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EXECUTION OF A MEDIATION AGREEMENT: RUSSIAN AND EUROPEAN APPROACHES

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Abstract

The article considers the topical issues related to the improvement of legislation in the field of mediation in Russia, in particular the problems of enforcing mediation agreements. A number of legislative provisions of various European nomocracies in this area and the prospects for their adaptation to Russian realities are under study. The article states that an adequate level of development of these procedures is absent at the moment that is caused by insufficient theoretical development and, as a result, gaps in regulatory framework appear, which entails citizens' distrust in developing institutions. Voluntariness is defined as the basic concept of the mediation agreement execution, wherein the importance of combining voluntariness and the mandatory implementation of a mediation agreement is noted in the interests of protecting the rights and legitimate interests of the parties to the mediation agreement. It is concluded that while striving for a wider dissemination of mediation procedures through the introduction of new tools for the enforcement of mediation agreements (including the possibility of its notarization) and such new institution as a judicial mediation, the legislator must stay on the brink when the value of the mediation agreement as a result of achieving a mutually acceptable result of the resolution of the dispute and, as a result, the willingness of the parties to execute it on a voluntary basis will not be called into question by administrative coercion for persons to participate in conciliation procedures and to develop such an agreement that will subsequently require enforcement.

Keywords: Agreement, conciliation procedures, execution, mediation, voluntariness

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1. Introduction

The recognition of the congestion of the judicial system in the Russian Federation has long become common in the discussion of the problems of the country's legal development. At the same time, the situation continues to worsen, there is a dynamic growth in the number of cases considered by courts in recent years. In 2017, more than 28 million cases were considered, in 2018, more than 31 million cases, and a decrease in this figure is unlikely.

As one of the directions for solving the problem, the development of alternative dispute resolution procedures, in particular, the institution of mediation, the formation of a corps of judicial mediators, and the improvement of the mechanisms for the execution of agreements, is considered.

A generally accepted assessment of the implementation of this method is a statement of the absence of the expected effect, due to insufficient theoretical development and resulting gaps in regulatory framework, which entails a lack of trust among citizens in developing institutions.

For a long time, Western countries have been actively developing mediation as an integral part of alternative methods of dispute resolution, encountering mainly a similar set of problems, in particular, in the sphere of execution of mediation agreements.

2. Problem Statement

In the development of mediation, the state faces the task of maintaining a balance of three interrelated aspects of this method of protecting rights: encouraging citizens to use extra-judicial methods of resolving disputes, ensuring minimization of state participation in the implementation of the results of such procedures, as well as maintaining control over the law and ensuring the rights of persons in the course of their application. Finding a balance in the legal regulation of this area will allow citizens to more effectively apply this method of protecting their rights, and the state to reduce the burden on the judicial system without losing control over compliance with legislation in the field of resolving civil law disputes.

3. Research Questions

The task of unloading the judicial system through, inter alia, the introduction of alternative dispute resolution procedures, which is of current interest for the Russian legal system, has also been the research subject for a number of foreign nomocracies, and for quite some time now.

A fundamentally important aspect of solving the problem of reducing the burden on the judicial system is the issue of executing the adopted mediation agreement as a mechanism to reduce system costs when the dispute returns to the sphere of state justice in connection with the refusal of one of the parties to execute the mediation agreement.

The central notion of a mediation agreement execution is voluntariness. In theory of law, as a substantiation for the feasibility of a mediation agreement, a rather simple logical construction is proposed, the key point of which is that the partners who are interested in maintaining relations and solving the existing problem agree to the mediation procedure. When both parties independently came to a mutually acceptable decision, the lack of ways to enforce the agreement does not play such a prominent role. In this

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case, it is natural to assume that these decisions should be executed voluntarily. Success in this area depends, first of all, not on the possibility of applying coercive measures on the part of the state to entities that do not comply with mediation agreements, but on the professionalism of mediators who will succeed (or fail) to synchronize the interests of the parties to the dispute and, in this form, consolidate them in the agreement .

