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EXTRAJUDICIAL METHODS OF RESOLVING ECONOMIC DISPUTES AS INSTRUMENT OF ECONOMIC DEVELOPMENT

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Abstract

Implementation of large projects in the investment and construction sector requires the development and use of special methods of dispute resolution due to the specificity of the contracts and the parties of legal relations. The study identifies and systematizes the factors contributing to the development of alternative (extrajudicial) methods of dispute resolution, and considers the reasons why alternative dispute resolution (ADR) is a tool fully capable of contributing to development of the sector. Commercial mediation and special methods of mediation used in separately organized systems, such as dispute resolution commissions, are in the focus of the research. They help to avoid reputation and time costs and to maintain long-term partnerships in the field of construction projects, so they are the most acceptable ways of settling disputes between economic entities. Thus, the use of specialized methods of dispute resolution requires both the need to use these methods at the legislative level, the preparation of practical recommendations and the establishing of associations engaging potential members of the commissions on dispute resolution that unite experts in the field of mediation in the implementation of construction projects. In addition, the work on implementation of certain mechanisms in the activities of construction companies dealing with large projects is very important..

Keywords: Construction projects, equity construction, investment contract, commercial mediation, mediation, specialized dispute resolution commissions. .

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1. Introduction

The modern format of interaction and cooperation, in particular in the field of investment in the implementation of large projects, requires the development and use of effective mechanisms for the rapid settlement of disputes. An outdated and non-constructive approach to the settlement of economic disputes leads to a significant decrease in the pace of development, the growth of socio-economic tensions and, as a consequence, the infringement of the rights of participants in economic turnover, deprivation of their opportunities to choose the appropriate ways out of conflict situations (Matveeva, 2013).

2. Problem Statement

The analysis of the situation in foreign countries reveals the factors contributing to the development of alternative dispute resolution or ADR:

1.Crisis phenomena in the judicial system: the huge volume of cases, which leads to violation of procedural deadlines, unpredictability of decisions, high cost of court proceedings. Germany presents a bright example of ADR development, and the system of mediation in particular, resulted from the necessity of serious transformation of the judicial system. In the United States, the widespread use of the Institute of jurors, in all categories of disputes, including economic, has also contributed to the promotion of ADR due to structural and procedural problems and shortcomings of cases involving Jurors.

2.The problems of legislative regulation and the emergence of judicial precedents leading to a crisis in a particular area. This situation arose in the UK in the late 1980s and early 1990s. It contributed to the emergence of specialized mechanisms in the investment and construction sector, which we will discuss in the article.

3.The development of international cooperation, which complicates the use of judicial means within one state.

4.National traditions, the nation's attitude to the court proceedings. Thus, the original legal culture in which conciliatory procedures are distributed is China. It is typical for the Chinese to have very negative attitude towards the formal means of settling disputes, such as litigation. Recourse to the Court is an involuntary measure in case of impossibility of normalization of relations and after that the company tends to break all partnership relations. Therefore, the parties usually make all their efforts to resolve the dispute by negotiation or mediation, denoted in Chinese by the word "Dzhaodzhi" (Matveeva, 2013). Researchers note that China is not only aware of the special importance of mediation in the life of society, but also active, purposeful actions of the state to promote the idea of reconciliation. Moreover, China is the only country in the world mentioning the word "mediation" in the Constitution.

5.Realities of a particular state: the territorial remoteness of courts, legal illiteracy of the population, together with the need to resolve conflict situations. Kyrgyzstan is an example of a state that has established non-state judicial institutions in its settlements. It is a revival of elders courts, caused, inter alia, by organizational problems of the national judicial system.

Taking into account the all the aspects of ADR establishing and development, it is possible to draw a conclusion about the action of the "Law of unintended consequences", when structural and organizational problems in the state stimulate the development of the alternative mechanisms, extrajudicial, non-state character, which demonstrate their effectiveness in practice (Shamlikashvili, 2011).

