportional refund of the paid state duty is provided in the event of a dispute resolution.

The legislation provides for the facilitation of arbitration, international commercial arbitration. The decisions of the arbitration courts may be enforced.

Accordingly, on the one hand, measures are taken aimed at the use of ADR. On the other hand, not everything has been done in this direction.

Thus, B. Walsh identifies two types of cases that can be resolved [8]:

1. cases when all parties are in some kind of constant connection, and they want to resolve their dispute quickly; or cases when the cost of resolution for both parties is not high and where the resolution would allow them to pursue other, more worthy goals. These cases have the prospect that the parties will finish the dispute at the beginning of the trial, often without the direct participation of the judge, using methods such as arbitration, mediation, dispute resolution conferences under the supervision of the court or regular negotiations between lawyers;
2. cases in which the parties are in an acute dispute, but which reach a state when one of the parties begins to become aware of three things: (a) if the dispute is not resolved, he will incur significant costs; (b) loss of time is inevitable or just around the corner; and (c) when he loses, he will be forced to quickly pay a higher price than if the dispute were resolved.

Accordingly, cases of the first type should be filtered out in the court lists as early as possible, in particular, before the case appears on the list in front of the judge. Concerning the second type of cases, following researchers on this topic in Canada [4] and Australia [7], we consider it possible to "combine" the legal and moral authority "of the court with the "flexibility and adaptability" of alternative ways to resolve disputes" – to give the judge the power to actively reconcile the parties.

#### **4.6. Social management**

Russia is characterized by an instrumental approach to law – law is an instrument of state power.

Almost all sections of public life are regulated by law. The state manages the society through the law (legislation). Thus, N.I. Maslennikova considers the civil process as a type of social management [21]. Courts in such a system, applying the law to specific life situations, are embedded in the system of public management.

Most of the cases before the courts are indisputable. In the first half of 2019, 8.1 million out of 10.6 million cases completed by courts of general jurisdiction in the first instance were completed in connection with the issuance of a court order, i.e. three quarters; for comparison, in 2015, 7.8 million out of 14.5 million civil cases considered by courts of general jurisdiction in the first instance were completed in connection with the issuance of a court order, i.e. about half.

The legislator is in no hurry to withdraw the consideration of indisputable cases (writ proceedings) from the competence of the courts, leaving judicial post-control. This circumstance is explained by the fact that the state fears that some parts of public life will leave legal regulation. If most disputes are resolved by alternative or other non-judicial methods, the function of social management may weaken.

The function of social management is also implemented in other countries, where it is viewed in a different way – as a problem of case-law regulation in the most important cases. So, literature notes a side effect of the development of alternative dispute resolution: "There will be less case law, less public knowledge of how laws should be interpreted" [1].

Accordingly, the Russian state, in spite of formal statements of adherence to ADR, seeks to maintain a monopoly on the resolution of most disputes.

#### **4.7. Abuse of law**

However, the law is treated as an instrument not only by the state. The parties have a similar attitude. The problem is using ADR as a means of abuse of law.

The literature names various forms of abuse by submitting a settlement to a court for approval:

1. for the purpose of nonobservance of competitive procedures;

2. in order to acquire ownership of unauthorized construction [17];
3. in order to postpone the sale from auction of assets belonging to the debtor included in the bankruptcy estate, or to withdraw assets from the bankruptcy estate [16];
4. to create a non-existent "fictitious" payables, etc.

In practice, there are also cases of using directly conciliation procedures for the purpose of procedural rights abuse and excessive duration of legal proceedings.

The already mentioned reform of the legislation on arbitration courts of 2015 was aimed at hindering the activities of "pocket" arbitration courts, using which banks and other business structures "turned the arbitration court into an instrument for resolving any dispute in their favor" [10].

Thus, the possibility of using ADR as a means of abuse of law may prevent their choice by bona fide persons.

## 5. CONCLUSIONS

To change the situation in the field of ADR in Russia you should implement the concept of multiple doors in dispute resolution; develop freedom and initiative of citizens; carefully consider mandatory pre-trial procedures; filter out cases that can be settled in judicial lists as early as possible and give judges the power to actively reconcile the parties; abandon the state monopoly on dispute resolution, leaving judicial post-control; develop mechanisms to prevent the use of ADR for abuse of rights.

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