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REVISTA BRASILEIRA DE *ALTERNATIVE DISPUTE RESOLUTION* – RBADR

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Luís Cláudio Rodrigues Ferreira
Presidente e Editor

Rua Paulo Ribeiro Bastos, 211 – Jardim Atlântico – CEP 31710-430 – Belo Horizonte/MG – Brasil – Tel.: (31) 99412.0131
www.editoraforum.com.br / E-mail: editoraforum@editoraforum.com.br

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Sumário

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Apresentação

Com seu primeiro número publicado em 2019, a *Revista Brasileira de Alternative Dispute Resolution – RBADR* se tornou um espaço internacional para a publicação de artigos acadêmicos sobre a temática de *alternative dispute resolution*.

A revista conta com um conselho editorial composto por especialistas na área, com capilaridade nacional e internacional, e artigos publicados por autores de inúmeros países. Devido às indexações obtidas pelo periódico, a revista privilegia a publicação de artigos em língua inglesa, sem, contudo, esquecer os artigos de qualidade escritos em português.

A revista é publicada pela Editora Fórum e tem como editor-chefe o Professor Daniel Brantes Ferreira. O periódico não está atrelado a nenhuma instituição, ou seja, é uma publicação independente.

Todas as contribuições são bem-vindas. Agradecemos a todos os editores, membros do conselho editorial, leitores, autores e revisores pelo sucesso da revista!

Daniel Brantes Ferreira, Ph.D.
Editor-Chefe

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Presentation

The Brazilian Journal of Alternative Dispute Resolution (RBADR) was first published in 2019 and has since become an international platform for academic articles on alternative dispute resolution. The journal boasts an editorial board comprising specialists in the field, with national and global reach, and features articles from authors across numerous countries. Due to its indexing achievements, the journal prioritizes publishing articles in English while ensuring the publication of high-quality articles written in Portuguese. The journal is an independent publication published by Editora Fórum and edited by Professor Daniel Brantes Ferreira. All contributions are welcome, and the editors thank the editorial board members, readers, authors, and reviewers for the journal's success!

Daniel Brantes Ferreira, Ph.D.
Editor-in-Chief

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Editorial

A *Revista Brasileira de Alternative Dispute Resolution – RBADR* chega ao seu sexto volume e segue com sua missão de ser um ponto de encontro da comunidade de *alternative dispute resolution* nacional e internacional. O presente número conta com artigos da Albânia, Brasil, Índia, Portugal, Rússia e Ucrânia.

Em 2024, a revista torna-se também uma publicação independente, continuando a ser publicada pela Editora Fórum e editada por seu editor-chefe, o Professor Daniel Brantes Ferreira.

A revista encontra-se atualmente indexada em várias bases de dados relevantes de periódicos, tais como Latindex, ERIHPLUS, Portal de Periódicos Capes, Scopus e ScimagoJR. Tal fato traz cada vez maior relevância internacional para a publicação, e o número de submissões tem crescido.

Em suma, a revista está aberta para submissões em formato contínuo, e seu sucesso se deve a todos os autores, leitores, revisores, editores e membros do conselho editorial. Agradecemos a todos pela colaboração.

Daniel Brantes Ferreira, Ph.D.
Editor-Chefe/Editor-in-Chief

Elizaveta A. Gromova
Editora-Assistente/Associate Editor

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Editorial

The Brazilian Journal of Alternative Dispute Resolution (RBADR) is reaching its sixth volume and continuing its mission of being a national and international alternative dispute resolution community hub. This issue includes articles from Albania, Brazil, India, Portugal, Russia, and Ukraine.

In 2024, the journal also becomes an independent publication, continuing to be published by Editora Fórum and edited by its editor-in-chief, Professor Daniel Brantes Ferreira.

The journal is currently indexed in several relevant academic databases, such as Latindex, ERIHPLUS, Capes Journal Portal, Scopus, and ScimagoJR. This fact increases the publication's international relevance, and the number of submissions has been growing.

In short, the journal is open for continuous submissions, and its success is due to the collaboration of all the authors, readers, reviewers, editors, and members of the editorial board. We thank everyone for their contributions.

Daniel Brantes Ferreira, Ph.D.
Editor-Chefe/Editor-in-Chief

Elizaveta A. Gromova
Editora-Assistente/Associate Editor

DOUTRINA | Artigos

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Impacto da mediação familiar em Portugal. Pressupostos e avaliação

Ana Melro

Investigadora no DigiMedia, Universidade de Aveiro, e no JusGov, Universidade do Minho. Advogada e Mediadora Familiar. Doutora em Informação e Comunicação em Plataformas Digitais e em Políticas Públicas. Mestre em Direito. E-mail: alrmelro@gmail.com. ORCID: https://orcid.org/0000-0001-9710-0574.

Resumo: A avaliação é uma ferramenta imprescindível se o objetivo é perceber se houve evolução (e que tipo de evolução) na implementação de determinado programa, política e/ou projeto. No caso da mediação familiar, tal é ainda mais pertinente, não só pela relevância que poderá ter no sistema judicial português, mas mais ainda pelos efeitos que se repercutem na vida dos indivíduos envolvidos adultos, mas, sobretudo, nas crianças. O trabalho apresenta alguns factos importantes para o entendimento e contextualização do que tem sido o caminho percorrido pela mediação familiar, em Portugal, factos esses que darão o mote e servirão de suporte para a definição de indicadores de avaliação e para a construção do modelo de avaliação de impacto que se propõe aplicar. Particularmente, a mediação familiar tem ganho bastante relevo no âmbito dos Meios Alternativos de Resolução de Litígios; é, por isso, muito relevante que, efetivamente, se entenda o impacto e em que diferentes dimensões vem tendo esse MARL.

Palavras-chave: Família. Mediação familiar. Impacto. Avaliação de impacto.

Introdução

Entre o que foi o estudo do conceito de família (e de infância) construído por Phillipe Ariès,[1] Émile Durkheim[2] e Claude Lévi-Strauss[3] na década de 1960 e a forma como, atualmente, se entende esse mesmo conceito, muito na instituição familiar tem evoluído e modificado até os dias de hoje. Aliás, todas essas transformações influenciaram a forma como a família é vivenciada e percecionada nos dias de hoje, conforme explica Gaspar:[4]

1 Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* (Alfred A. Knopf, Nova Iorque, 1962).
2 Émile Durkheim, *L'éducation Morale* (Presses Universitaires de France, Paris, 1963).
3 Claude Lévi-Strauss, *Les Structures Élémentaires de La Parenté* (Mouton, Paris, 1967).
4 Paula Alexandra da Costa Gaspar, *A Mediação Familiar no Sistema Jurídico Português*, Dissertação de Mestrado (Instituto Superior Bissaya Barreto, Coimbra, 2012).

> Hoje em dia, poderemos de certo falar em famílias em vez de família. Cada vez mais a sociedade é fruto de transformações socioculturais que resultam no aparecimento de modelos alternativos ao modelo tradicional família. A família representa a principal forma de organização pessoal de uma comunidade e desta organização fazem parte regras, afectos, respeito, liberdade, união, protecção e compreensão.[5]

Assim, compreende-se que também os modelos de resolução de litígios se adaptem ao que são as novas exigências dos agregados familiares, contemplando a possibilidade de optar por uma via menos exigente do ponto de vista emocional, mais concordante e célere e menos dispendiosa, sobretudo no que diz respeito a situações de divórcio, separação e regulação do exercício das responsabilidades parentais.

Mas como saber que, efetivamente, a mediação familiar, como um dos modelos previstos de resolução alternativa de litígios, cumpre aqueles requisitos? Que impactos tem a mediação familiar nas famílias e no sistema judicial? E como avaliar esses impactos?

O que o presente trabalho propõe é discutir não apenas a pertinência da mediação familiar no contexto das soluções de resolução de litígios familiares, mas, mais do que isso, debruçar-se sobre a forma como se avalia e percebe essa pertinência através da avaliação dos impactos gerados.

Para o efeito, recorreu-se à pesquisa bibliográfica, no sentido de entender que estudos têm já sido realizados no âmbito da avaliação de impacto, concretamente, aplicados à mediação familiar. Ademais, dada a relevância que tais dados têm para a definição de um modelo aplicado de avaliação de impacto, realizou-se um levantamento estatístico do número de processos de mediação familiar, em Portugal, através da consulta dos gabinetes oficiais.

Como hipóteses de trabalho que orientaram a investigação realizada, avançou-se com o considerar, à partida, que não está a ser efetivada a avaliação de impacto da mediação familiar, em Portugal. Não obstante, esse meio alternativo de resolução de litígios cumpre vários papéis centrais na relação interpessoal, mas, igualmente, na Justiça portuguesa. Por esse motivo, a avaliação de impacto será o instrumento-chave para aferir da qualidade da mediação familiar realizada, bem como dos efeitos e das consequências que aquela terá nas pessoas, nas suas relações e no sistema judicial.

O artigo está organizado em três secções principais: na primeira, far-se-á uma breve descrição da mediação familiar em Portugal, apresentando alguns factos e números. De seguida, será definida a avaliação de impacto, nomeadamente,

[5] *Id.*, p. 68.

indicando as suas dimensões e características, para, finalmente, se refletir sobre a aplicação da avaliação de impacto à mediação familiar, propondo um modelo concreto.

Com o artigo, espera contribuir-se para se refletir sobre a importância da mediação familiar em Portugal, não apenas para as famílias e todos os envolvidos, mas, igualmente, para o sistema judicial.

1 Mediação familiar em Portugal. Factos e números

Curiosamente, a raiz histórica da mediação familiar encontra-se nela mesma, suscitada pela criação do Instituto Português de Mediação Familiar, composto por uma equipa multidisciplinar, no início da década de 1990. A partir daí, perceberam-se as vantagens associadas à mediação em variadas áreas, para além da familiar, como no contexto do Mercado de Valores Mobiliários (Decreto-Lei n.º 486/99, de 13 de novembro), nos processos tramitados nos Julgados de Paz (Lei n.º 78/2001, de 13 de julho), no contexto laboral (Protocolo de 5 de maio de 2006), entre muitos outros.[6]

Atualmente, a mediação continua a ser uma realidade que vai ganhando cada vez mais pertinência e em cada vez maior número de litígios de variados contornos e objetos. Vejam-se, a título de exemplo, os estudos conduzidos por Golda Sahoo sobre mediação penal,[7] por Sangeeta Taak e Rajiv Gandhi sobre defesa do consumidor[8] ou por Daniel Brantes Ferreira, Elizaveta A. Gromova, Bianca Oliveira de Farias e Cristiane Junqueira Giovannini sobre plataformas de apostas desportivas *online*.[9]

No que diz respeito à mediação familiar, verifica-se que, entre 1977 e 1997, o número de divórcios, em Portugal, aumentou de 7.773 para 13.927. Esse crescimento gradual, mas sucessivo, foi um dos motivos para a realização do protocolo entre o Ministério da Justiça e a Ordem dos Advogados, resultando no Despacho n.º 12 368/97, de 9 de dezembro, do Ministro da Justiça. Por via

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6 Luísa Magalhães, "A evolução do regime jurídico da mediação em Portugal. Os antecedentes normativos de maior relevo até à Lei n.º 29/2013, de 19 de Abril", *Revista da Faculdade de Direito e Ciência Política da Universidade Lusófona do Porto*, 1(9), 155-193, 2017, https://revistas.ulusofona.pt/index.php/rfdulp/article/view/5964.

7 Golda Sahoo, "A victim-sensitive approach towards victim – offender mediation in crimes: an analysis", *Revista Brasileira de Alternative Dispute Resolution*, 4(8), 123-146, 2022, https://rbadr.emnuvens.com.br/rbadr/article/view/159.