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It is important to emphasize that alternative ways of resolving economic disputes have a significant impact on the development of the sphere of economic turnover as a whole, i.e. it serves as an effective instrument of economic development due to the following reasons (The Problems of Settlement…, 2017).:

1.The extrajudicial mechanisms provide participants in the professional community with adequate ways to resolve differences that meet time demands, taking into account the systematic complication of legal relations between participants in the economic activities. The availability of well-considered and high-potential solutions to economic disputes has a significant impact on the investment attractiveness of the state.

2.These methods contribute to the development of legal culture, the tradition of friendly partnership, the promotion of long-term relationships and agreements as an alternative to short-term contractual relations with unverified counterparties.

3.There is a close relationship between judicial and alternative ways of settling differences. On the one hand, judges should have skills not only of the state "Punisher", but also of the mediator, because in practice, especially in the investment and construction sphere, a huge number of disputes are caused by violation of obligations of all parties of the conflict. Thus, a compromise is the only possible option in such cases. On the other hand, the established ADR system can considerably reduce the burden on the courts, which can significantly exceed the reasonable limits. In addition, extrajudicial measures reduce the risk of right abuse by the dispute parties. Such actions are particularly evident in insolvency proceedings (bankruptcy), also performed by court-appointed managers, in corporate conflicts, as well as disputes in which violations of existing agreements are made by two parties, but at the same time, they do not compromise.

4.The possibility of considering the opinions and interests of citizens, especially in disputes between them and the state. The ADR system can ensure the dialogue with the authorities not only in the area of dispute resolution, but also in the preparation of bills dealing with the most important social issues.

3. Research Questions

The actions of the state itself and the representatives of the judicial system, as well as the direct economic entities determine the low level of extrajudicial resolution of disputes in the Russian Federation. We will highlight the main reasons that impede the spread of ADR and significantly reduce the effectiveness of the existing methods of dispute resolution, which includes the court proceedings:

- Conservative and static legal system of the state.
- The amount of the state duty is extremely low and the possibility of not using qualified legal aid when applying to the court. That is, the costs of trial may be minimal, which certainly creates an incentive for litigation.
- The inefficiency of legislation on ADR (its abstract nature, the lack of appropriate competencies, as well as mandatory procedures to apply ADR). Thus, more than six years has passed since the adoption of the law "On alternative procedure of dispute settlement with the participation of the mediator (mediation Procedure)" (hereinafter the Law on Mediation) in the Russian Federation, but during this period, the arbitral tribunals and the parties to disputes completely failed to realize

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the potential of ADR. The analysis of practice testifies: the fragmentation of some provisions of the law does not allow expanding the scope of ADR.

- Unawareness of ADR procedural peculiarities.
- The lack of a culture of dispute resolution by "intellectual" methods requiring parties to make certain efforts to achieve consensus of economic interests based on mutual concessions.
- The existence of a legal tradition – the use of judicial proceedings to exert pressure on the opposite side of the dispute and the systematic abuse of procedural rights.
- Some competition between mediators and lawyers, the lawyer's unwillingness to engage the mediator and the desire to bring the case to court.
- The lack of interaction and cooperation between state and non-state institutions in dispute resolution.

4. Purpose of the Study

The desire of the state courts to limit the competence of arbitral tribunals results from distrust. The researchers has repeatedly noted this trend referring to the Supreme Arbitration Court of the Russian Federation (SAC). Moreover, sometimes the same disputes can be resolved through mediation, but are not subject to consideration by the arbitral tribunals, for example, corporate, tax disputes and insolvency proceedings (bankruptcy). The legislation of the Russian Federation practically does not contain restrictions for concluding an amicable settlement, including the settlement after application of conciliation procedures (except the bankruptcy of credit organizations, and non-state pension funds). Thus, there is a contradiction between arbitrability and mediability. (Report on the results.., 2017.) In this regard, in some countries, including Sweden, the criterion of dispute arbitrability is the possibility of concluding an amicable settlement.

