Periódico do Núcleo de Estudos e Pesquisas sobre Gênero e Direito
Centro de Ciências Jurídicas - Universidade Federal da Paraíba
V. 9 - Nº 04 - Ano 2020
ISSN | 2179-7137 | http://periodicos.ufpb.br/ojs2/index.php/ged/index

DEVELOPMENT OF MEDIATION IN RUSSIA: EXTRAPOLATION OF FOREIGN EXPERIENCE

Marina A. Sorokoletova[1]
Svetlana S. Baeva[2]
Alla Yu. Kornyushkina[3]
Sergey A. Kravets[4]
Nina V. Stus[5]

Abstract: The article analyzes the development of mediation in Russia based on foreign experience. The Institute of mediation has passed a long way of development before it was established on a legislative basis and is still far from perfect. Many problems prevent the effective use of mediation. This institution cannot fully carry out the tasks assigned to it. Mediation has great potential to become a real alternative and at the same time effective way of resolving disputes in Russia, which is proved by examples of legislation in other countries and the practice of its application.

Keywords: alternative dispute resolution, negotiations, mediation, soft law, restorative justice, collaborative law.

1. Introduction

Mediation is the oldest instrument of international law. However, the legal literature indicates that it appeared «only in the second half of the XX century. It first settled in the United States, England, and Australia, and later appeared in Europe - France, Belgium, the Netherlands, Germany, Austria, Italy, and Switzerland»[1]. Mediation is an alternative dispute resolution. But mediation is a type of alternative dispute resolution. Alternative dispute resolution is a set of procedures that facilitate out-of-court dispute resolution. There is a steady

Belgorod State University, 85 Pobedy Street, Belgorod, the Belgorod region, 308015, Russia[1]
Northern Caucasian branch of the «Russian state University of justice», 187/1 Levanevskogo Street, [2] Krasnodar, 350002, Russia
Belgorod State University, 85 Pobedy Street, Belgorod, the Belgorod region, 308015, Russia[3]
Belgorod State University, 85 Pobedy Street, Belgorod, the Belgorod region, 308015, Russia[4]
Belgorod State University, 85 Pobedy Street, Belgorod, the Belgorod region, 308015, Russia[5]

figure of speech - Alternative dispute resolution (ADR). ADR in different countries includes various out-of-court forms of case resolution. There are usually three known forms: arbitration, mediation, and negotiation. Arbitration is a traditional way of resolving disputes. It is famous in Roman law. The term «negotiation» has also been known for a long time, but only in recent decades has it come to be seen as a way of alternative dispute resolution [2]. The term «mediation» appeared relatively recently, but, nevertheless, replaced the term «intercession». The three listed ADR methods are the main ones, but not the only ones. The development of mediation in Russia and other countries is a very interesting topic. By studying the experience of other countries, you can extrapolate the results to Russia.

2. METHODS

Various general scientific methods and the methods of logical cognition are used in the work: analysis and synthesis, systemic, extrapolation, functional and formal-logical approaches. The development of conclusions was facilitated by the application of formal-legal and comparative-legal methods.

3. DISCUSSION AND RESULTS

For the first time, the term «alternative dispute resolution», or ADR for short, appears in the United States with the active participation of public committees. [3]. In 1998, a Law was passed in the United States - Alternative Dispute Resolution Act [4]. In 2001, a Uniform Mediation Act was developed and recommended for adoption in the United States [5]. The American Bar Association lists 22 forms of out-of-court dispute resolution on its website. These forms include [6]: 1) Arbitration; 2) Case Evaluation; 3) Collaborative Law [7]; 4) Cooperative Practice; 5) Divorce Coaching; 6) Early Neutral Evaluation; 7) Facilitation; 8) Family Group Conference; 9) Litigation; 10) Mediation; 11) Mini-Trial; 12) Multi-Door Program; 13) Negotiation; 14) Neutral Fact-Finding; 15) Ombuds; 16) Parenting Coordinator; 17) Pro Tem Trial (resolution of the dispute by a state judge with the possibility for the parties to set the date of the court session and the judge-Rapporteur) [8]; 18) Private Judging; 19) Settlement Conferences (settlement of the dispute through a