8 Sangeeta Taak e Rajiv Gandhi, "'Mediation' as an Alternative Dispute Settlement Mechanism under the Consumer Protection Act 2019: An Analysis", *Revista Brasileira de Alternative Dispute Resolution*, 4(8), 211-226, 2022, https://rbadr.emnuvens.com.br/rbadr/article/view/162.

9 Daniel Brantes Ferreira, Elizaveta A. Gromova, Bianca Oliveira de Farias e Cristiane Junqueira Giovannini, "Online Sports Betting in Brazil and conflict solution clauses", *Revista Brasileira de Alternative Dispute Resolution*, 4(7), 75-87, 2022, https://rbadr.emnuvens.com.br/rbadr/article/view/118.

desse despacho, estava dado o mote para o surgimento da mediação familiar em Portugal, inicialmente, apenas disponível em Lisboa.

O que o gabinete criado visava era, essencialmente, dar resposta:

> *Às* situações de conflito parental relativas *à regulação do exercício do poder paternal*, *à alteração da regulação do exercício do poder paternal* e aos *incumprimentos do regime de exercício do poder paternal* para cujo conhecimento seja competente a comarca de Lisboa.[10]

Ou seja, em causa estavam as situações de separação e divórcio, mas, mais do que isso, as questões relativas ao superior interesse da criança. E talvez por que o cerne da mediação familiar fosse, de facto, o bem-estar da criança, a Lei n.º 133/99, de 28 de agosto, adita à Organização Tutelar de Menores (Decreto-Lei n.º 314/78, de 27 de outubro) o artigo 147.º-D no sentido de incluir a possibilidade de mediação, a qual visa, como se referiu, satisfazer o interesse do menor.

E, após o que foi o reconhecimento da relevância e da urgência da sua existência, o Gabinete do Secretário de Estado da Justiça alargou a oferta de mediação familiar às comarcas de Amadora, Sintra, Cascais, Oeiras, Loures, Mafra, Seixal, Barreiro e Almada (Despacho n.º 1091/2002, de 16 de janeiro), todas, ainda assim, na Área Metropolitana de Lisboa, situação que se veio a alterar com o Despacho n.º 5524/2005, de 15 de março, do Gabinete do Ministro da Justiça, tendo alargado o âmbito um pouco mais a Norte do País, com a criação de um gabinete de mediação familiar em Coimbra.

Por despacho do Gabinete do Secretário de Estado da Justiça, mais uma vez, em 2007, a competência territorial dos gabinetes de mediação familiar sofre um alargamento, para incluir Braga, Leiria, Porto e Setúbal (Despacho n.º 18 778/2007, de 22 de agosto). Também nesta altura, é criado e regulado o Sistema de Mediação Familiar (SMF). Aliás, esse é um despacho norteador da mediação familiar, ainda que um longo caminho se precisasse continuar a percorrer.

E, um ano mais tarde, por força do disposto na Lei n.º 61/2008, de 31 de outubro, é incluído no Código Civil (CC) o artigo 1774.º, relativo à mediação familiar, definindo que "antes do início do processo de divórcio, a conservatória do registo civil ou o tribunal devem informar os cônjuges sobre a existência e os objectivos dos serviços de mediação familiar". E por via desse mesmo diploma legal, também o Decreto-Lei n.º 272/2001, de 13 de outubro (relativo aos processos da competência do Ministério Público e das Conservatórias do Registo Civil), passa a incluir o n.º 3 no artigo 14.º, que se refere a "recebido o

[10] Rossana Martingo Cruz, *A Mediação Familiar como Meio Complementar de Justiça - Algumas Questões*, (Almedina, Coimbra, 2018), p. 34.

requerimento, o conservador informa os cônjuges da existência dos serviços de mediação familiar [...]".

Ora, sendo a mediação familiar uma das áreas nas quais é possível recorrer à resolução de litígios por essa via, o diploma que densificou o Despacho n.º 18 778/2007, de 22 de agosto, sobretudo no que aos princípios da mediação diz respeito, foi a Lei n.º 29/2013, de 19 de abril. Nesse diploma, são definidos os conceitos de mediação[11] e de mediador de conflitos[12] e são elencados os princípios norteadores da mediação de conflitos, que se aplicam também à mediação familiar, a saber:

i) princípio da voluntariedade (artigo 4.º);
ii) princípio da confidencialidade (artigo 5.º);
iii) princípio da igualdade e da imparcialidade (artigo 6.º);
iv) princípio da independência (artigo 7.º);
v) princípio da competência e da responsabilidade (artigo 8.º);
vi) princípio da executoriedade (artigo 9.º).

Entretanto, seguindo essa linha histórica, é, ainda, de referir a Lei n.º 141/2015, de 8 de setembro, relativa ao Regime Geral do Processo Tutelar Cível, que, na sua primeira versão, incluía já os artigos 4.º, n.º 1, b); 21.º, n.º 1, b); 24.º; 38.º, a); 39.º, n.º 1, 2 e 3 e 40.º, n.º 10, com expressa menção à mediação familiar. Posteriormente, a Lei n.º 24/2017, de 24 de maio, adita, concretamente, a esse respeito, o artigo 24.º-A, relativo às situações em que é inadmissível o recurso à mediação.

Vinte e um anos volvidos desde o despacho que criou o primeiro gabinete de mediação familiar (Despacho n.º 12 368/97, de 9 de dezembro), 11 anos após a criação do SMF (Despacho n.º 18 778/2007, de 22 de agosto) e de modo a dar resposta à exigência da Lei n.º 29/2013, de 19 de abril, relativamente ao que são as especificidades da mediação familiar, é publicado o Despacho Normativo n.º 13/2018, de 9 de novembro.

Não nos deteremos na análise desse diploma legal, no entanto, reitera-se a relevância que o mesmo tem, e não deixa de se assinalar que surge apenas em 2018, ou seja, é recente o suficiente para que a experiência com a mediação familiar em Portugal e nos demais países da Europa se visse refletida nas suas normas.

De facto, também a legislação europeia tem tido uma enorme influência no desenvolvimento da mediação familiar em Portugal. São de assinalar a

[11] Forma de resolução alternativa de litígios, realizada por entidades públicas ou privadas, através do qual duas ou mais partes em litígio procuram voluntariamente alcançar um acordo com assistência de um mediador de conflitos (artigo 2.º, a)).

[12] Terceiro, imparcial e independente, desprovido de poderes de imposição aos mediados, que os auxilia na tentativa de construção de um acordo final sobre o objeto do litígio (artigo 2.º, b)).

Recomendação n.º R(98) 1, do Comité de Ministros do Conselho da Europa sobre Mediação Familiar; o Livro Verde sobre os modos alternativos de resolução de litígios em matéria civil e comercial que não a arbitragem, da Comissão das Comunidades Europeias, de 2002; o Código Europeu de Conduta para Mediadores, apresentado dia 2 de julho de 2004, na Comissão Europeia; e a Diretiva 2008/52/CE do Parlamento Europeu e do Conselho, de 21 de maio de 2008, relativa a certos aspetos da mediação em matéria civil e comercial.

Mais recentemente, têm sido, igualmente, relevantes as experiências de mediação familiar *online*. O legislador não foi taxativo no que diz respeito ao processo de mediação familiar, nomeadamente, sobre as suas fases e modos de desenvolvimento, respeitando o princípio da flexibilidade que o caracteriza. Tal flexibilidade permite uma abertura relativamente ao modo como se irá operar a mediação: seja presencial ou online. Tal apresenta inúmeras vantagens, algumas das quais elencadas por Heitor Moreira de Oliveira e Paulo Cezar Dias,[13] e não sendo esse o foco do presente artigo, considera-se ser essa referência um excelente contributo para a temática em concreto.

A mediação familiar tem, assim, desde há alguns anos e a uma dimensão nacional e europeia, sido perspetivada como vantajosa quando o que se pretende é dirimir litígios entre um casal e em resultado da sua situação conjugal, nomeadamente, uma situação de divórcio ou separação, promovendo e privilegiando sempre o superior interesse das crianças que se encontrem envolvidas. Nas palavras de Paula Gaspar:

> A Mediação está ao serviço da **harmonia**, da **justiça**, e da **pacificação social**. Funciona como uma forma mais breve e simplista de resolver pequenos conflitos que pela sua natureza exigem uma **forma de tratamento especial** e **adequada**. […] A **voluntariedade** das partes determina a aceitação da solução encontrada, faculta o entendimento e a celebração de um acordo escrito. Um contrato de **compromisso** das vontades expressas.[14] (Negrito nosso)

Relevam-se as palavras assinaladas porque se concorda que o que se procura é, no caminho da harmonia, da justiça e da paz, encontrar uma solução que vá de encontro aos interesses de ambas as partes envolvidas no processo de mediação (mas, mais ainda, ao interesse das crianças envolvidas, se as houver), solução que tem que considerar como ponto de partida um elo que não existirá

[13] Heitor Moreira de Oliveira e Paulo Cezar Dias, "Audiências de conciliação e mediação por videoconferência no Estado de São Paulo: benefícios e desvantagens segundo relatos empíricos dos conciliadores e mediadores judiciais", *Revista Brasileira de Alternative Dispute Resolution*, 4(8), 147-186, 2022, https://rbadr.emnuvens.com.br/rbadr/article/view/160.

[14] Nota 4 supra, p. 76.

nas demais relações sociais ou, como Rossana Martingo Cruz coloca, "um vínculo forte e duradouro".[15]

No entanto, já não se concorda com a referência de Paula Gaspar ao que identifica como sendo duas das características da mediação familiar: a brevidade e a simplicidade. Sim, é um processo que se pretende seja célere, até para diminuir o desconforto emocional de todos os envolvidos numa situação já de si penosa. E, se o objetivo for comparar, pode dizer-se que é mais simples que um processo judicial, porque há um conjunto de trâmites processuais que não será necessário percorrer. Mas será que isso torna tudo mais simples?!

Prefere-se, por isso, a caracterização das vantagens da mediação familiar apontada por Marta San-Bento, sendo elas:

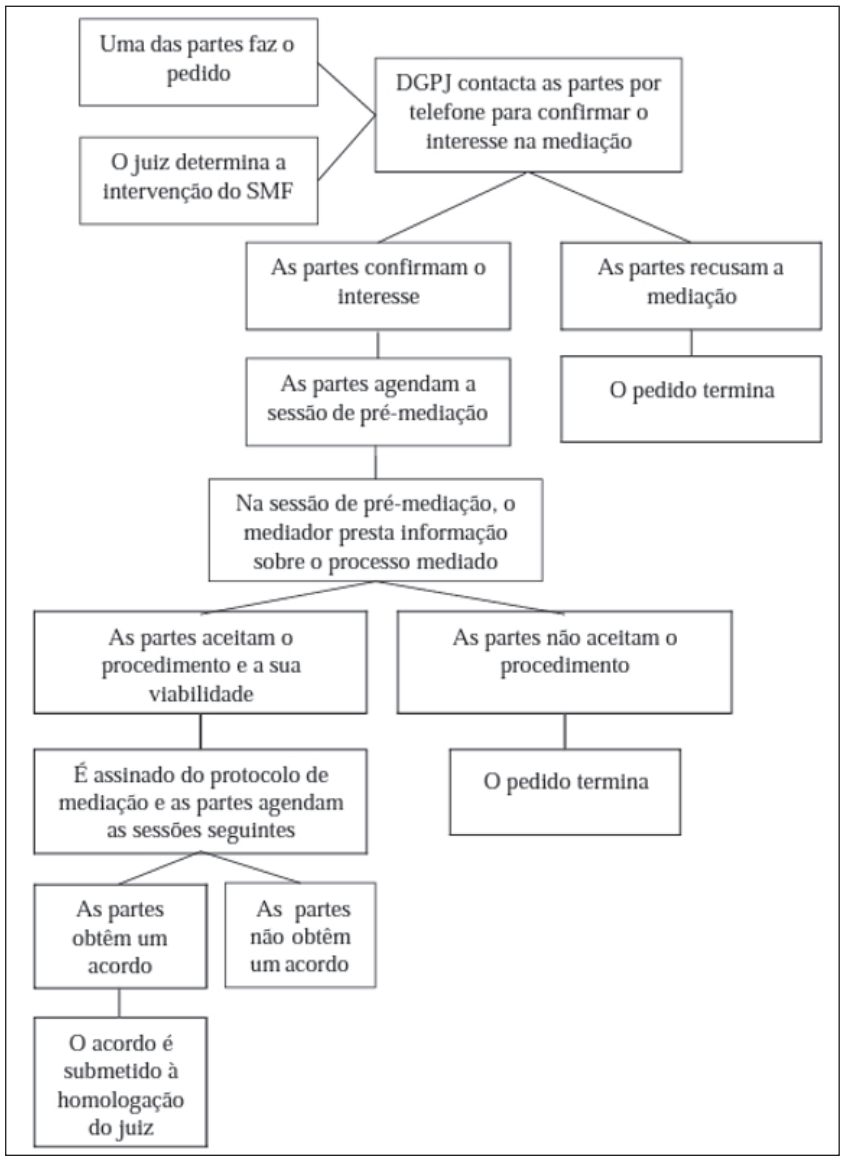
- *segurança/qualificação*, na medida em que se trata de um serviço público promovido pelo Ministério da Justiça prestado por mediadores com formação especializada;
- *confidencialidade*, uma vez que, ao estar proibida a divulgação do teor das sessões de mediação familiar, fica acautelada a reserva da vida privada;
- *informalidade*, pois existe um contacto próximo e simplificado entre o mediador e as partes;
- *eficácia*, afigurando-se consensual que a probabilidade de cumprimento pelas partes de um acordo obtido em sede de mediação revela-se sempre superior *à* de uma decisão que lhes *é* imposta;
- *rapidez*, porque o procedimento de mediação familiar tem, por princípio, uma duração máxima de três meses, sendo que, em média, os procedimentos de mediação desenvolvidos no contexto do SMF também se contêm em tal prazo;
- *custo reduzido/gratuitidade* para as partes.[16]

Tudo isso por via de um processo que se desenrola seguindo os passos que se apresentam na figura 1:

[15] Rossana Martingo Cruz, "Mediação Familiar - Nótulas Soltas", *In* Maria Clara Calheiros, *Uma Nova Mediação. Notas a Partir Das Experiências Portuguesa, Espanhola e Brasileira*, 1, 75-90 (Escola de Direito da Universidade do Minho, Braga, 2014), https://repositorium.sdum.uminho.pt/bitstream/1822/47267/1/Uma_Nova_Mediação.pdf, p. 75.

[16] Marta San-Bento, "O Sistema (Público) de Mediação Familiar (SMF): Por Uma 'Doce Justiça'….", *In* Ana Teresa Leal, *Mediação Familiar – Resolução Amigável de Litígios e Salvaguarda do Interesse das Crianças*, 11-52 (Centro de Estudos Judiciários, Lisboa, 2021), p. 28.

Figura 1 – Esquema de desenvolvimento de um pedido de mediação[17]



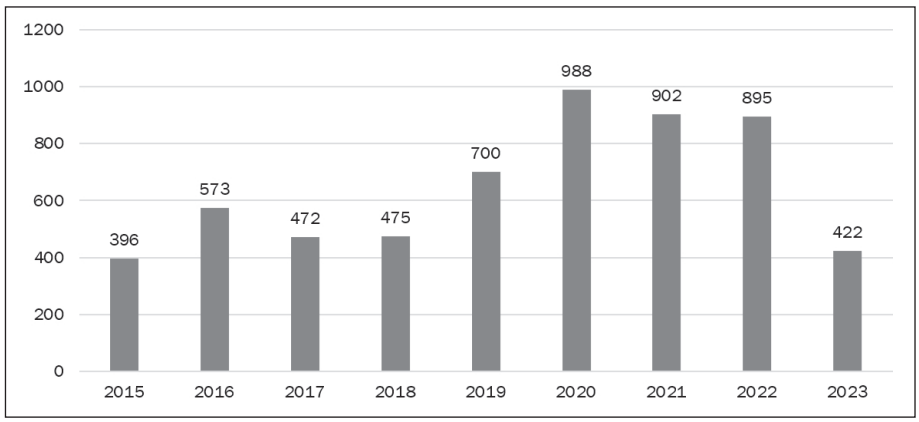
Há, por isso, duas formas de um processo de mediação ter início: ou porque as partes assim o decidem à partida, ou porque aceitam a decisão judicial nesse sentido. E, do mesmo modo, o processo termina ou porque as partes deixam de ter interesse nessa forma de resolução do conflito, ou porque se obtém acordo.

[17] *Id.*, p. 12.

Do início ao fim, é um procedimento caracterizado, essencialmente, pela vontade das partes e pela sua intervenção ativa e direta na decisão, processo esse que, em média, dura cerca de três meses.

As vantagens associadas à mediação familiar conduzem a que o número de pedidos tenha aumentado nos últimos anos. Os gráficos seguintes apresentam uma breve caracterização estatística do que tem sido a evolução da mediação familiar em Portugal entre 2015 e o 1.º semestre de 2023:

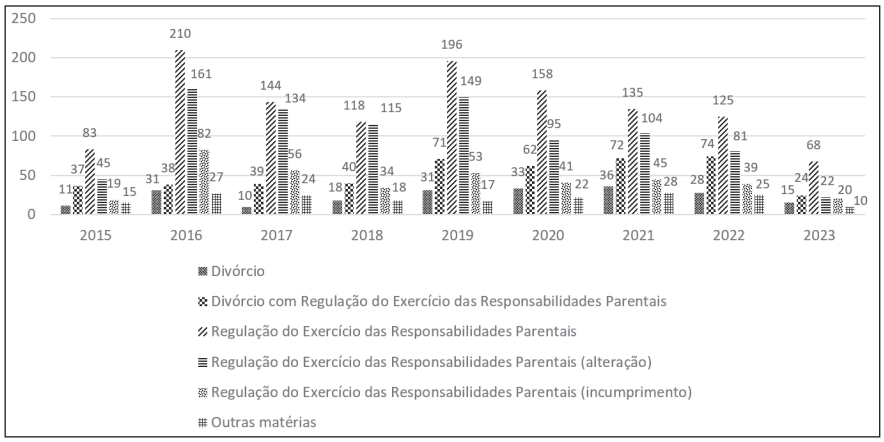
Gráfico 1 – Movimento dos pedidos de mediação pública familiar que deram entrada entre 2015 e o 1.º semestre de 2023[18]



O que se assiste é à eventual mudança de paradigma de 2018 para 2019, consequência da mudança legislativa ocorrida nesse período. O número de pedidos de mediação pública deu um salto significativo, passando de 475, em 2018, para 700 em 2019 e para 988 em 2020.

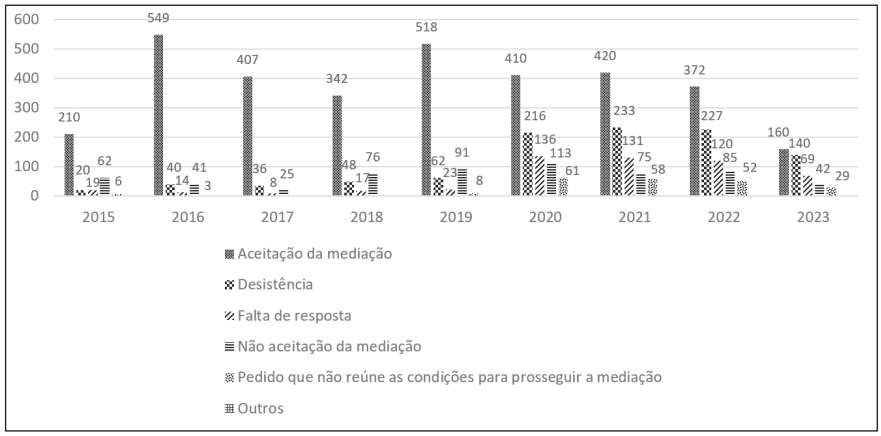
[18] https://estatisticas.justica.gov.pt/sites/siej/pt-pt, acedido em 05 de janeiro de 2024.

Gráfico 2 – Movimento de processos de mediação pública familiar que deram entrada entre 2015 e o 1.º semestre de 2023, por objeto de ação[19]



Ao longo dos anos, o que se tem verificado é que o principal motivo para recorrer à mediação familiar tem sido a regulação do exercício das responsabilidades parentais, seja o início do processo, seja a sua posterior alteração, o que confirma a finalidade que vinha disposta no Despacho fundador n.º 12 368/97, de 9 de dezembro.

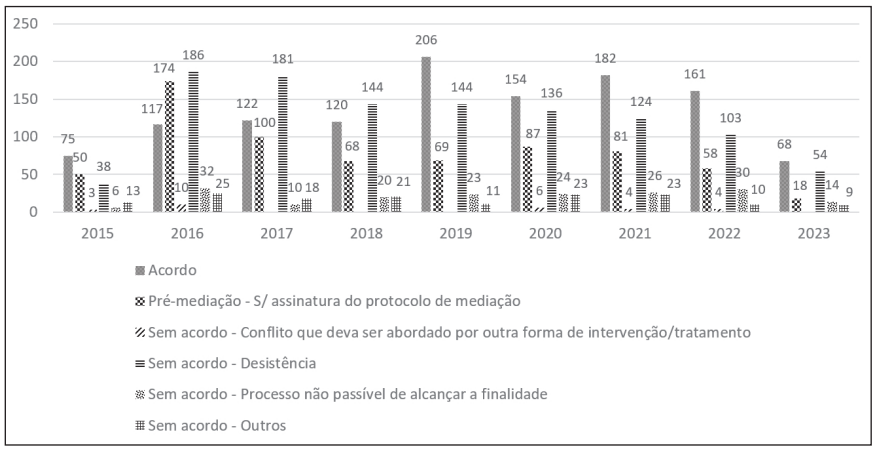
Gráfico 3 – Pedidos de mediação pública familiar findos entre 2015 e o 1.º semestre de 2023, por modalidade de termo[20]



[19] https://estatisticas.justica.gov.pt/sites/siej/pt-pt, acedido em 05 de janeiro de 2024.
[20] https://estatisticas.justica.gov.pt/sites/siej/pt-pt, acedido em 05 de janeiro de 2024.

Em termos de motivo para o término dos pedidos de mediação familiar, verifica-se que o mais expressivo ao longo dos anos é a aceitação da mediação pelas partes, seguido da sua desistência ou da não aceitação da mediação.

Gráfico 4 – Processos de mediação pública familiar findos entre 2015 e o 1.º semestre de 2023, por modalidade de termo[21]



Por último apresentam-se, ainda, motivos para a finalização dos processos de mediação familiar, sendo o alcance do acordo o que mais se verifica ao longo dos anos (com exceção de 2016 e 2017), seguido da desistência e da pré-mediação.

Conclui-se esta secção com uma reflexão de Catarina Madeira, a propósito também das estatísticas da Justiça relativas à mediação familiar. Refere a autora que "o número de pedidos de mediação familiar em Portugal era equivalente a menos de 2% do total de processos entrados nos tribunais, se contabilizarmos apenas os relacionados com a regulação de responsabilidades parentais".[22]

Assim, ainda que o caminho percorrido entre 1997 e os dias de hoje tenha garantido uma evolução grande e importante para que seja possível oferecer a mediação familiar de modo cada vez mais sistematizado e global enquanto meio de resolução de conflitos, também não é menos verdade que há ainda um longo caminho a percorrer, sobretudo no sentido de este ser um meio que efetivamente é considerado por todas as partes chamadas à colação quando há um litígio familiar, nomeadamente, magistrados, advogados, conservadores do registo civil e as próprias partes.