The Russian legislator is gradually expanding the tools that facilitate the execution of the concluded mediation agreement, protection of the rights and legitimate interests of the parties in case of refusal of voluntary execution of the mediation agreement. The possibilities of such protection are laid down in the legal construction of a mediation agreement. This is a civil transaction, which is concluded in writing and must contain information about the parties, the subject of the dispute, the mediation procedure, the mediator, as well as the obligations agreed upon by the parties, the terms and conditions for their implementation. By virtue of this, the protection of rights violated as a result of non-execution or improper execution of such a mediation agreement is carried out by the methods provided for by civil law.

If the parties in the future want to guarantee the execution of the mediation agreement, then, at their request, in accordance with the applicable procedural and other legislation, such an agreement reached by the parties as a result of the mediation procedure carried out after the dispute is submitted to a court or arbitration court can be based on clause 3 Art. 12 of Federal Law 193-FZ “On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)” approved by the court or arbitration court as an amicable settlement. It will create additional guarantees for the parties to such an agreement in the form of the possibility of its enforcement; in addition, a novel is introduced about the possibility of notarization of a mediation agreement.

Initially, when preparing the bill, it was not planned to execute the mediation agreement signed by the parties through a notary office, which would certify it, thereby giving the force of an executive document. With further preparation of the bill, these provisions were introduced. They contribute to the achievement of public goals, namely, to reduce the burden on the judicial system, as well as to protect the interests of participants in a civil law dispute, who would get the access to a simplified enforcement of the mediation agreement. As a result, these provisions were included in the text of the law, and from October 25, 2019, Article 12 of Federal Law 193-FZ dated July 27, 2010 was supplemented by part 5, which establishes that the mediation agreement reached by the parties as a result of the mediation procedure carried out without transferring the dispute to consideration of a court or court of arbitration, in the case of its notarization, has the effect of an enforcement document. Thus, a mediation agreement can have two statuses, notarized and without a civil law transaction.

The criteria for verification of a certified mediation agreement by a notary have not yet been developed in practice, and there are risks of unfair behavior of the parties when using insufficiently developed mechanisms for the enforcement of mediation agreements.

For agreements not certified by a notary, the old problem remains - if such a mediation agreement is executed through a court, it will actually check the transaction itself or the relations themselves in the proceeding, and this is in the time of loading of the court, etc.

It is important to note the following circumstance. The law is silent about the legal force of mediation agreements concluded on labor and family disputes. If in ordinary economic disputes, based, as a rule, on

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civil legal relations, the parties have the opportunity to defend their interests in ways similar to protecting the parties to transactions, then participants of labor and family relations were denied this opportunity. Labor and family law per se do not have any, similar to mediation, ways to protect agreements. Accordingly, in labor and family disputes, the execution of mediation agreements has long been completely voluntary. The mechanism of their enforcement remained unsettled, which very often adversely affected the interests of at least one of the parties. The situation changed with the introduction of the aforementioned possibility of notarization of agreements arising from marriage and family relations. However, the practice of the Federal Bailiff Service on the enforcement of such agreements has not yet been developed. The introduction of mediation procedures with the resolution of labor disputes also faces a number of difficulties, however, the thesis is being put forward that there is no alternative to reconciliation of the parties for the effective resolution of labor disputes (Zaitseva et al., 2019).

The toolkit for enforcing non-certified notarized mediation agreements also remains not entirely effective. In case of non-execution of civil legal obligations arising from the mediation agreement, the parties will be forced to apply for protection of violated rights and interests to a court or arbitration court. The judicial procedure enshrined in the Russian legislation for the consideration of all disputes does not imply another option for resolving the issue if the settlement agreement is not fulfilled. As a result, they find themselves in the total mass of civil relations participants, losing at the stage of execution of the agreements all the advantages of conciliation procedures.