series of negotiations); 20) Special Master (special assistant to the judge); 21) Summary Jury Trial (simplified procedure for hearing with the jury); 22) Unbundled Legal Services (independent legal services). In England, experts in this field allocate from 5 to 8 forms ADR: 1) Negotiation; 2) Mediation; 3) Conciliation; 4) Early Neutral Evaluation; 5) Arbitration [9]; 6) Adjudication; 7) Expert determination [10]; 8) executive tribunal [11]. Two species are common in France ADR: la mediation и la conciliation [12]. Moreover, both mediation and reconciliation can be both extrajudicial and judicial (extrajudiciaire, judiciaires). In France, alternative ways of resolving disputes are indicated by a stable speech expression «MARC» (Modes alternatifs de reglement des conflits). Alternative dispute resolution methods were introduced by Law №98-1163 of 1998 [13], with MARC being referred to in the law as «friendly» dispute resolution methods in contrast to traditional judicial authoritarian dispute resolution methods (de reglement amiable). In Germany, the main out-of-court method of dispute resolution is mediation. The law on mediation and other forms of extrajudicial settlement of conflicts was adopted on July 26, 2012. [14]. In the law of the European Union as the main attention was drawn to mediation [15]. In 2008, the European Directive №2008/52/EU «on certain aspects of mediation in civil and commercial matters» of 21.05.2008 was adopted [16]. The Directive provided for the obligation of all EU member States to develop and adopt mediation laws as soon as possible. Among European countries, the Netherlands has a rich tradition in mediation. The main characteristics of legal regulation here are a focus on achieving consensus, democracy, encouraging the use of informal procedures, non-compliance, and adherence to the concept of «soft law» [17]. This approach assumes the existence of a number of concepts, recommendations, and methodological acts that do not have the status of law and do not require unquestioning compliance. In this case, the legislator does not set a strict legal framework for the parties to the legal relationship, but only directs their behavior in the desired direction.

It is considered that in the Russian Federation mediation first appeared in the norms of the Arbitration Procedure Code of the Russian

Federation, which contains the following wording: «the Parties can settle a dispute by entering into a settlement agreement or using other conciliation procedures, if this does not contradict Federal law» [18]. The process of establishing the mediation Institute in the Russian legal field took many years. In 2010, the Federal law «On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)» came into effect [19:22]. This Law became the legal basis for further development of the mediation Institute in the Russian legal space. In relation to the mediation Institute, it is true that it can be considered as an element of state policy in the field of protecting the rights and legitimate interests of citizens and organizations. «The adoption of this law on mediation has become a necessary condition for the integration of the Russian state into the European community and a stimulating factor for the further spread of mediation» [20]. The law on mediation in Russia has been adopted, but is it valid? Practice shows that this procedure is used very rarely. It can be assumed that the non-use of mediation in cases where it is possible and even necessary, is due to the fact that people do not know about its existence. It is also likely that people are not able to assess the prospects of its use in resolving a dispute. Raising the level of legal awareness of the participants of the dispute by highlighting the essence of mediation by professional participants of this procedure (mediators) in the pre-trial form of dispute resolution or by judges will help to increase the frequency of use of this procedure. The survey of judges on the factors of low popularity of mediation in Russia allowed us to identify a whole range of reasons, both objective and subjective. Objective reasons include the relative novelty of the procedure and the lack of widespread practice of its application, the unwillingness of the parties to incur additional financial costs for paying for the services of a mediator, and the unwillingness of judicial representatives to recommend mediation, since in the Russian practice this leads to a decrease in their income. Among the subjective factors distinguish the continuing high level of conflict in society, the desire of persons whose rights have been violated at any cost to bring the offender to justice, to punish, to punish the offender; the perception of judicial decisions as more «valuable» act in comparison with

the mediation agreement, having the status of civil transactions; the passivity of the parties, the desire to place the responsibility for decision-making on the court and an unwillingness to take responsibility for the decision itself; the confidence in the mediator and confidence in the ability of the mediator to resolve between the parties to the conflict. These reasons, as well as other subjective reasons, are primarily due to the lack of awareness of the parties about the features and advantages of the mediation procedure, the lack of skills and traditions for conducting negotiations to resolve the dispute, and the low level of legal culture [21].

Today, the institution of mediation is provided by law only in relation to the private legal sphere. However, it is impossible to ignore the use of mediation in the public legal sphere. In recent years, there have been works on mediation in criminal proceedings. There is no definition of mediation that can be used in criminal proceedings in Russian law. The definition of mediation in criminal proceedings is given in one of the fundamental documents that was adopted within the international community, namely in the Recommendation of the Committee of Ministers of the Council of Europe N R (99) 19 of September 15, 1999 «On mediation in criminal cases». Mediation is understood as any process in which the victim and the offender are given the opportunity, if they voluntarily agree, with the help of an impartial third party (mediator) to take an active part in solving problems that have arisen as a result of the crime. Without distorting the essence of mediation in the criminal legal sphere, it should be viewed from a slightly different perspective. If in the private law sphere mediation acts as an alternative procedure for resolving a dispute, in criminal law it acts as a measure of restorative justice.