[21] https://estatisticas.justica.gov.pt/sites/siej/pt-pt, acedido em 05 de janeiro de 2024.

[22] Catarina Antunes da Cunha Pires Madeira, *Mediação Familiar: Análise Dos Obstáculos e Pistas Para Um Novo Modelo*, Dissertação de Mestrado (ISCTE - Instituto Universitário de Lisboa, Lisboa, 2020), https://repositorio.iscte-iul.pt/bitstream/10071/22364/1/master_catarina_pires_madeira.pdf, p. 13.

2 Avaliação de impacto

Antes de qualquer definição de avaliação de impacto, será relevante entender-se o que é impacto e em que dimensões se decompõe. Para tal, recorre-se à explicação dada por Chris Roche, que entende impacto como as "mudanças significativas ou duradouras na vida das pessoas, resultado de uma determinada ação ou conjunto de ações".[23] [24] Assim, de acordo com o mesmo autor, alguns programas podem fazer uma diferença muito grande na vida dos indivíduos (trazer impacto), ainda que aqueles sejam apenas pontuais.

Daqui poderá depreender-se a relevância que terá compreender que mudança foi a ocorrida e que impacto trouxe (para os indivíduos, para a comunidade ou sociedade), uma vez que este poderá ser negativo ou positivo, poderá conter efeitos e consequências desejadas e previstas, mas, igualmente, outras que não foram contempladas de início e que até se traduzem em efeitos nefastos.

Assim, a forma como se compreende a mudança é através daquela previsão das consequências, sejam elas económicas, ambientais, sociais, entre outras, e agir em conformidade. Ou seja, será através da definição de objetivos, indicadores e dimensões de impacto, que permitam perspetivar a situação atual e proceder a uma avaliação posterior.

Por avaliação de impacto, entende Chris Roche, como sendo a "análise sistemática das mudanças significativas ou duradouras – positivas ou negativas, intencionais ou não intencionais – ocorridas na vida das pessoas por via de determinada ação ou conjunto de ações".[25] [26]

Aquela análise é, então, conduzida tendo como requisito a definição dos seguintes elementos:

- objetivos (claros e mensuráveis);
- dimensões que se pretendem analisar (e que estão contidas nos objetivos);
- indicadores (que compõem as dimensões e que permitam medir o cumprimento dos objetivos);
- atividades necessárias levadas a cabo para verificar o cumprimento dos objetivos.

Esses quatro elementos (bem como, eventualmente, as componentes que integram as dimensões) devem ser definidos no momento prévio à implementação

[23] Tradução da autora.
[24] Chris Roche, *Impact Assessment for Development Agencies. Learning to Value Change* (Oxfam Publications, Reino Unido, 1999) https://policy-practice.oxfam.org/resources/impact-assessment-for-development-agencies-learning-to-value-change-122808/, p. 21.
[25] Tradução da autora.
[26] *Id.*, p. 21.

do projeto ou programa, e a avaliação de impacto deve ser conduzida em várias etapas: numa fase preparatória, de modo a que se antecipem os impactos; numa fase intermédia, que permita avaliar como está a decorrer a implementação (caso se trate de um projeto ou programa que se prolonga no tempo, esta avaliação será repetida periodicamente); e, caso se aplique, após o término do projeto ou programa, no sentido de perceber o seu impacto total.[27]

Considerando o que ficou referido, sobressai a exigência inerente a um processo de avaliação de impacto, uma vez que é complexo; leva tempo; idealmente, constitui-se uma equipa multidisciplinar que permita conhecer as variadas áreas decorrentes dos programas; é dispendioso e decorre em múltiplos ambientes: primeiro, no gabinete e, posteriormente, no terreno. Isto porque:

> A avaliação de programas, também, tem por objetivo dimensionar e entender determinantes de problemas sociais, dimensionamento e caracterização de públicos alvos de possíveis programas, investigar as dificuldades de desenvolvimento de determinadas atividades previstas na implementação de um programa, analisar os resultados, efeitos mais abrangentes e custos.[28]

Uma das ferramentas mais utilizadas para se realizar uma avaliação de impacto é através da construção da teoria da mudança. Essa ferramenta avalia ao longo do tempo o efeito causado pela implementação de determinado projeto ou programa que resulta na mudança de determinada situação,[29] ou seja, parte do mesmo princípio que a avaliação de impacto, uma vez que lhe serve de base.

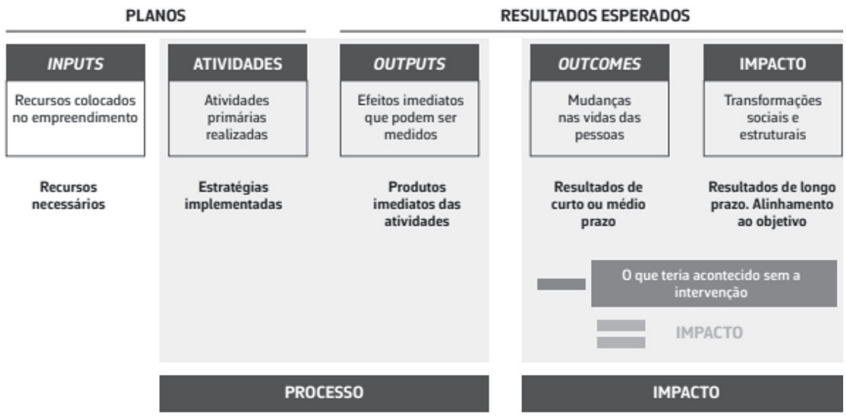
[27] *Id.*, pp. 30-31.

[28] Aparecida de Moura Andrade e Héctor Valverde Santana, "Avaliação de Políticas Públicas versus Avaliação de Impacto Legislativo: Uma Visão Dicotômica de Um Fenômeno Singular", *Revista Brasileira de Políticas Públicas*, 7(3), 781–98, 2018, pp. 788-789.

[29] Juliana Rodrigues e Aurélia Adriana de Melo, "Passo a Passo Até Ao Impacto", *GV-Executivo*, 21(4), 32-38, 2022, p. 34.

Em termos gráficos, a teoria da mudança apresenta a seguinte forma:

Figura 2 – Componentes da teoria da mudança[30]



De acordo com as autoras, a teoria da mudança está dividida em duas dimensões: os planos e os resultados esperados. Ao nível dos planos, devem considerar-se os *inputs* (ou os recursos que são necessários para se implementar o projeto ou programa) e as atividades a realizar. Nos resultados esperados, incluem-se os *outputs* (produtos imediatos do resultado do projeto ou programa), os *outcomes* (resultados, mas em termos não tão facilmente quantificáveis e mais ao nível das mudanças percebidas) e os impactos (os resultados duradouros, que se distinguem dos *outcomes* por se prolongarem no tempo).

A avaliação de impacto é uma importante ferramenta que permite compreender as diferentes exigências de determinado programa ou projeto, em diferentes fases da sua implementação, exigências a nível de recursos humanos, materiais e científicos. É, ao mesmo tempo e considerando a análise holística que se permite fazer desses projetos, uma ferramenta que permite alcançar uma visão retrospetiva e prospetiva da situação de determinados indivíduos, comunidades e/ou sociedades, contribuindo para uma atuação proativa em caso de ser necessário intervir para contrariar algum efeito ou consequência menos positiva ou mesmo negativa. Vejamos como poderá a avaliação de impacto ser compreendida no âmbito da mediação familiar.

[30] *Id.*, p. 35.

3 Pertinência da avaliação de impacto da mediação familiar

Uma das afirmações de Rossana Martingo Cruz com as quais se concordam, mas para a qual se considera que a avaliação de impacto da mediação familiar poderá dar um relevante contributo, de forma que se consiga contrariar, é a seguinte: "Apesar do impulso público e das iniciativas privadas, os meios de resolução alternativa de litígios ainda são estranhos para grande parte dos cidadãos e encarados com desconfiança por numerosos juristas".[31]

De facto, embora presente em vários diplomas legais, demonstrativo da sua relevância e aplicabilidade,[32] certo é que nem sempre o recurso à mediação de conflitos se verifica, continuando a preferir-se os tribunais para dirimir litígios, conforme se analisou na secção anterior,[33] o que não seria impeditivo de se proceder à sua avaliação de impacto.

Aliás, a previsão da avaliação de impacto da mediação familiar está, desde logo, presente no Despacho n.º 12 368/97, nomeadamente, quando refere que deverá o gabinete de mediação familiar "aferir a qualidade do serviço prestado e avaliar a eficácia dos acordos", através da "aplicação de questionários e realização de entrevistas".

Avaliar permitirá desmistificar alguns preconceitos e compreender a real importância de determinado programa ou política legislativa, em concreto, da mediação familiar. De acordo com Aparecida Andrade e Héctor Santana, a avaliação fornece informação relativamente ao "desenho, implementação e validação de programas", o que não só contribui para aquela desmistificação de preconceitos, como para melhorar o que vem sendo realizado de forma menos eficiente, mas, mais ainda, dá um importante conhecimento relativamente à realidade do que se vem implementando.[34]

Podendo a mediação familiar assumir um papel preponderante na gestão das relações familiares, quando em situação de conflito,[35] é, também por isso, um programa que se reveste de elevada complexidade, características que, a não ser

[31] Nota 10 supra, p. 77.

[32] Relativamente ao levantamento legislativo da mediação de conflitos, ver o artigo "A consagração legal da mediação em Portugal", Jorge Morais Carvalho, "A Consagração Legal da Mediação em Portugal" *Julgar*, 15, 271-90, 2011.

[33] Embora, de facto, se deva incentivar o recurso à mediação familiar, certo é que esta tem já sofrido uma evolução e, à semelhança do avançado por Chau Huy Quang e Cao Dang Duy para a mediação comercial, aqueles avanços também se perspetivam que possam ocorrer para a mediação familiar, em Portugal, com as devidas e necessárias adaptações. Chau Huy Quang e Cao Dang Duy, "An Assessment of Commercial Mediation Activities in Vietnam: Advantages and Challenges", *Revista Brasileira de Alternative Dispute Resolution*, 5(9), 179-190, 2023, https://rbadr.emnuvens.com.br/rbadr/article/view/196, pp. 184-187.

[34] Nota 18 supra, p. 796.

[35] Desde logo, basta ter presente a sua relevância em regulação de exercício das responsabilidades parentais ou em todas as outras providências tutelares cíveis (artigo 3.º da Lei n.º 141/2015, de 8 de setembro), para as quais a mediação ocupa agora um lugar de destaque, no artigo 24.º do mesmo diploma legal.

por mais qualquer outro motivo, deviam exigir que se envidassem esforços para a sua avaliação.

Assim, também como explicam Andrade e Santana relativamente às políticas públicas, a mediação familiar encerra em si diversos outros programas ou ações, o que obrigará a incluir na definição de um modelo de avaliação de impacto da mediação familiar uma avaliação dessas ações componentes.[36]

De esclarecer que não se tratará de definir um modelo de avaliação do trabalho do mediador. A sua tarefa, em cumprimento dos princípios dispostos na lei, "é a de restaurar a comunicação entre os mediados, auxiliando-os na busca de um acordo que os satisfaça e que vá ao encontro das suas necessidades, bem como das dos seus filhos, caso existam".[37] Não obstante, o modelo que se apresentará de seguida visará, inevitavelmente, avaliar se a mediação familiar (e, consequentemente, o mediador) alcança o fim a que está, à partida, adstrita. Vejamos, então, o modelo proposto.

3.1 Proposta de modelo de avaliação de impacto da mediação familiar

Por tudo o exposto nas secções anteriores, pensa-se ter ficado clara a relevância da avaliação de impacto da mediação familiar. Assim, o que agora se propõe é percorrer o caminho para o que será a construção de uma sugestão de modelo.

