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Mediation in Russia: grounds and tendencies

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In England they usually declared: "A bad compromise is better than a good lawsuit". Obviously, it is more convenient to settle a dispute through alternative dispute resolution. In the foreign practice such ways of alternative dispute resolution as negotiation, mediation, collaborative law, and arbitration are well-known and widespread. Our article is devoted to the issue of mediation. Three years ago with the enactment of the Federal Law “On an Alternative Dispute Resolution Procedure Involving an Intermediary (Mediation)” [n1] (“The Law on Mediation”), a new type of a dispute resolution procedure was introduced in Russian jurisdiction.

To define the mediation it is indispensable to clarify the main features that make mediation different from litigation and arbitration. In contrast to the other types of dispute resolution, mediation is a far less formal procedure that requires less time and that is based on the principle of voluntariness. Moreover, mediation allows finding a balance between the interests of both parties, which cannot be reached by using other ways of dispute resolution. In addition, it may be stated that such an innovation will help to decrease the amount of cases in Russian courts, which will improve the system of administrating justice in Russia as a whole.

The Russian Federation is a part of the global community and it relies on acknowledged experience of mediation in other countries. A lot of provisions were adapted by Russian legislators from the UNCITRAL Model Law on International Commercial Conciliation [n3] and Directive 2008/52/EC of the European Parliament and of the Council of the European Union of 21 May 2008 [n2]. These provisions laid down the basis of the new law.

The system of mediation in England has been developing for centuries. The sources of the mediation procedure are both precedents and statutes. The Directive mentioned above was implemented in the UK with some amendments in Part 78 of the Civil Procedure Rules that came into effect for cross-border transactions. But Great Britain also has its domestic mediation (which deals with national issues). In Russia the system of mediation is similar to British domestic mediation procedure. The Law on Mediation regulates civil, family, labor law disputes. However, The Law on Mediation may also be used as an appropriate means of resolving some cross-boundary issues.

The procedure of mediation is very popular in the UK, there is even a special service – hotline - that you can use from any country, and you can describe the conflict, your preferences concerning mediators and choose a mediator who meets your requirements from the list of experts. They also have the CEDR [n5] service that provides a number of independent mediators and gives access to experts in a range of commercial problem solving disciplines used to achieve resolution in business conflicts. In Russia the Centre for Mediation and Law [n6] provides mediations services and consulting.

Unlike the British model of mediation, the German jurisdiction requires a mandatory conciliation procedure before litigation (for such cases as disputes between neighbors and disputes the amount of which does not exceed 750 Euros). So, one of the possible amendments to the Law on Mediation could provide for using mediation as a compulsory procedure. Nowadays the court may invite the parties to participate in mediation, but the final decision is made by the parties. Some Russian scholars suggest authorizing courts to compel the parties to resort to this procedure.

Nevertheless, we support Russian scholars who claim that the approach given above contradicts the principle of voluntariness of mediation [n4]. Mediation shows that parties are ready to settle their dispute. Despite this, in England in 2007 there was an attempt to introduce a temporary system of obligatory mediation. Researches have compared two different types of mediation (voluntary (VOL) and mandatory (ARM) [n7]. The results of the research illustrated the inefficiency of mandatory mediation. The absence of voluntariness led to the unwillingness of parties to come to an agreement. Therefore, the probability of the positive outcome decreased.

Under the Law on Mediation it will be possible to apply the procedure of mediation both before and after litigation. The parties can make an agreement in which they stipulate the subject matter, the people who will act as mediators, the procedure and the term of mediation. Having completed this procedure, the parties conclude a mediation agreement that sets forth terms and conditions the parties agreed to. Such an agreement should be performed pursuant to the principles of voluntariness and conscientiousness. However, if such an agreement is made after the commencement of litigation, it may be approved by the court as a settlement and can be compulsory enforced if the parties fail to perform it voluntary. If mediation starts out of trial, a mediation agreement shall be performed by the parties bona fide. However, in case of failure or unfairness it may remain unperformed, which is far from being fair.

To sum up, we believe that an enactment of the Law on Mediation indicates positive changes in the system of Russian law. Nonetheless, as mediation is still 'immature' there is a question of its popularity among opposing parties and of its effectiveness. Moreover, mediation rules should be appropriate to resolve some cross-borders issues to promote the popularity of Russian jurisdiction among contracting parties. As to whether should mediation be compulsory or voluntary, we believe that voluntariness is the essential feature of mediation and cannot be isolated from mediation itself. There is also a necessity to provide legal enforcement for mediation agreements made out of court as compared with mediation agreements made before or during litigation.

Литература

1. The Federal Law "On an Alternative Dispute Resolution Procedure Involving an Intermediary (Mediation)// Russian Gazette. 2010. № 168.

2. Directive 2008/52/EC of the European Parliament and of the Council of the European Union of 21 May 2008 on certain aspects of mediation in civil and commercial matters // URL: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF

3. The UNCITRAL Model Law on International Commercial Conciliation // URL:http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

4. Kalashnikova S.I. Mediation in civil jurisdiction // Moscow. Moscow Infotropik Media, 2011. P. 27.

5. CEDR // URL: http://www.cedr.com/

6. The Centre for Mediation and Law // URL: http://www.mediacia.com/

7. Twisting arms: court referred and court linked mediation under judicial pressure // URL: http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf