
Comparative Legal Analysis of Mediation in Russia and the EU

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Abstract:

The purpose of this article is to identify the specifics of mediation procedures, review them as extrajudicial method of conflict resolution. As the methodological basis of the research we use the synergistic, phenomenological and dialectical analysis techniques to examine the main aspects of the mediation as well as identify its principal features.

As a result of the study, the authors concluded that in Russia it is necessary to take into account the international experience of mediation, legislation to support the mediation process and in some cases give it forceful character, to develop cooperation with the courts and notaries with the mediators.

Key Words: *Mediation, mediation nature, notaries, court mediator.*

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Introduction

Mediation - a procedure in which an impartial third party helps to understand and resolve the conflict of interest that has arisen in between the other two opposing parties. The advantage of this method of dispute resolution is that the mediator helps the parties to develop their own terms of agreement between them.

It is important to point out that mediation was first developed and outlined in the United States in the 20th century. US economy at the time witnessed a completely new form of conflict in the struggle between the trade unions and employers on the matter of wages and working conditions. It was necessary to resolve the dispute expeditiously to eliminate the risks of protests and continuous strikes. Then the US government issued a proposal for the parties to refer to the Ministry of Labor in order to resolve the dispute in a neutral way. In 1947, to fulfill this function a special federal agency - the US Federal Service for Mediation and Conciliation (Federal Mediation Conciliation Service, FMCS) created, which still exists today. For the first time the term "mediation" was used. The second prerequisite for the emergence of mediation was the emergence of such organizations as «Neighborhood Justice Centers» and «Community Mediation» in the late 1960s. These local non-governmental organizations, whose activities are focused on resolving conflicts between families, neighbors, as well as low-income groups. Thus, citizens are provided access to justice. The third prerequisite that was established in the 60s, features the American civil procedure. Mediation became a fully independent procedure only since mid 1970s.

The first countries to take on mediation after the US took over the Anglo-Saxon legal system were UK and Australia. So in the UK mediation found its primary use in the resolution of labor disputes. As a result since 1976, there is Advisory Conciliation and Arbitration Service operating in the UK, the objectives of which are: to contribute to the improvement of industrial relations, in particular, support collective bargaining process.

In Australia, the protection of rights of the native population (that by initiating numerous lawsuits tried to defend their right to cultural autonomy) required an efficient settlement. To resolve the dispute, the National Court of Rights for Indigenous Population has established the possibility of the judge forwarding claims to the independent mediator.

In Russia, the first step towards the implementation of mediation was seen in the adoption of the Federal Law of 27.07.2010 N 193-FZ "On alternative dispute resolution procedure involving a mediator (mediation procedure)."

In this work, the leading hypothesis formulates that the development of mediation in Russia is inevitable; it is just due to the peculiarities of the law enforcement practices.

The authors of this work aim to test this hypothesis, the definition of the concept of mediation, the development of this institution in Russia and abroad, as well as the relationship of mediation with other spheres of legal activity in modern Russia.

Literature review

History of development of mediation and its periodization have been affected the works of many foreign lawyers and legal scholars (H. Besemer, 2004; Parkinson, L. 2010; Russ K. 2008). Besides, Europe has progressed far enough in exploring mediation, which is confirmed in the works of foreign scientists (Joerg Risse, 2005; Grefin, K. von Schlieffen, 2005; R. Fisher, 2006). The mediation of the Russian Federation has also attracted attention of both practitioners and legal theorists (Blazheev, B. 2008; C. A. Shamlikashvili, 2010; Nosyreva, E.I. 2012; Emelkina, 2016; Famina, 2016). Neither did mediation escape the eyes of philosophical theorists (Berželè, 2000; Solovyov, V.S. 1990). It is said that following the adoption of the federal law in Russia (2010) mediation began to penetrate many spheres of human life. Practicing lawyers, judges and legal theorists began to talk about the successful use of mediation in areas such as family law, labor and business. Foreign experience allows us to use the works of European lawyers (L. Parkinson, 2010; M. Pel, 2009; D. Crowley, 2010) as the basis for the formation of our own well-functioning system (V. Lisitsyn, 2010; Belov, 1998).

Methods of carrying out research

As the methodological basis of the research - synergistic, phenomenological and dialectical methods were used. The essence of the method consists of a synergistic open social system in other words, its ability to interact with the environment. Also do not forget about how uneven and non-linear social life is.

With regard to the phenomenological method, it provides common research entities and private phenomena, types of observations of phenomena and interpretation of the phenomena of values.

The peculiarity of the dialectical method is the objectivity of the study, historicism, taking into account the unity of qualitative and quantitative determination, determinism and compliance with the principle of negation of negation.

Results

1. Nature of mediation

Any concept should be inscribed into the theoretical model, validity of which is crucial for the validity of the entire concept. The concept of "mediation" is no different. Principal need for theoretical modeling of phenomena is connected with the fact that its existence is always systematic. Its description and analysis, despite

the efforts and the ever-expanding volume of research, doesn't allow obtaining solid and systematic knowledge about the phenomenon, trace the existence of phenomenon in the practice of its actual existence.

Of course, the theoretical analysis is always, to a greater or lesser extent, based on the study of the phenomena that form an overview of the research facility. From this point of view in relation to this work, the authors formed a view on the credibility of the results of studies of applied aspects of mediation processes in the field of Sociology of conflict, social psychology, economics, management, as well as in branches of legal sciences.

The question arises about the general nature of mediation. In different areas of scientific knowledge the answer to this question is answered, depending on the authors' point of view. For example psychology, which considers mediation as a form of intermediary, building on the features and the essential traits of the characters, worldviews, and systems of interest, etc., as final product offers technology activities. Sociology, considers mediation as a relatively autonomous social institution of conflict resolution, offering a system of interactions, optimum in terms of mutual achievement of goals and balance of interests. Alongside with approaches proposed by psychological science, this knowledge set allows (with sufficient precision) to create a scheme of action of mediators in any given conflict.

Any management involves not only the choice one of the several options for the development of managed processes to bring the system to a proper State, but also frames, borders, in which these choices are carried out. Moreover, frameworks and boundaries define the choices, and not vice versa. It is difficult to imagine in today's society, when a persons' shall set uniform compulsory rules of conduct. Choice is a strong-willed and authoritative action which is always subjective. Rules as formal tribute are always objective. Their objectivity is based on the fact that the will which forms the basis of the rules reflects the reality in the way it is understood in society at varying stages of historical development.

The ultimate goal of mediation is to bring the system to a proper state.

The nature of the mediation process possesses legal characteristics, since those rules within which the mediator and the parties to the conflict are legal, and the conflict itself is a contradiction between what is perceived by the subject and how it is expressed in the law.

The nature of mediation mechanism is governmental in its basis. This thesis raises the largest number of objections and disputes. The main argument against the recognition of the state nature of mediation is the argument that the mediator is not a person exercising public authority, neither are the actors of the conflict, therefore there is no relation to the State. However, as Soloviev pointed, "the requirement of personal liberty, for it to come true, implies tightness of this liberty, in a way that it

is not compatible with the existence of society and the common good. These two opposing interests in abstract thought, but are equally morally obligatory. When the two coincide - rights are born».

The thesis is that the nature of mediation is not a state nature, is a false statement itself.

Firstly, recognition of this thesis ruptures the legal link between the individual and the State. This means that an individual is outside of the State, its institutions and its regulatory mechanisms.

Secondly, recognition of this thesis leads to the mechanism of legal regulation detaching from the content of the relations arising between the parties forming the conflict. Ultimately, this situation leads to a lack of responsibility before the society, which is certainly unacceptable.

Thirdly, the link between the right and the State is lost. The nature of the conflict, as well as the department of the nature of the settlement is by no means a reason to admit the impossibility of using the law as an instrument of conflict resolution.

Fourthly, in this formulation, we have to admit that justice loses the ability to be supported by the law, and the law in turn loses the nature of justice. In no event it is possible to consider the nature of the mediation mechanism outside the State. V.S. Nerseyants, one of the greatest contemporary legal theorists, proved that the emergence of the State relates to the issues of legal mediation and registration of political relations, the main idea around which the process of legal mediation of relations is formed, becomes the idea that equity and not power gives rise to justice. It should be noted that the General considerations about the public nature of the mechanisms of mediation, in spite of the above arguments, remain precarious enough without considering the contractual nature of private law relations.

The contract is not only a separate agreement between individuals, but also a universal agreement that is generated in each particular case by a separate contract. This agreement allows for existence State and its institutions.

The contract has two functions: a function of defining the position of an individual within the system of relationships as well as determining the functions of ones resources. However it is clear that any agreement in a form of social action was originally constructed in terms of its usefulness. Such feasibility is the ratio of the effectiveness of the methods of the desired outcome. Available target, whatever it is, is always is a state of relations, far from existence and not matching the present. This distance is the basis for the choice of paths to the final destination.

The contract is concluded only when the concept of appropriateness is formed and is no longer relevant to any one subject, but to a system of subjects, i.e. concerns "Us".