Para o seu integral entendimento, desde já, se deixam aqui algumas ressalvas em relação a esse modelo: a) não será possível a apresentação (e construção) de um modelo totalmente completo pelas limitações que um trabalho desta natureza encerra;[38] b) apresenta-se, por isso, uma primeira proposta de um modelo de avaliação de impacto, que poderia (e poderá, caso se reveja de pertinência suficiente para efetivamente se aplicar) ser melhorada e aumentada para servir o propósito de avaliar; c) ademais, a implementação da avaliação de impacto é uma tarefa que exige tempo e outros recursos (humanos e materiais), recursos esses que deverão ser pensados também na definição do modelo, mas que aqui, pela inerente limitação de espaço, não serão considerados; d) a avaliação de impacto pode seguir vários modelos (económico, sociológico, político, psicológico, etc.),

[36] Nota 18 supra, p. 796.

[37] Nota 10 supra, p. 76.

[38] A construção de um modelo na íntegra carece de um trabalho preliminar de levantamento de informações relativamente ao programa ou projeto que se pretende avaliar; por exemplo, será necessária a realização de entrevistas prévias com os mentores do programa ou projeto, o acesso a todos os documentos que fazem parte do que foi a reflexão sobre o programa antes e, no caso concreto, durante a sua implementação, entre outras etapas de recolha de dados com informantes privilegiados.

privilegiando-se, aqui, um modelo que prima por parâmetros sociológicos; e) finalmente, esse modelo está pensado para que se aplique ao longo da implementação da mediação familiar, ou seja, ao fim de determinado período de tempo (dois ou três anos, idealmente) deve ser aplicada avaliação de impacto.

Os princípios norteadores da mediação familiar dão o mote para o modelo que se desenha. A justificação para tal é, precisamente, porque são esses princípios que devem estar presentes na aplicação do programa e é, precisamente, a efetividade dessa presença que se pretende avaliar. Elencam-se, por isso, os princípios aplicáveis à mediação familiar, que se retiram da leitura dos diversos diplomas legais que regem a mediação:

i) princípio da simplicidade;
ii) princípio da voluntariedade;
iii) princípio da confidencialidade;
iv) princípio da imparcialidade;
v) princípio da neutralidade;
vi) princípio da flexibilidade;
vii) princípio da oralidade;
viii) princípio da celeridade;
ix) princípio da proximidade;
x) princípio da economia processual.

Não se parte do zero na construção desse modelo. De facto, já Luiz Oliveira e Vera Ramires aplicaram a avaliação a um programa de mediação de conflitos, que deu importantes informações para o modelo que aqui se apresenta. Os autores percorreram as seguintes etapas:

> (i) *descrição abrangente do caso*, sintetizando a história da família e do conflito, descrição do processo de mediação e das intervenções utilizadas, o resultado da intervenção ao final do processo e quatro meses depois;
>
> (ii) *construção da explanação*, identificando as intervenções que contribuíram para uma evolução positiva do processo (obtenção do acordo), situando-as teoricamente; identificação de intervenções que podem não ter sido tão favoráveis, analisando-as *à* luz do referencial teórico que fundamenta o Programa;
>
> (iii) *síntese de casos cruzados*, analisando-se convergências e divergências entre os casos, de forma a identificar intervenções que favoreceram a elaboração e a superação dos conflitos e aquelas que não favorecem.[39]

[39] Luiz Ronaldo Freitas de Oliveira e Vera Regina Ramires, "Avaliação de Um Programa de Mediação de Conflitos", *Contextos Clínicos*, 4(2), 99-112, 2011, p. 101.

E também Roche propõe a seguinte abordagem:

i) passos preparatórios;
ii) definição do objetivo da avaliação de impacto;
iii) definição da teoria da mudança (o que mudou, como e por quê);
iv) áreas e indicadores da mudança a avaliar;
v) atores que se devem envolver;
vi) definição da amostra;
vii) período da avaliação.[40]

Um modelo de avaliação de impacto é, idealmente, um modelo coconstruído, ou seja, não deverá ser uma ferramenta que se apresenta ao programa ou projeto-alvo de avaliação, mas que se elabora em conjunto com as partes interessadas nessa avaliação. Assim, deverão ser realizadas reuniões presenciais com essas partes (passos preparatórios), nas quais se delimita concretamente qual (ou quais) o(s) objetivo(s) da avaliação.

No caso concreto, a avaliação de impacto visa *compreender como está a ser implementada a mediação familiar em Portugal (passos, estratégias, ferramentas, recursos disponíveis) e como se poderá contribuir para promover a sua ocorrência mais frequente*.

Partindo daqui, elabora-se a teoria da mudança, considerando os *inputs*, ou seja, os recursos necessários para a aplicação da mediação familiar e as atividades ou estratégias implementadas.

De seguida, define-se o modelo, composto das seguintes fases:

a) definição de um conjunto de indicadores que permitam avaliar a mudança operada nas famílias, ao longo do processo de mediação, em várias dimensões-chave – proximidade (do sistema de justiça), comunicação, harmonização;
b) definição e construção de instrumentos de recolha de dados que permitam medir e parametrizar os indicadores definidos;
c) análise dos dados recolhidos;
d) compreensão da forma como se operou a teoria da mudança construída no âmbito do programa de mediação familiar;
e) estabelecimento de comparações entre a fase de pré-teste e a fase de pós-teste;
f) compreensão da mudança operada nos elementos do agregado familiar após a implementação da mediação familiar;
g) elaboração do relatório final.

[40] Nota 14 supra.

Essas fases permitirão alcançar a próxima fase da teoria da mudança, ou seja, os resultados esperados, através dos *outputs*, dos *outcomes* e do impacto.

O modelo pode ser visualizado na tabela 1. Contém os principais conceitos, os princípios que integram a mediação, as dimensões, os componentes e os indicadores dos conceitos e o instrumento de recolha de dados (bem como as questões, caso se aplique) em que é expectável que se retire informação para dar resposta a todas essas variáveis.

Através da aplicação do modelo à mediação familiar, espera contribuir-se para um melhor entendimento e conhecimento do que tem sido a aplicação do programa em Portugal, quer em termos de trabalho desenvolvido pelos mediadores familiares, quer como da perceção que as partes envolvidas retiram da sua participação no processo e do resultado obtido. A forma como se iniciou o processo de mediação familiar (até em termos de perceção e expectativas iniciais do que iria ser o processo) e a forma como terminou, com a comunicação e o acordo alcançado, são os elementos que compõem a teoria da mudança.

Tabela 1 – Modelo de avaliação do impacto da mediação familiar[41]

Conceito	Princípios da mediação que integra	Dimensões	Componentes	Indicadores	Instrumento de recolha de dados	Questão n.º
Proximidade (do sistema de justiça)	Princípio da simplicidade Princípio da oralidade Princípio da proximidade Princípio da economia processual	Localização Facilidade de acesso Linguagem Modo de acesso Tempo de resposta Tipo de resposta	Município onde decorreu Contacto com o sistema de mediação familiar	- Forma como teve conhecimento do sistema de mediação familiar - Quilómetros percorridos para aceder ao sistema de mediação familiar - N.º de dias que aguardou para ser contactado por um técnico do sistema de mediação familiar - N.º de dias que aguardou para iniciar as sessões - N.º de dias que decorreram entre as sessões - N.º de sessões necessárias - Período de duração das sessões	Inquérito por questionário Inquérito por entrevista	
Comunicação	Princípio da simplicidade Princípio da neutralidade Princípio da proximidade Princípio da oralidade	Do mediador	Linguagem utilizada para comunicar com as partes Momentos em que comunicou Conteúdo do que comunicou	- O que foi dito pelo mediador às partes - Em que momentos comunicou o mediador com as partes - Em que momentos o mediador se absteve de comunicar com as partes	Inquérito por questionário Inquérito por entrevista Observação direta	
	Princípio da oralidade Princípio da flexibilidade Princípio da voluntariedade	Das partes	Momentos de comunicação permitidos às partes Comunicação das crianças Forma de comunicação entre as partes Forma de comunicação entre as partes e o mediador	- Conteúdo da comunicação entre as partes - Conteúdo da comunicação entre as partes e o mediador - Espaço dado às crianças para comunicarem	Inquérito por questionário Inquérito por entrevista	

[41] Elaboração da Autora.

Conceito	Princípios da mediação que integra	Dimensões	Componentes	Indicadores	Instrumento de recolha de dados	Questão n.º
Harmonização	Princípio da flexibilidade Princípio da voluntariedade Princípio da imparcialidade	Acordo alcançado	Alcance de *win-win* no acordo	- Linhas gerais definidas no acordo - Acordo era o que as partes tinham pensado desde início - Acordo vai de encontro aos interesses das partes - Acordo vai de encontro ao superior interesse da criança	Inquérito por questionário Inquérito por entrevista	
Estabilidade	Princípio da simplicidade Princípio da flexibilidade Princípio da voluntariedade	Manutenção do acordo	Momento em que foi alcançado o acordo Número de anos de duração do acordo Eventuais desacordos e motivos	- Intervenção das partes, de forma equilibrada, nas dimensões do acordo - Manutenção do acordo ao longo dos anos	Inquérito por questionário Inquérito por entrevista	

Considerações finais

Iniciar e levar a bom porto um processo de mediação familiar não se traduz numa tarefa simples. Desde logo, porque há algumas limitações e entraves a ultrapassar, quer pelas partes envolvidas, fruto do desconhecimento generalizado dessa possibilidade de resolução de litígios, quer pelos agentes judiciais, sejam os mandatários ou os magistrados, mas, igualmente, pelos próprios mediadores, que se veem confrontados com um conjunto de preconceitos em relação à sua profissão e à mediação como uma todo e que terão, necessariamente, que rebater nas primeiras sessões, que deveriam servir para paziguar as partes.

Não obstante, tem sido um longo caminho percorrido pela mediação familiar, em Portugal, como, aliás, se viu nas primeiras secções deste trabalho, mas não é possível entender na plenitude esse caminho pela única análise das estatísticas disponíveis. Assim, seria relevante aplicar-se a avaliação do impacto ao que tem sido a implementação da medida.

O artigo pretendeu responder às questões: como saber que, efetivamente, a mediação familiar, como um dos modelos previstos de resolução alternativa de litígios, cumpre requisitos de: adaptação ao que são as novas exigências dos agregados familiares, apresentar-se como uma possibilidade menos exigente do ponto de vista emocional, mais concordante e célere e menos dispendiosa? Que impactos tem a mediação familiar nas famílias e no sistema judicial? E como avaliar esses impactos?

A forma de responder é através da aplicação de um modelo de avaliação de impacto que permita entender a evolução pensada numa fase pré-teste e a que efetivamente veio a acontecer. O modelo de avaliação de impacto proposto contempla, por isso, não apenas o que tem sido o impacto do programa para as famílias, mas, igualmente, para o sistema judicial.

Ainda que se considere ter contribuído de forma original para o que foi a reflexão da mediação familiar em Portugal, julga-se existir espaço para trabalhar esse modelo, aplicá-lo, em fase prévia, a um processo de mediação familiar piloto e, doravante, ser uma prática que se institui a todos os processos e ao próprio programa de mediação familiar.

The impact of family mediation in Portugal. Assumptions and evaluation

Abstract: Evaluation is an essential tool if the aim is to understand whether there has been progress (and what kind of progress) in the implementation of a particular programme, policy and/or project. In the case of family mediation, this is even more pertinent, not only because of the relevance it could have in the Portuguese judicial system, but also because of the effects it has on the lives of the individuals involved, adults, but especially children. The paper presents some important facts for understanding and contextualizing the path that family mediation has taken in Portugal. These facts will set the tone and support the definition of evaluation indicators and the construction of the impact

evaluation model that is proposed. Family mediation has gained a lot of prominence in the context of Alternative Means of Dispute Resolution, and it is therefore very important to effectively understand the impact and different dimensions of this AMDR.