- The passive role of judges as bystanders, their lack of skills to assist the parties in reconciliation. Moreover, in the hearing of cases in a collegial body, in fact, only the presiding Judge is in the essence of the dispute, other judges have significantly less influence on the outcome of the process.
- The lack of specialization of judges, which excludes the possibility of making decisions by experts in a particular field who are aware of the economic problems of the sphere in the same or even greater degree than the parties to the dispute.
- The lack of mechanisms influencing the parties of a dispute abusing procedural rights. The Arbitration Procedure Code of the Russian Federation contains an indication to the possibility of adverse consequences in case of such abuse. The court has the right to attribute the legal expenses to the person concerned, to refuse to satisfy his application, and to impose a fine. In addition, article 10 of the Civil Code of the Russian Federation gives the possibility for the arbitral tribunal, taking into account the nature and consequences of abuse, to deny a person the right to defend his or her rights in whole or in part, and to apply other measures provided by law. In practice, however, judges are extremely wary of this possibility.
- A formal approach to the hearing of cases by the state courts, which is due, among other things, to the high burden on judges. The Supreme Court of the Russian Federation is the exception to

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which the most difficult questions of enforcement are transferred. At the same time, it is important to take into account that before the Supreme Court of the Russian Federation, the cases are reached on average not earlier than in a year. Consequently, the parties to the dispute lose the most important economic resource-time.

It is very important that the courts rarely use the doctrine of the "corporate veil" that imposes the responsibility for breach of obligations on the persons directly managing the organization (including its domestic and foreign affiliations).

In fact, the trial is a very long process, and the time is the determining factor that is especially true for the investment sphere of construction projects. That is why the alternative methods of dispute resolution, which differ significantly from the trial, are of particular importance. The main task at present is to develop the pre-trial stage of settlement of disputes, which, on the one hand, will allow settling the differences at an early stage, and on the other hand, will reduce the burden on the courts, which does not ensure the proper level justice administration. Moreover, specialized methods of dispute resolution will involve in the process the experts in a particular field, for example experienced investors, developers, etc. (Peshkov & Yaskova, 2015) (unlike the judges who do not have specialization and, because of the huge number of cases, do not have the opportunity to gain the insight of the dispute in detail).

5. Research Methods

The most common and proven way of settling disputes is commercial mediation. According to the International Institute of Mediation, which actively cooperates with the International Trademarks Association (INTA), 8 out of 10 disputes are successfully resolved by this method. Its main advantage is the ability to focus on specific aspects of doing business. At the same time, legal issues take the second place. Initially, the mediator holds joint meetings with the parties to the dispute, establishing the degree of escalation of the conflict, and then a separate discussion of the substance of the dispute with the participants. The most important principle is confidentiality: the mediator is not entitled to disclose the information and the positions that the parties have voiced in the process of meeting with him. The main advantage of this method is the possibility to identify additional ways of cooperation between the parties, which they were not aware of before. Moreover, the mediator can offer them an effective opportunity to resolve differences, as well as to maintain partnership relations in the future (The Problems of Settlement, 2017)

In developed legal systems, in addition to the Institute of Mediation, there are also other alternative ways to resolve disputes, which include mediation, an analogue of the concept of "conciliation". The study emphasizes that the concepts of "mediation" and "conciliation" can be translated equally into Russian, but there are differences between them. (Latham, 1994). This is the role of a third party in facilitating the reconciliation of the parties. The mediator's powers are much wider in comparison with the conciliator; he can give opinions on legal issues, draft the mediation agreement, and assess the prospects of the dispute consideration in court. That is, the mediator acts not only as an advisor, but also as an expert. For example, specialized arbitration institutions, such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce, provide the conciliation prior to the submission of the dispute to the arbitrators.

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In addition to the usual mediation, the world practice has developed the specialized types of assistance to the parties in resolving differences. These include the following: mini-trial, mediation-arbitration (combined form), services of "the neutral listener", an arbitration procedure "last offer" or "baseball arbitration", expertise, etc. All these methods prevent economic damage caused by the court proceedings.