Russian law enforcement practice should use the developed and implemented foreign mediation tools. However, it is necessary to be careful and take a balanced approach to testing the Western experience, since it is impossible not to take into account the specifics of the identity of Russian justice, the legal consciousness of people, cultural, historical and socio-economic factors. In Russia, there is no stable practice of applying the mediation procedure. In the regions of the country, the development of the mediation

institution is uneven. Therefore, the primary task of the state, the professional community of mediators, and scientists is to justify the expediency and necessity of using the mediation procedure and ensure its effectiveness in solving the problems of both the judicial community and civil society as a whole. We can say with full confidence that mediation will soon justify its role in creating agreement and trust between business partners, and therefore an atmosphere of civil harmony in society as a whole.

4. CONCLUSION

Based on foreign experience, the development of mediation in Russia has a positive trend. Objectively assessing the advantages of peaceful out-of-court settlement of disputes, Russian society accumulates the potential for its further development : it searches for the most popular areas of mediation application, works in the field of improving the legal regulation of mediation, defining a clear, visual system of conciliation procedures, and gradually forming in the public consciousness attitudes to adopt peaceful technologies for resolving disputes and conflicts [21].

CONFLICT OF INTEREST

The authors confirm that the information provided in the article does not contain a conflict of interest.

References

Is civil society and the state Ready to resolve disputes by applying a mediation procedure that is still new to Russian law? // Administrator of the court. 2017. №3. P. 8 - 11.

Ivanovskaya N. V. Rendering services for alternative dispute resolution by public organizations in foreign countries // Black holes in Russian legislation. 2013. №2. P. 131.

Kseniya I. Korobko, Svetlana V. Radaeva, Elizaveta V. Rozanova, Sergey A. Rubanov, Aleksej P. Treskov Mediation as an alternative dispute resolution: world experience // Revista San Gregorio. Núm. 30 (2019). Special edition-MARCH 2019.

Alternative Dispute Resolution Act 1998 // https://www.law.cornell.edu/uscode/text/28/651

Uniform Mediation Act // http://www.uniformlaws.org/Act.aspx?title=mediation%20Act/

Types of Dispute Resolution Processes // American Bar Association //

http://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses.html

Collaborative Law // American Bar Association // http://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/collaborative_law.html

Pro Tem Trial // American Bar Association // http://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/pro_tem_trial_.html

Citizens Advice // https://www.citizensadvice.org.uk/consumer/alternative-dispute-resolution/settling-out-of-court/using-alternative-dispute-resolution-adr/

Gill C., Williams J., Brennan C. and Hirst C. Models of Alternative Dispute Resolution (ADR). A report for the Legal Ombudsman 31 October 2014 // http://www.legalombudsman.org.uk/downloads/documents/research/Models-Alternative-Dispute-Resolution-Report-141031.pdf

Practical Law, United Kingdom // Alternative dispute resolution (ADR) // http://uk.practicallaw.com/0-107-6391

Cadiet L. Panorama des modes alternatifs de reglement des conflits en droit francais // http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr28/CADIET2.pdf

Loi n 98-1163, 18 decembre 1998 relative a l'acces au droit et a la resolution amiable des conflits // https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000750880

Abolonin V. O. German Law «On support for mediation and other forms of extrajudicial settlement of conflicts» (Mediation G) (with a brief explanation) / / Bulletin of civil procedure. 2013. №5.

Ermakova E. P., Sitkareva E. V. the Law of the European Union: the procedure for resolving private law disputes: A textbook. Moscow: Yurlitinform, 2016. P. 199.

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters // http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:01:EN:HTML

Davydenko D. World practice of mediation / / Consulting company «Z-Group». Publications. URL: www.z-gr.ru.

Arbitration procedural code of the Russian Federation of 24.07.2002 №95-

FZ // Sz of the Russian Federation. 29.07.2002. №30. Article 3012.

Federal law of 27.07.2010 №193-FZ «On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)» // Collection of legislation of the Russian Federation. 02.08.2010. №31. Article 4162.

Rekhtina I. V. Mediation in Russia as an alternative method of dispute resolution and an element of integration into the European community // Lawyer. 2012. №11. P. 40 - 43.

Milokhova A.V. Development of conciliatory dispute resolution procedures in the context of judicial reform // Laws of Russia: experience, analysis, and practice. 2018. №8.

Ebrahim Abadi, M., & Namdar, Sh. (2016). Comparison between the legal nature of commercial factoring and similar legal institutions. UCT Journal of Social Sciences and Humanities Research, 4(2), 10-15