Keywords: Family. Family mediation. Impact. Impact evaluation.

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The legal policy in fostering the use of alternative dispute resolution procedures

Anna Zakharkina

Candidate of Legal Sciences, Associate Professor, Associate Professor of the Department of Civil Law, Associate Professor of the Department of Theory and History of State and Law of the Perm State National Research University. E-mail: annavladimirovna2009@yandex.ru. ORCID: https://orcid.org/0000-0002-7262-4467.

Sadagat Bashirova

Candidate of Legal Sciences, Associate Professor of the Department of Theory and Methodology of Law Education of the Kazan Federal University. E-mail: bashirova-sg@mail.ru; bashirova-sg@mail.ru. ORCID: 0000-0003-0503-3920.

Abstract: The complications of social relations contribute to the growth of the number of disputes that result from conflict situations. In these conditions, the role of the state's legal policy, aimed at stimulating the participants of social relations to choose economical, efficient, and prompt methods of conflict resolution, is significantly increasing. Improving the quality of dispute resolution directly correlates with a drop in the number of cases pending before a judge. This is achievable only through the development of the mechanisms of pre-trial dispute resolution and conciliation procedures. This paper aims to study legal issues and perspectives on the development of alternative dispute resolution based on the analysis of the legal policy of the Russian Federation. To achieve the mentioned goal, comparative legal analysis, a systemic approach, and formal-juridical methods were used to show the current developments of the legal policy of the Russian Federation in the sphere of stimulating and incentivizing alternative dispute resolution. Authors concluded that, unlike the domestic legal order, in foreign states, there is not only a formed normative basis for the procedures of alternative dispute resolution but also political acts of stimulating tone, designed to actively involved in these procedures more and more participants of social relations in a state of conflict. It has been established that the legal policy on introducing alternative dispute resolution procedures in foreign legal orders is characterized by a shifted emphasis on family law.

Keywords: Alternative dispute resolution. Mediation. Judicial mediation. Legal proceedings. Legal policy. Strategic acts.

1 Introduction

The complication of social relations contributes to the growth in the number of disputes resulting from conflict situations.[1] In these conditions, the role of the legal policy of the state, aimed at stimulating the participants of social relations to choose cost-effective, efficient and prompt methods of conflict resolution, is significantly increasing. As V.O. Abolonin correctly noted, the right of everyone to judicial protection guaranteed by the Constitution of the Russian Federation is "a challenge for any judicial system, including the Russian one".[2]

At the same time, recognizing the importance of judicial reforms carried out in Russia, it is important to note their narrow focus on the modernization of the process itself, including ensuring its efficiency, effectiveness and functionality. In this sense, it can be argued about the extensive character of improvement of the domestic judicial system.[3] However, despite the positive results achieved, the modern judicial system of the Russian Federation is still experiencing an enormous load associated with a constant increase in the number of court proceedings.[4] It is possible to overcome this difficulty effectively by stimulating the development of conciliation procedures, including judicial mediation.

The aim of this paper is to study legal issues and perspectives of the development of alternative dispute resolution based on the analysis of the legal policy of the Russian Federation. To achieve mentioned goal the methods of comparative legal analysis, systemic approach as well as formal-juridical method were used to show the current developments of the legal policy of Russian Federation in the sphere of stimulating and incentivizing alternative dispute resolution.

2 Evolution of the legal policy in the sphere of stimulating ADR: domestic and foreign experience

For a long time, the legislator together with the law enforcer have been solving the problem of increasing citizens' confidence in the domestic judicial system.[5]

1 FERREIRA, D.B., SEVERO, L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. *BRICS Law Journal*, 8 (3), 5, 2021; FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", *Technology in Society*, vol. 68, 101872, 2022; FERREIRA, D.B., GROMOVA, E.A, FARIAS, B.O., GIOVANNINI, C.J. Online Sports Betting in Brazil and conflict solution clauses, *Revista Brasileira de Alternative Dispute Resolution*, Vol. 4, nº 7, pp. 75-86, 2020.

2 ABOLONIN V.O. Judicial Mediation: Theory, Practice, Prospects. (Infotropik Media, 2015).

3 YARKOV, A.A. Mediation in enforcement proceedings: foreign experience. Court Administrator, n 4, 51, 2023.

4 ANOKHIN, V.S. Judicial reform and the effectiveness of economic justice. Vestnik VGU, n. 1, 107, 2010.

5 VAN NAM, Tran; QUYNH, Nguyen Thi Nhu; CHUNG, Pham Duc; GIGLIONE, Thomas. Megatrends of E-commerce Online Dispute Resolution in Vietnam. International Journal of Ecosystems and Ecology Science (IJEES2022), v. 12/3, 2022; VAN NAM, Tran; MINH, Nguyen Binh; VAN HAI, Tran; G. GIGLIONE,

Citizens' distrust in the Russian judicial system was largely due to the low quality of court proceedings. At the same time, growth in the quality of dispute resolution directly correlates with a decrease in the number of cases pending before a judge. This is achievable only if mechanisms of pre-trial dispute resolution and conciliation procedures are developed. A.A. Ivanov repeatedly drew attention to this: "We need to develop conciliation procedures with all our might… If we cannot reduce the number of cases that end up in the courts, all our other actions will lose all meaning". It is not surprising that the development of mediation became part of the instruction of the President of the Russian Federation, formulated by him following the VII All-Russian Congress of Judges.

Since legal policy, which has recently aroused increased scientific interest, often expresses in strategic acts, it is interesting to start analyzing the current legal policy of the Russian Federation in the sphere of stimulating alternative dispute resolution procedures with such acts. Thus, the federal target program "Development of the judicial system of Russia" for 2007-2012 drew attention to the importance of the formation of conciliation procedures, extrajudicial and pre-trial methods of dispute settlement.[6] It is noteworthy that the said strategic document spoke precisely about the introduction, i.e., the creation of restorative justice, which indicates that it has not formed. Among all conciliation procedures, the mentioned federal target program gave priority to mediation. Similar forecasts are set out in the Concept of the federal target program "Development of the judicial system of Russia" for 2007-2011.[7]

It is worth adding that the Russian President's Address to the Federal Assembly of December 22, 2011,[8] also contains an indication of the importance of developing a system of alternative dispute resolution. As D.A. Medvedev correctly noted, the most important problem in this sense remains the lack of legal culture in terms of negotiating and achieving a mutually beneficial result of such negotiations. In addition, the President of the Russian Federation drew attention to the low efficiency of legal acts adopted in the field of mediation. He raised the issue of the possibility of making mediation procedures mandatory for certain types of disputes.

Thomas. The Development of New Technology Intergration in E-commerce Dispute Resolution in Vietnam. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 04, n. 07, 215, 2022.

6 On the federal target program "Development of the judicial system of Russia" for 2007–2012: Decree of the Government of the Russian Federation of September 21, 2006 No. 583 (as amended on November 1, 2012) // Russian newspaper. No. 245. 01.11.2006.).

7 On the Concept of the federal target program "Development of the judicial system of Russia" for 2007–2011: Order of the Government of the Russian Federation of August 4, 2006 No. 1082-r // Collection of legislation of the Russian Federation. 08/14/2006. No. 33. Art. 3652).

8 Message of the President of the Russian Federation to the Federal Assembly: Message of the President of the Russian Federation to the Federal Assembly of December 22, 2011 // Russian newspaper. No. 290. December 23, 2011).

It is interesting to note that, in recent years, the UK government has increasingly encouraged the use of mediation in family law matters, especially in cases involving children, and the debate continues whether such procedures should be mandatory. Australian politicians took this step in 2006 with reforms that require parents in conflict to make a "sincere effort" to resolve their dispute through a "family dispute resolution" process before they are eligible to seek court orders. As a consequence of this policy change, there has been increasing interaction between legal practitioners and mediation professionals in Australia.[9]

The later Concept of the Federal target program "Development of the Judicial System of Russia for 2013-2020"[10] pays attention to mediation, but does so through the prism of stating the fact of adoption of the Federal Law of July 27, 2010, No. 193-ФЗ "On the alternative procedure of dispute resolution with the participation of a mediator (mediation procedure)" (hereinafter also referred to as the Law on Mediation).[11] At the same time, the Concept further clarifies that the aim of adopting this law is to reduce the burden on judges and increase the quality of court proceedings. By the way, in the explanatory note to the draft Law on Mediation its developers very laconically limited themselves to pointing out that the adoption of this law aims at creating legal conditions in Russia for the development of non-jurisdictional methods of dispute resolution.[12]

Modern society owes the emergence of the institution of mediation to the United States of America, where people initially applied this institution in the field of resolving labor-law conflicts.[13] The widespread use of mediation contributed to the adoption of a specific legal act in this country – the Uniform Mediation Act of 2001. Another clear example of active introduction of mediation as an alternative dispute resolution procedure emerged in the PRC, where the institution of mediation has been enshrined at the constitutional level, which testifies to the relevant targeted policy of the Chinese state.

When adopting the Law on Mediation, the domestic legislator did not have extensive empirical experience, so they proceeded from the theoretical model of

[9] RHOADES, H. Mandatory mediation of family disputes: reflections from Australia, Journal of Social Welfare and Family Law, n. 32:2, 183, 2010.

[10] On approval of the Concept of the federal target program "Development of the judicial system of Russia for 2013–2020": Order of the Government of the Russian Federation of September 20, 2012 No. 1735-r // Collection of legislation of the Russian Federation. 01.10.2012. No. 40. Art. 5474.

[11] On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure): Federal Law of the Russian Federation of July 27, 2010 No. 193-ФЗ (as amended on July 26, 2019) // Russian newspaper. No. 168. 07/30/2010.

[12] Explanatory note "On the draft Federal Law "On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure)". Access from "ConsultantPlus" (date of address: 03/12/2024).

[13] ALLAKHVERDOVA, O.V. THE history of mediation development. Bulletin of St. Petersburg University, vol. 6, n 2, 73, 2007.

mediation that best suited the Russian justice system. The Law on Mediation proposed to understand the mediation procedure as "a method of dispute resolution with the assistance of a mediator based on the voluntary consent of the parties with the aim of reaching a mutually acceptable solution".

A short time after the adoption of the Law on Mediation, the Supreme Court of the Russian Federation prepared an analytical brief note on the practice of application of this law.[14] This brief outlined the results of the monitoring of conciliation procedures conducted by the Supreme Court of the Russian Federation. Thus, one of the results of this monitoring was the clarification of the number of constituent entities of the Russian Federation in which, at the time of the preparation of the relevant note, organizations providing relevant mediation services had been established. In addition, the analyzed reference lists the categories of cases in resolution of which contained mediation procedures. These include consumer, housing, family, land, contractual and other disputes. The brief makes a general conclusion that mediation procedures have not gained much popularity in Russian society, which, in the opinion of the Supreme Court of the Russian Federation, happens because of the following reasons: relative novelty of the relevant procedures, complex relationships between the parties to the dispute, underdeveloped traditions of negotiation.

It seems that the underdevelopment of the system of alternative dispute resolution procedures in our country is largely due to the underdevelopment of socio-economic, cultural-psychological and political prerequisites necessary for this.

Scientific literature often draws attention to the fact that the reason alternative dispute resolution is underdeveloped in Russia is that the legislator has not developed a specific model of such dispute resolution.[15] Thus, foreign legal systems know two models of mediation: associated and integrated. The first model consists of a partnership between a judge and a private mediator, whose services the participants use in the process with the aim of concluding a mediation agreement, which is subsequently approved by the judge. This is the model that has been tacitly adopted in the domestic legal order. It is noteworthy that such an alternative method of dispute resolution as mediation typically applies after the

[14] Supreme Court of the Russian Federation "Information on the practice of applying the Federal Law "On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure)" // Bulletin of the Supreme Court of the Russian Federation. 2012. No. 8.