The most popular are the ways revealing the potential outcome of the case that help to identify the risks for the parties to the dispute. These include various types of the mini-court. The purpose of this conciliation procedure is to draw the attention of the parties to the weak points. This allows the parties to evaluate their real chances in court. It is relevant that a mediator who conducts the mini-court is conducted is usually by a professional lawyer, for example, a retired judge. Being an expert, he evaluates all the arguments of the parties and expresses his opinion on the potential verdict of the court, and in which party's favour the decision will be. As for the neutral listener, he provides an assessment of differences in terms of potential reconciliation. If the prospect of an agreement is available, after the parties have concluded the agreement, the mediator may resolve the differences and settle the contradictions. (Nechaev, Antipina, Matveeva & Prokopeva, 2015)

The mixed procedure called "mediation-arbitration" consists of two stages. If the parties failed to resolve the differences and conclude an agreement, the dispute shall go to the next stage, which is the arbitration proceedings. In this case, the mediator becomes the arbitrator. Despite a widespread use (especially in the field of labour disputes), this procedure raises certain doubts among experts. The problem is that the parties may not fully trust the third party if they realize that all the information obtained from them can be relevant for making the decision in the future. In addition, the combination of a third-party mediator and arbitrator could lead to a violation of the fundamental principles of impartiality and fair trial.

In addition, separate methods of dispute resolution are applicable to separate systems of interaction and cooperation. Thus, one of the last examples is the function of independent arbitration; it is the possibility provided by the platform of block chain (a decentralized system, via which it is possible to make transactions quickly and to store the transaction data). If the project investors have disagreements with counterparties, the experts acting as arbitrators take part in the settlement of the differences in respect of the declared results of the investment and construction project (Shaposhnikova, 2017).

The sphere that needs more flexible methods of dispute resolution and that reduces reputation and time costs maintain long-term partnership relations, is the sector of investment-building projects. Its peculiarities result from of a wide range of subjects of disputes, both professional participants of the given activity and less protected physical persons who are participants of the equity construction. Besides, in the process of realization of construction projects it is necessary to pass many procedures of coordination and interaction with the state bodies that can lead to infringement of terms fixed in contracts. In other words, the involvement of the public-legal element to some extent complicates the process of cooperation, which influences the planning of possible differences. Thus, within the framework of construction of a residential complex in Moscow Region, more than 20 shareholders gave to individual entrepreneurs the right to demand a fine and a penalty for violation of the period of transfer of apartments in the property. This violation arose due to the refusal of the Ministry of Construction of Moscow Region to issue a permit to authorize the facility into operation. The courts concluded that the circumstance in the meaning of Part 3

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of Article 401 of the Civil Code of the Russian Federation could not be considered as an irresistible force, due to which the proper performance of obligations became impossible. The developer as a subject of entrepreneurial activity bears the risk of negative consequences in case of violation of the terms stipulated by the contract of participation in the construction. At the same time, the developer has the right to use the methods provided by the law to protect his rights and recover the losses suffered.

In judicial practice, there are also cases in which the parties continue to cooperate on the implementation of a large project, but, at the same time, initiate proceedings resulted from the impossibility to settle individual differences. This conflict happened between a general contractor and a subcontractor during their work on the expansion of Punginski underground gas storage facility. After signing the acts of work acceptance, the parties could not agree on their final cost and the moment to transfer the executive documentation. In hearing the dispute, the fact of non-performance of obligations by both parties was revealed, which significantly hampered the adjudication (Matveeva & Kholodova, 2014).

Therefore, the question arises what methods of the extrajudicial settlement the sphere of realization of building projects demands. First, let us consider mediation and conciliation as possible options.

Despite all the advantages of commercial mediation, the role of the third party is rather passive; the purpose of its activities is to establish a constructive dialogue between the conflicting parties. Consequently, the result of this method in some cases may be reduced to the resumption of negotiations. Mediation as a method of ADR assumes a more active role of the mediator, which not only contributes to the settlement of differences, but also gives a legal assessment of the dispute, proposes concrete proposals for its resolution, may constitute a draft mediation agreement and assess the prospects of the dispute in court. This study emphasizes that according to the law on mediation, the third person is not a specialist in a particular field. The question of the necessity of specialization of mediators is debatable, nevertheless, in relation to the sphere of construction specialization is very expedient, as in the process of settlement in any case arises purely professional questions; moreover, with the participation of the shareholders, a mediator will be compelled to perform further and explanatory function. Therefore, it is difficult to agree with the opinion of a number of researchers, as well as practicing mediators about the absence of the mentioned necessity (Matveeva & Kopelchuk, 2014).