In these conditions, it is advisable to turn to the experience of countries where the institution of mediation has successfully existed for many years, in particular, European countries. It would allow us to take into account the mistakes that were made in the implementation and development of the conciliation procedure in other countries, despite the fact that the problems here are often similar. In the United States of America, for example, disputes related to the enforcement of mediation settlement agreements are the most common type of litigation in the mediation process (Coben & Thompson, 2006). In particular, it is due to the fact that in the United States there is a fairly wide range of instruments related to various types of mediation, including in particular the so-called legal mediation carried out directly by the lawyers of the parties, which, as noted by some authors, is less effective (Pappas, 2015).

It is noted that in Europe the most successful experience in the use of mediation is observed in the UK, the Netherlands, Norway, Slovenia and France. According to some estimates, various forms of mediation are used in 60-70% of labor disputes, commercial disputes, consumer disputes, divorce proceedings, neighborhood disputes and school disputes. Statistics show that in about two thirds of mediation cases, they lead to the conclusion of an agreement (Vankova, 2016).

Moreover, the Western science constantly raises the question of the expansion and applicability of alternative methods of dispute resolution to new areas of public life, such as the use of digital platforms and disputes related to behavior in social networks (Enguerrand & Yseult, 2019). New technologies are also used in the procedures themselves to facilitate citizens' access to them, as in the Netherlands special "digital" windows are created where citizens can apply for mediation without any legal assistance (Brink, 2017).

If you look at developing countries, they often go along the path of introducing alternative methods of resolving disputes, through the adoption of highly specialized acts to stimulate procedures for certain

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categories of disputes, for example, in Indonesia there is an "alternative model for resolving brand litigation" based on the principles (Praptono & Rahayu, 2018).

The feasibility of mediation agreements has been successfully resolved for many years in many countries of the European Union. Directive No. 2008/52/EU on the improvement and coordination by member countries of legislation on mediation procedures is in force at the European Union level. In many European countries, legislation requires mandatory mediation procedures before going to court. In Austria, the act on the reform of civil law establishes that a certain list of disputes between neighbors cannot be referred to the court until certain mediation procedures have been carried out (Aschauer, 2017). Italy has also taken this path and introduced the mandatory application of mediation in "important and sensitive disputes" (De Rita, 2017). In the UK, a court can charge the defendant who won the case with the costs of the defendant's lawyers only because the plaintiff evaded the mediation process (Halsey v Milton Keynes General NHS Trust, 2004).

Many European countries have taken the path of imparting executive power to out-of-court settlement agreements concluded as a result of mediation. For example, according to §794 of the German Civil Procedure Code, enforcement is carried out, inter alia, to settlement agreements concluded in a conciliation body established or recognized by the Land Justice Office according to documents drawn up by a German notary within his/her official powers. This is also allowed in French law, where the chairman of a court of great jurisdiction, upon the application of the parties to the settlement agreement, gives executive force to the presented act. Moreover, in France, in addition to the two most common types of conciliation procedures - contractual and judicial mediation, the institution of administrative mediation was introduced (Bonnet & Pedone, 2017).

Italian law also has the possibility of giving executive power to out-of-court settlement agreements concluded as a result of mediation. Moreover, in some cases, an agreement signed by the parties and lawyers is automatically enforceable for a number of disputes: on forced expropriation; on the delivery and release; on fulfilling obligations regarding what can and cannot be done; and recognition of judicial mortgages.

In other cases, the agreement attached to the protocol is approved at the request of one of the parties by a decree of the chairman of the court, subject to verification and approval of the relevant requirements. In case of cross-border disputes, the mediation protocol is approved by the chief judge of the district in which they should be held (Brun, 2019).

UK law also permits a court to approve agreements reached without appeal to the court with a lawsuit and enforce them on a par with a court decision made on the merits of the dispute (Civil Justice Council, 2017). The law contains provisions on issuance of executive orders on the basis of applications for the enforcement of the mediation settlement agreement, which may be issued with the prior consent of the parties.