In the presence of institutional forms of power, any contract and any agreement is not considered as arising solely from an individuals' will, are not the result of a single legal act. They are derived from the whole of social mechanism, group contracts and positive law, which ensures the supremacy of collective interests and community organizations over individual interests. J.I. Beržel' notes that "... the presence of the Institute's ultimate goal involves the hierarchical organization of elements that make up this Institute. Relevance to the final objective is the key in determining the location of each item and rules are arrayed around the institutions-in the hierarchy. ... Institutions generated by these rules are merged to the point that altogether they form a proper legal order. "

Permanent, publically observed preferences of authorities oppose the theoretically instantaneous and egalitarian nature of the contract, as a form of social relations. In other words, the emergence of any status position as such, is only possible when the entity authorities took some constant position, which doesn't correlate to the contract, allowing, however, for a relationship with the contract as with the subject of powerful impact. Then "the presence of the Institute is the criterion that contrasts the constancy of juridical situations with accidental and rolling nature of obligations or contracts for example.

In this respect, the consideration of the nature of mediation through the prism of its public-legal framework implies that apart from the parties to the conflict and the mediator, there is another player in the process – the State.

2. The use of mediation in Europe

Over the last thirty years, mediation has proven itself as a very efficient way to resolve disputes in Western European countries and North America. Compared to other alternative methods of dispute settlement mediation is distinguished by the presence of one or more professionally trained mediators who strongly contribute to the conflicting parties in order to find a mutually acceptable solution to their common disputes, concluding a voluntary agreement.

Unfortunately, we are obliged to note that mediation has not yet become a widespread tool of conflict settlement on the territory of the Russian Federation, but the experience of many countries clearly demonstrates the effectiveness of mediation in resolving conflicts in many areas.

In France for example, the mediation Institute was established in the year 1996. A significant contribution to the development of mediation was introduced by the Chairmen of the Court of Appeal. Their cooperation led to election of mediators and judges that could refer cases to qualified professionals, classifying those cases by nature. In addition, effectively functioning programs for the training of mediators were developed. These programs have been approved by the Court of Appeal, either

directly, or with the assistance of organizations providing mediation procedures, or at the request of lawyers themselves.

In addition, the regulations were drawn up (articles of Association) regarding the practice in mediation, which required ethics from the mediator. It concerns the relations between the mediator and the parties, the judiciary and the lawyers. Considerable importance was tribute to the confidentiality of mediation.

The French Courts also organized training programmes for judges themselves, with a view to explain the advantages of this way of dispute settlement. An additional target of this kind of programs was teaching the judges methods necessary to persuade the parties and their lawyers to participate in mediation and provide a suitable mediator. As a result of this procedure the parties return to the Court to either witness the consent of the parties, or in case of failure of the mediator, to continue the trial.

Finally, procedural instructions were issued, complementing and clarifying the rules of the code of civil procedure, the aim of which was to include mediation in the process of the trial, in order to avoid delays.

In 2008, the President of the Court of Appeal in Paris initiated the creation of incentives for strengthening the work towards the application of mediation in the judicial system. A special group was formed, to propose a number of steps to simplify the assimilation of mediation. Namely:

- to create mediation structures which would be responsible for the implementation of the mediation in each law enforcement authority;
- to create a pilot department to deal with judicial cases;
- to appoint an authority figure in each law enforcement officials, the purpose of which would be to coordinate the activities of the mediator;
- to broaden the powers of judges to inform parties about the benefits of mediation;
- to create access to the professional activities of mediators in each Court of Appeal;

Due to these measures, mediation took its worthy place in the French judicial system. It is particularly effective when resolving commercial, family and social conflicts. Although of course, it is worth mentioning that the actions of the European institutions have also had their influence on the development of alternative methods of settling of ports. Mediation is supported by both the Council of Europe and the European Union. The latter issued a directive on certain aspects of mediation in civil and commercial cross-border relations on the 23rd of April 23, 2008.

Conferences on promoting and evaluating the use of mediation by law enforcement, frequently take place in France. Leading experts share their experience in this area and most experienced judges in the field spend time familiarizing colleagues, lawyers and representatives of enterprises with the ideas of mediation.

There are also many mediation providers that operate in various fields: family, social, commercial. All these organizations possess a list of mediators, providing them with training as well as control the quality of the services rendered by these mediators. Such organizations played an important role in the promotion of mediation in the country.

Mediation is also an example of means of access to justice and in some disputes is only the possible way to preserve positive relations between the conflicting parties — for example, business or family disputes. Approaches used by the mediator, are most effective in resolving such disputes. They make a dialogue between the parties possible, which would not necessarily be an option in other circumstances. 83% of independent mediators are lawyers. Among them, 35% are practicing lawyers, 17.5% honored lawyers and 15% honored judges. This suggests that the mediation procedure in France is carried out by highly qualified professionals, following the rule of law and, so is able to resolve conflicts without significant costs.