According to the Centre for Mediation and Law, there are special techniques developed for implementation in construction projects, namely, a comprehensive and integrated mediative approach, the purpose of which is to implement mediation mechanisms and skills in activities of corporations and organizations. That is, the centre reports ADR bolstering not only at the legislative level, but also by means of direct putting its methods into practice. However, the Russian practice of ADR application is unlikely to become widely used in the implementation of construction projects because of the need to cover the entire spectrum of problems and differences arising from the agreements between the parties. Facilitating to engage the parties into a meaningful dialogue is clearly not enough. In this regard, the most promising in the field of dispute resolution could be complex ways, combining both mediation and arbitration.

These methods include specialized dispute resolution commissions also known as Dispute Review Board (DRB), organized for the purposes of specific projects. The members of the commissions should have experience not only in the field of dispute resolution, but also in the specific sphere of the project. The settlement of disagreements with the participation of the Commission is one of the binding conditions of

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the contract (analogue of the mediative clause), which serves as a guarantee for the parties (Taş & Fırtına, 2015). DRB differs from other types of ADR in its structure at the early stages of the project realization, i.e. before the occurrence of a dispute. The members of the Commission are the direct participants of the project, and they monitor its various stages, prevent the occurrence of differences and in case of aggravation of contradictions directly resolve the dispute.

If we turn to the experience of foreign countries, the first DRB was established in the process of implementation of the project for the construction of the Eisenhower Tunnel in Colorado. Subsequently, the World Bank, the International Chamber of Commerce and the International Federation of Consulting Engineers developed the recommendations for the effectiveness of DRB functioning. The lists of potential members of the commissions were approved by the London International Arbitration Court, the Consortium on International Dispute Resolution (Switzerland), the specialized Dispute Resolution Foundation (North Carolina). The costs associated with the Commission's activities are distributed equally between the parties to the contract and are included into the contract price (Butenko, 2016). It is important to emphasize that one of the main functions of the Commission is not the resolution of the dispute, but its prevention. The preventive function gives DRB significant advantages in comparison with other types of ADR.

The study also highlights a special ADR procedure performed in the UK since 1998 in construction industry known as a dispute adjudication mechanism. The reason for the implementation of this procedure was the inability of the state courts to provide an effective opportunity to settle disputes between contractors and customers, which led to abuse by the latter and, in general, to an increase in the number of unfinished objects . The procedure was applicable to all arising disagreements between all project participants (customer, general contractor and subcontractors); it was possible for the state court to review the decisions only after completion of the construction, and the court could do the enforcement in a simplified manner. Australia, New Zealand, Singapore, Malaysia and Ireland have implemented similar procedures.

6. Findings

In the process of putting specialized mechanisms for the resolution of economic disputes into practice, certain difficulties may arise: disagreements with regard to the third member of the Commission, a significant increase of the cost of the project, lack of qualification of potential members of the Commission, solving the most difficult disputes. Moreover, if the dispute resulted from systematic violations of the obligations of one party, the only possible option would be a judicial decision, with the enforced one in the future. In this case, there is no sense for the parties to maintain business relations that lead only to the losses of one party and to unjustified enrichment of the other party. In other words, the agreement on the provision regulating the resolution of all arising disputes with the help of a specialized commission makes sense in case of cooperation with a trusted and reliable partner (Yas'kova & Matveeva 2014)..

7. Conclusion

Thus, the use of specialized methods of dispute resolution requires both the need to use these methods at the legislative level, the preparation of practical recommendations and the establishing of associations engaging potential members of the commissions on dispute resolution that unite experts in the

field of mediation in the implementation of construction projects. In addition, the work on implementation of certain mechanisms in the activities of construction companies dealing with large projects is very important. Moreover, not only economic entities, but also state bodies, whose competence includes construction issues, should take part in this process to ensure a meaningful discussion between all the participants of the project (including the buyers). That is, only the system development of ADR methods at the legislative and enforcement levels can solve problems of low efficiency of dispute resolution in court and can prevent the abuse of rights by unscrupulous counterparties.

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