In Scotland, there is a special additional procedure that ensures the execution of agreements without going to court. It is called registration for storage and execution in the books of the council and session. In fact, this is a way to formally record the terms of the agreement in the Register of Acts and Evidence in the Books of the Council and Session to ensure a "formal check" - this means that the document takes effect on its terms without additional procedures (RoS, 2020).

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To use this procedure, the results of mediation must be signed by the parties and contain the words "the parties agree to register for storage and execution". Then the document should be sent to a special registration authority. The registrar returns an extract from the agreement (it is an independent document), which contains a record confirming the date on which it was registered, and the wording that "and the mentioned Lord gives a warrant for the lawful execution of this document". It means that the act can be enforced as if it were a court order (Alexander et al., 2017).

If the result of mediation is registered to preserve execution in the books of the council and session, it must be enforced in any EU jurisdiction as a "genuine document" in terms of the Civil Jurisdiction Law and Judicial Decisions of 1982 (Alexander et al., 2017).

At the same time, some Western researchers note that the institutions of "forced mediation" are losing their usefulness, but this does not mean abandoning mediation programs related to the court (Nolan & Jacqueline, 2013). It is noted that the goal of these programs should rather be to improve the quality of justice. One way to achieve this is to simply abolish mandatory mediation and require the parties to give informed consent to mediation. Other options include economic incentives, namely a partial or even full refund of court fees; another option would be to expand educational programs. The continued efforts of the courts to educate the public about what to expect from the mediation process are important to assist the parties in their decisions on mediation. Using available technologies, the courts could provide parties with informational videos reflecting different approaches to mediation.

It seems that the European approach to the development of the status of a mediation agreement should be taken into account when considering possible mechanisms for strengthening the conditions for the settlement of disputes in the framework of mediation in Russian law. It will allow being more optimistic about the prospects for the development of mediation in Russia. Ultimately, Russian reality will leave its mark on the idea of the legislator. Whether mediation will become an effective way of resolving disputes or will remain a legal fiction can only be judged after a lapse of years from the results of a generalization of the accumulated practice of applying the Law on Mediation.

4. Purpose of the Study

The purpose of the study is to determine the concept of the most effective combination of various elements of legal regulation of the application of alternative dispute resolution procedures.

5. Research Methods

The work was carried out using such general scientific research methods as comparative legal, formal legal and institutional legal modeling. The formal legal method was used in the analysis of legal norms related to the institution of the enforcement of mediation agreements. In the course of the study, a system-structural and logical approach to research was used, as well as a sociological method. The logical method involves the study of reconciliation institutions precisely as a system. In the framework of the sociological method, issues of using conciliation procedures are considered in the context of the analysis of the mutual influence of these legal institutions and society.

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6. Findings

Striving for a wider dissemination of mediation procedures, the legislator should focus on ensuring a balance between the recognition of the value of the mediation agreement (a mutually acceptable result of the dispute's resolution itself and the willingness of the parties to execute it voluntarily) and the introduction of tools to force individuals to participate in conciliation procedures and to develop such agreement, which subsequently will require mandatory execution.

The experience of foreign countries in the enforcement of mediation agreements, both through the introduction of simplified judicial procedures and giving them the power of state coercion, and various forms of extrajudicial legitimization of such agreements can and should be used in the development of Russian models.

7. Conclusion

The analysis of various approaches of the Russian and European law and order to ensure the possibility of the enforcement of agreements reached in the framework of conciliation procedures, especially out of court mediation agreements, has been carried out.

The basic notion of a mediation agreement execution is defined as voluntariness, the implementation of which is estimated as a central problem that determines the prospects for the development of this method of dispute resolution. As the main way to solve this problem, the authors consider a combination of voluntariness and the mandatory execution of the mediation agreement in the interests of protecting the rights and legitimate interests of the parties to the mediation agreement.

The pattern is noted that the reinforcement of the administrative element in mediation procedures, as a departure from the principle of voluntariness, is often manifested in the increase in the number of cases related to the enforcement of mediation agreements, due to the parties' evasion of the execution of the agreements imposed on them.

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