[15] MINIKINA, N.I. Mediation as an institution of modern Russian society. Journal of Russian Law, n 10, 55, 2023; GROMOVA, E.A. & FERREIRA, D.B. Tools To Stimulate Blockchain: Application Of Regulatory Sandboxes, Special Economic Zones, And Public Private Partnerships," International Journal Of Law In Changing World, 2(1),16, 2023; GROMOVA E.A., PETRENKO S.A Quantum Law: The Beginning, *Journal Of Digital Technologies And Law*, 1(1), 62, 2023.

parties have gone to court. Popularization of this conciliation procedure and its advantages will actually burden the judge.

The second model of mediation, called integrated mediation, means that people offer alternative dispute resolution procedures directly to the court.[16] This model is characterized by the coincidence of the judge and the mediator in one person, as well as the consideration of the conflict in the courthouse, in the framework of sessions, on a pro bono basis. In addition, other persons, including court staff, may act as mediators in the integrated model.[17] However, Russia does not have sufficient prerequisites, including regulatory ones, for such a model, which is popular in foreign legal orders.

3 The legal policy in the sphere of incentivizing ADR: modern state and prospects

It seems that the legal policy of the Russian Federation in the sphere of stimulating alternative dispute resolution procedures should have two main aims: the professional community of mediators and the participants of social relations who intend to appeal to the court. It is obvious that the legislation in this subject area should form an associated model of alternative dispute resolution, in which the parties to a conflict situation themselves, rather than a judge, will be the initiators of an appeal to a professional mediator. In the future, to achieve the aim of stimulating relevant procedures, this model should assume the absence of a judge altogether. The judicial system can be unloaded only when the parties to a conflict situation manage without recourse to the judicial justice system.

Interestingly, unlike in foreign legal orders, the emergence of judicial mediation in Russia was a consequence of the adoption of the already mentioned Law on Mediation. At the same time, in many foreign countries, including Germany and the Netherlands, the situation was opposite: first, the mediation procedures themselves appeared, involving the participants of social relations, and only then these procedures gain an objective form of normative prescriptions. This circumstance predetermined the criticism of the Law on Mediation adopted in Russia: its theoretical basis in the absence of an empirical one was noted.

In his scientific research, Hazel Jenn describes the development of alternative dispute resolution in the UK: Mediation legal policy in the UK has made enormous strides over the last 15 years in gaining a firm foothold in the dispute resolution system, particularly in civil and family law. The mediation movement has challenged

[16] WEITZ, D.M. Renovations to the Multidoor Courthouse. Dispute Resolution Magazine, 21, 2007.

[17] LOER, L. Richterliche Mediation. Moglichkeiten einer Einbindung von Mediation in das Gerichtsverfahren am Beispiel des Zivilprozesses. ZZP, n. 2. 202, 2006.

the aims of the civil and family justice systems, the value of state courts, the relevance of adjudication to modern disputes and the commitment of lawyers to representative advocacy. We have witnessed a revolution in the discourse of dispute resolution. In the early twenty-first century, political arguments, court speeches, and policy statements about how civil and family justice should work focused on how to encourage more people to mediate, on concerns about why more people do not mediate, and on promoting the value of mediation to the justice system and society.[18]

On January 20, 2010, the UK Ministry of Justice (MoJ) published an announcement of a "Fundamental review of the family justice system" in England and Wales. Even the most cursory reading of this brief document reminds those of us who work in family law and policy what the point of our efforts might be. It repeats familiar mantras about the complex and adversarial character of the legal system in combating family breakdown, the virtues of mediation, and the desirability of forcing all users of the system through a mediator-controlled portal before they encounter the legal system.[19]

It is worth emphasizing that the policy of introducing alternative dispute resolution procedures in foreign jurisdictions focuses on family law.[20] Family mediation was first introduced to France from Quebec in the late 1980s and had established itself as a profession by the beginning of the 21st century. Throughout this period, it has been possible to watch this group of professionals go through various stages of development, from the emergence of a new mediation practice to its recognition as a profession through a national diploma in family mediation. The creation of a profession, in this case family mediation, can be seen from different perspectives: it reflects the general development of alternative dispute resolution mechanisms and the diversity of ways of responding to the difficulties encountered in the family sphere.[21]

Interestingly, alternative dispute resolution procedures have not reached a high level of development in all countries. For example, in the Irish family justice system, mediation currently plays a minor role, but there is a political consensus that more couples should be encouraged to mediate and that an increase in

[18] GENN, H. Civil mediation: a measured approach?, Journal of Social Welfare and Family Law, n. 32:2, 195, 2010.

[19] DINGWALL, R. Divorce mediation: should we change our mind?, Journal of Social Welfare and Family Law, 2010, n. 32:2, pp. 107–117, DOI: 10.1080/09649069.2010.506307.

[20] CARL, L. TISHLER, LAURA, LANDRY-MEYER & SUZANNE, BARTHOLOMAE Mediation and Child Support, Journal of Divorce & Remarriage, n. 38:3-4, 129, 2003; MORRIS, P. Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting, Journal of Social Welfare and Family Law, 2013, n. 35:4, 445, 2013.

[21] BASTARD, B. Family mediation in France: a new profession has been established, but where are the clients? Journal of Social Welfare and Family Law, n. 32:2, 135, 2010.

mediation will reduce the number of applications for redress through the courts. The Irish Mediation Act 2017 takes this position, suggesting that providing information about mediation will enhance coverage and that mediation offers an alternative to litigation for most civil disputes. In the opinion of Deirdre McGowan, the policy focus should shift from promoting mediation as an alternative to litigation to a more nuanced understanding of mediation as supporting judicial resolution of disputes.[22]

It is obvious that the state should pursue a legal policy of stimulating alternative dispute resolution procedures both in the sphere of general jurisdiction and in arbitration. As is known, Chapter 15 of the Arbitration Procedure Code of the Russian Federation entitled "Conciliation Procedures. Settlement Agreement", for a long time remained without norms devoted to conciliation procedures, due to their absence from the draft of the current Arbitration Procedure Code of the Russian Federation.[23] The situation has partially changed after the adoption of the Law on Mediation. However, unlike general jurisdiction, arbitration widely uses, not only mediation, but also various conciliation procedures. For example, the "Alternative dispute resolution" system, which includes several types of conciliation procedures, is widely known.[24]

Interestingly, in accordance with Paragraph 2 of Part 1 of Article 135 of the Arbitration Procedure Code of the Russian Federation, when preparing the case for trial, the judge "shall explain to the parties their right to hear the case with the participation of arbitration assessors, the right to refer the dispute to the arbitral tribunal, the right to apply at any stage of the arbitration process with the aim of settling the dispute for assistance to a mediator, including mediator, judicial conciliator, to use other conciliation procedures, shall explain the conditions and procedure for the realization of this right". It follows from this rule of law that alternative dispute resolution includes such procedures as mediation, judicial conciliation with the participation of a judicial conciliator, as well as other procedures. Speaking of the analysis of judicial conciliation, it is noteworthy that the Resolution of the Plenum of the Supreme Court of the Russian Federation of October 31, 2019, No. 41 approves the regulations of such procedure.[25]

[22] MCGOWAN, D. Reframing the mediation debate in Irish all-issues divorce disputes: from mediation vs. litigation to mediation and litigation, Journal of Social Welfare and Family Law, 2018, n. 40:2, 181, 2018.

[23] BOLSHOVA, A.K. On the conciliation procedure with the participation of a mediator. Journal of Russian Law, n. 5, pp. 98, 2008.

[24] TIKHONOVA, E.A. Some issues of integration of conciliation procedures into civil and arbitration proceedings. Almanac of modern science and education, n. 4. pp. 185, 2013.

[25] On approval of the Rules for conducting judicial conciliation: Resolution of the Plenum of the Supreme Court of the Russian Federation dated October 31, 2019 No. 41 // Russian newspaper. No. 254. 11/12/2019.

Despite the fact that the Russian mediation system has undergone significant changes in connection with the relevant mediation reform carried out in 2019,[26] which allowed including a notary in this procedure of alternative dispute resolution with the aim of notarizing the mediation agreement, thus acquiring the status of a writ of execution.[27]

Foreign scientific literature correctly points out that mediators increase the chances of the parties in "civil wars" to sign a peace agreement by exerting pressure or influence, called leverage.[28] As Helena Nadal Sanchez correctly emphasizes, in practical terms, mediation is a process by which a third party helps change their attitude from hostile to cooperative, allowing them to work together to find and create solutions to their conflict. Mediation looks at conflict from its own perspective and has its own status as a dispute resolution process in justice systems where it is recognized.[29]

4 Conclusion

The legal policy of the Russian Federation in the sphere of stimulating alternative dispute resolution procedures should be recognized as unformed: this is evidenced both by the absence of a separate strategic document specifically dedicated to these procedures and by the insufficient elaboration of the main normative legal act in this sphere – the Law on Mediation.

Unlike the domestic legal order, in foreign legal orders there is not only an established normative basis for the procedures of alternative dispute resolution, but also political acts of an incentive character, designed to an increasing number of participants in social relations in a state of conflict actively involved in these procedures. It has been established that the legal policy on the introduction of alternative dispute resolution procedures in foreign legal orders is characterized by a shifted emphasis in the area of family law.

Reflecting on the mandatory character of alternative dispute resolution procedures, we concluded that their introduction in an imperative manner is premature. This is predetermined by the unpreparedness of Russian society for such cooperation. Unlike foreign countries, where mediation and other alternative procedures have existed since the end of the 20th century, Russian mediation

[26] On amendments to certain legislative acts of the Russian Federation: Federal Law of July 26, 2019 No. 197-ФЗ. Official Internet portal of legal information http://www.pravo.gov.ru.

[27] BORISOVA, E.A. Mediation and notarial system: experience of France and Russia. Law, n 9, 191, 2023.

[28] MENNINGA, E. Complementary mediation: Exploring mediator composition in civil wars, International Interactions, n. 46:6, 893, 2020.

[29] SÁNCHEZ, H. What can María Zambrano contribute to mediation and to the philosophy of mediation?, History of European Ideas, n. 44:7, 925, 2018.

cannot boast such a rich history: the youth of domestic mediation predetermines a significant amount of time needed for the widespread introduction of mediation and other similar alternative procedures. However, the role of legal policy in encouraging alternative dispute resolution procedures is more important than ever.

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The conciliation of the parties to a dispute by a mediator (mediation)

Askhat Kuzbagarov

Professor of the Department of Civil Law of the North-West Branch of the Russian State University of Justice. E-mail: ashat69@mail.ru. ORCID: https://orcid.org/0000-0003-3039-5624.

Kamil Arslanov

Doctor of Law. Professor. Head of the Civil Law Department. Kazan Federal University. E-mail: kam.arslanov@gmail.com. ORCID ID: 0000-0001-7680-8581.

Abstract: Mediation, one of the forms of conciliation of the parties, has acquired the character of a successful guide to the world of harmony. However, several barriers prevented the proper implementation of the mediation. In-depth research on mediation is needed to find a way to overcome the mentioned barriers. This paper aims to analyze mediation as a modern legal institution, defining its genesis, types, principles, and sources. To achieve this, the author used retrospective analysis to illustrate the peculiarities of the genesis of the concept of mediation, a systemic approach to study the implementation of the idea of mediation in different legal systems, and comparative legal analysis to show the development of the concept in various countries. The article reveals its formation, points of support and opportunities for resolving legal conflicts (disputes). The basic principles on which the mediation procedure is based and what actions the mediator performs are concretized, including in the form of principles and stages of mediation.

Keywords: Conciliation of parties. Mediation. Principles of mediation.