3. Mediation in notarial practice

In countries where there is a Latin type notary, an opportunity of performing functions of the mediator notary was introduced. This profession, among the most other legal professions is potentially the most suitable for the implementation of the mediators' role.

Principles such as impartiality, independence, confidentiality are peculiar to both notarial activities and mediation.

The fact that mediation principles fit into the ethical rules of notarial activities, gives grounds for integration of mediation into the professional activities of notary public. So, in the rulings of the XXIII International Union of Latin Notary (Athens, 2001) it is rightly noted that the notary public which, by virtue of their profession should often lead various interests of the parties to a single denominator, should be considered fit for a mediator role.

While analyzing the provisions of the draft federal law "Regarding notaries and notarial activities in the Russian Federation ", one can confidently point out that the reform of the Russian notarial activity involves a notary in a procedure of mediation. Thus, in Article 4 of the stated document, one of the objectives is to promote the activities of notarial settlement of disputes or conflicts of applicants as an integral part of the legal assistance provided by notaries, including the adoption of measures to reconcile the parties, whereas chapter 35 governs the identity of mediation agreements.

Considering the above statements the use of the capacity of notary in the further development of the institution of mediation in the Russian Federation seems promising. Notaries can actively participate in resolving the differences arising

within the Notarial Acts, conduct the very mediation itself, conciliate procedures under to certify the production agreement for a settlement of the dispute and, if necessary, to carry out executive writing, in case of nonperformance or improper performance of the settlement agreement. In this regard, appropriate changes should be made in existing legislation on notarial activity, or include these provisions in the draft federal law "Regarding notaries and notarial activities in Russian Federation ".

Discussion

Thus, as a result of the research, the hypothesis has been proven, confirming the inevitability of the development of mediation in Russia and its application to address economic, family and labor disputes. From what has been mentioned above, some fundamental conclusions should be made.

1. Mediation as a phenomenon has firmly entered the judicial system in many European countries as we need to take into account foreign experience in mediation, because these countries possess a rich arsenal of techniques, methods and means of out-of-court dispute resolution.
2. It is necessary to persuade sides opposing the use of mediation, and prepare qualified personnel to work in this area and to legally support the mediation procedure, in some cases even make it compulsory for the conflicting parties to use.
3. There should be collaboration of the judicial system and mediation, as well as, notaries and mediation to establish a fully-fledged interpersonal conflict settlement structure at the stage of pre-trial settlement of disputes.

Conclusion

Based on the conducted research it can be concluded that mediation is a method that enables the parties, with the assistance of a neutral third mediator on a voluntary basis to develop a mutually beneficial solution. Mediation differs from the traditional settlement of disputes in court or arbitration, primarily because the mediator does not rule on the dispute. Only the conflicting parties are able to take a binding decision, which with the assistance of the mediator, produce and consider possible options and determine the most suitable ones. In the broadest sense, mediation is the ability to reach a consensus decision in a dispute that is mutually beneficial to both sides.

References

- Beržel', J.I. 2000. General theory of law/V.I. Danilenko M. S. 322.
- Canivet, G. 2011. Mediation takes a worthy place in the judicial system of France//Mediation and conciliation. Mediation and law No. 1 (19).
- Denisenko, S.V. 2010. General problems of mediation: monograph/. -M: University book, – 160s. S.
- Emelkina, A.I. 2016. Problems of Improving Russian Legislation on Property Rights and Other Proprietary Interests. European Research Studies Journal, 19(3B), 170-186.
- Fomina Yu.L. 2016. Protection of the Right to Respect for Private and Family Life in European Court of Human Rights. European Research Studies Journal, 19(3B), 97-110.
- Joerg, Risse. 2005. The future of mediation - the chances of American model in Germany//Mediation in notarial practice/Alternative modes of dispute resolution. – M.: VoltersKluver. C. 61
- Lyutov, N.I. 2008. Alternative resolution of labor disputes in the UK//Work abroad, 2. P. 143.
- Medvedev, I.G. 2005. analytical review of the materials of the past congresses of the International Union of Latin Notariat./by: Yarkov V.V. Notary and mediation: the question//Arbitration Court.5. C. 151.
- Nelson, R.M. 2000. Global achievements in the field of conflict resolution//Arbitration court, 5. S. 57.
- Nerseyants, V.S. 1999. General theory of law and State. M. S. 88.
- Ralco, V.V. 2014. Fomin V.A. Notary in the prevention and resolution of legal conflicts. Notarial mediation monograph. -M: lawyer, p. 127.
- Solovyov, V.S. 1990. Compositions. B2-x t. m, P. 458.
- The draft federal law. Regarding notaries and notarial activities in the Russian Federation. /ATP «Consultant Plus».