1 Introduction

Conflicts and disputes as a social phenomenon have and will continue to exist, but their character and essence will vary depending on the stage and level of development of society. In this regard, conflict (dispute) as a phenomenon has become an object of sociological, psychological, legal and other studies. At the same time, scientists engaged in its study, strive not only to determine its essence and content, taking into account the specifics of the scientific field, but also to identify ways to resolve them through the resolution of contradictions through legal mechanisms that have found their description, research, and analysis in the legal

literature.[1] In Russia, starting from 1990, the relations on settlement of conflicts of private law nature have passed the way from their scientific cognition, legislative regulation, development, and application of technologies with the help of which they are resolved. In the mid-2000s, the development and implementation of the direction of reconciliation of the parties in Russian society, in the work of the judiciary and other law enforcement bodies, was several times set as a task for the bodies of all branches of government by the Head of State. As a result, today almost all procedural legislative acts in Russia contain norms (chapters) on reconciliation of conflicting parties (conciliation procedures). One of the most widespread has become the mediation procedure.

Mediation is a legal institution that is in the stage of taking root, and therefore we can wish it successful development and wide application. The problems associated with the introduction, development, and improvement of mediation belong to completely different spheres and since the institution in question is relatively new to domestic legal thought, the problems that accompany its development are of interest.

The aim of this paper is to analyze mediation as a modern legal institution, define its genesis, types, principles, sources. To achieve it author used retrospective analysis to define peculiarities of the genesis of the concept of mediation; systemic approach to study the implementation of the concept mediation in different legal systems; comparative legal analysis to show the development of the concept in different countries.

2 Mediation: the genesis

It is impossible in principle to pretend to unambiguously define the origins of mediation as a form of conciliation of conflicting parties. Obviously, it is connected with those natural beginnings that lie in the cultural sphere of relations, endeavors, which are inherent in each of us – to be understandable to the interlocutor, harmonious and educated in communication, in the matter of achieving important goals for oneself. In many tribes, mostly preserved today on the African continent, there are rituals of reconciliation of conflicting people, including with the participation of a reconciler (leader, quasi-mediator). However, not any form

[1] FILIPCZYK, H. ADR in Tax Disputes in Poland – The State of Play and Perspectives. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, pp. 205, 2023; FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", Technology in Society, 68, 101872, 2022; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, p. 153-175, 2023.

of conciliation of the conflicting parties constitutes mediation. Historically, any phenomenon is evolutionary, but the evolution of mediation has been accelerated to a greater extent in practical application and study – by the improvement of trade relations. Thus, the use of mediators in the settlement of disputes is noted in the trade of the Phoenicians and Babylon.[2] In Ancient Greece, there was a practice of using intermediaries (proxenetas). The Romans, starting with the Code of Justinian (530-533 A.D.), recognized mediation. They used various terms for the concept of "mediator" – internuncius, medium, intercessor, philantropus, interpolator, conciliator, interlocutor, interpres, and finally mediator. References to mediation are also found in canonical traditions – the Bible and the Koran.

Nowadays, the prescription of mediation finds its expression in the law of many countries of Western Europe (France, Great Britain, etc.), Asia (China, Japan, etc.), the American continent (USA, Canada), etc.[3] In France, mediation originated during the French Revolution of the 18th century as an alternative to judicial dispute resolution. In France, mediation originated during the French Revolution of the 18th century as an alternative to judicial dispute resolution. In the National Assembly on July 7, 1790, deputy L. Prunon called to follow the "temple of justice" through the "temple of concord". It should be noted that his ideas are based on the views and proclamations of J.J. Rousseau to law and public order.[4] The institute of conciliation procedures was enshrined in the Civil Procedure Code of France in 1806.[5] Today's CPC of France preserves the institution of conciliation procedures, moreover, it can be considered quite liberal in this matter. According to Article 21 of the New CPC of France, the judge's duties include reconciliation of the parties, i.e., reconciliation is one of the basic principles of judicial proceedings and has received the name of judicial mediation. The idea of the latter is the result of the judicial practice of the 60s of the last century of the Paris Tribunal of Grand Instance, the Court of Appeal and then the Court of Cassation. According to Article 131-1 of the New Civil Procedure Code of France, any judge may resort to the

[2] KOWALCZYK, B.J. Historical, cultural and legal bases of mediation in common law and continental law systems as well as its Roman origins in Alternative dispute resolution: from Roman law to contemporary regulations. Ed: B. Sitek, J. Szczerbowski, K. Ciućkowska-Leszczewicz, C. Lazaro Guillamon, S. Kursa, A. Bauknecht (Silva Rerum, 2016); CORTES, P. Using Technology and ADR Methods to Enhance Access to Justice, International Journal of Online Dispute Resolution, Vol 5. Is. 1, 103, 2019.

[3] FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5-26, 2021; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law, 36, 2261–2281, 2023; GROMOVA E., IVANC T. Regulatory Sandboxes (Experimental Legal Regimes) for Digital Innovations in BRICS. BRICS Law Journal, 7(2), 10-36, 2020; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56-76, 2023.

[4] CADIEUX, L. Conciliation procedures in France: tradition and modernity, Russian Yearbook of Civil and Arbitration Procedure, 6, 541, 2007.

[5] CADIEUX, L. op. cit. cit. p. 542.

assistance of a third party to hear the parties and compare their points of view, as well as to facilitate the resolution of differences between them. The achievements in France in the development of mediation are impressive, but not unique.

In Germany, the institution of mediation is about 200 years old.[6] Today, according to Paragraph 278 (2) of the Civil Procedure Code of Germany[7] (hereinafter referred to as the CPCG), in order to resolve a dispute, the court conducts a conciliation procedure, which provides for discussion with the parties to the dispute of both material and formal circumstances of the case. The court is free to assess these circumstances and may ask questions. The personal presence of the parties is mandatory (i.e., the participation of representatives is excluded), and in case of failure to appear, the case is left without motion (see Paragraphs 3, 4 of Article 278 of the CPCG).

Modern mediation in the USA is connected with the experiment conducted in the cities of Atlanta, Kansas City and Los Angeles. They established centers for the settlement of disputes between citizens with the help of mediation specialists. As a result, 82% were resolved without court proceedings.[8]

In the post-Soviet space, the institute of mediation quite quickly (in the historical aspect) found understanding and acceptability for the countries of Belarus, Russia and other countries. Quite successfully this direction is developed in Belarus in economic disputes, cases on which are considered by the system of economic courts of the Republic of Belarus.

Russia has its historical background. Thus, according to Article 1359 of the Statute of Civil Procedure, a settlement deal was considered valid if it was made by a notary with the necessary procedure (Article 89 of the Notarial Regulation). Nothing subsequent verification by the court was required, unless it was the witnessing of the signature of those requesting conciliation. In this case, a judicial procedure of the rite was required (Article 1362 of the Statute).[9] Today the Federal Law No. 193-ФЗ dated July 27, 2010 "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)"[10] (hereinafter – the Law on Mediation Procedure) has been adopted and is in force, to which we will further refer to reveal the essence of the mediation institution.

6 ALEKSANDROV, I. Alternative ways of resolving economic disputes in Germany (Kluwer Law Internetional, 2006).

7 German Code of Civil Procedure, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html

8 NOSYREVA, E.I. Alternative dispute resolution in the USA (M., 2005).

9 The Statute of Civil Procedure. Ed. 5th, revised, supplemented and newly processed. Ekaterinoslavl, 1913. P. 685, 686.

10 Federal Law of the Russian Federation of July 27, 2010, No. 193-ФЗ "On the alternative procedure of dispute settlement with the participation of a mediator (mediation procedure)" // Collection of Legislation RF. 2010. No. 31. Art. 4162.

3 Definition, principles, sources, and types of mediation

The definition of mediation. Mediation is one of the technologies of alternative dispute resolution with the participation of a third neutral, impartial, disinterested party in the conflict – a mediator, who helps the parties to work out a certain agreement on the dispute, while the parties have full control over the process of making a decision on dispute resolution and the terms of its resolution. It has certain conditions and rules of conduct, sequence of actions, phases, and is based on the following principles: voluntariness, confidentiality, mutual respect, equality of the parties, neutrality, and impartiality of the mediator, transparency of the procedure for the parties. Judicial protection of rights was and remains a solid foundation of the legal form of protection of rights and legitimate interests by the residual method. It should be noted that in the institution of alternative dispute resolution (*hereinafter – ADR*),[11] the term "alternative" is not unique in reflecting the procedure of dispute resolution with the participation of a mediator, are used: friendly,[12] accelerated, better or innovative dispute resolution.[13]

Domestic legal thought is reflected in the legal definition of mediation – a method of dispute resolution with the assistance of a mediator on the basis of voluntary consent of the parties in order to reach a mutually acceptable solution, which is enshrined in Article 2 of the Law on Mediation Procedure. This definition is not flawless. The systemic interpretation of the above norm with Paragraph 4 of Article 12 of the Law on Mediation Procedure does not fit into the historically established institute of settlement agreement, as they are not identical. Mediation practitioners in Russia are united in the ambiguity of these legal phenomena, which significantly restrains the application of mediation in Russia. Despite some ambiguity in the concept of mediation, nevertheless, the concept of mediation is based on the following features in which the authors are united:

1) the presence of negotiations;
2) participation of a neutral person – mediator.

Some authors put negotiation in the form of "procedure", "process", which should be agreed with rather than denied. Of course, this procedure is not enshrined in normative or even local acts. In negotiations there are stages of preparation, conducting negotiations, and evaluation of achievements.[14]

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[11] FILIPCZYK, H.F. ADR in Tax Disputes in Poland – The State of Play and Perspectives. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, pp. 205-220, 2023.

[12] Reconciliation of disputes in Russian and world practice, http://www.pro-zakon.com/node/64.

[13] ABRAMSON, H. Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks, Harvard Negotiation Law Review, 23, 319, 2018.

[14] BAGULEY, F. Negotiations: Master Class. M., 2005. P. 7; WALTZ, R. The technique of negotiation by notaries: Practical textbook (Center for Notary Research at the Federal Notary Chamber, 2005).

The mediator is a key figure in the negotiation process. He or she must meet certain requirements, the composition of which depends on whether they are acting on a professional or non-professional basis. Thus, a reference to Articles 15 and 16 of the Mediation Law begs the question: Do the restrictions set forth in Article 15 apply to the activities of a mediator on a professional basis? An affirmative answer is quite conducive to the logic and meaning of the definition of the mediator's status, regardless of whether he or she is a professional or not. Thus, according to Article 15(6) of the Mediation Law, a mediator may not be a representative of any party. Article 16 does not establish such a restriction. Does it follow from this that this restriction does not apply to the activities of a mediator on a professional basis? I think the answer is obvious – it does. Taking into account such a reservation, comparing and contrasting such norms, it is possible to identify general requirements for both categories and special requirements peculiar to only one of them.

The requirements common to mediation (non-professional and professional) for a person-mediator are:

1) must be of legal age;
2) have full legal capacity;
3) must have no criminal record;
4) may not be persons holding public positions of the Russian Federation, constituent entities of the Russian Federation, municipal service positions;
5) must not be a representative of any party;
6) must not provide any party with legal, consulting or other assistance;
7) must not be interested (directly or indirectly) in obtaining a result for any party;
8) must be restrained and not make public statements on the merits of the dispute without the consent of the parties.

Special requirements established only for a professional mediator:

1) age not less than 25 years;
2) have higher professional education;
3) to undergo additional professional education on the application of mediation procedure;
4) may be retired judges from the list recommended by the councils of judges of the constituent entities of the Russian Federation.

The source of requirements may also be the parties' agreement for a non-professional mediator and the rules of mediation procedure for a professional mediator.

In order to fully define the status of a mediator, two things should be emphasized. *First*, the mediator's activity should not be characterized as entrepreneurial. Here we can only analogize their status to that of a lawyer[15] or a notary.[16]

Secondly, the issue of mediator's liability is interesting. Article 17 of the Law on Mediation emphasizes civil liability, which is determined by the provisions of the Civil Code of the Russian Federation, and in the case of multiple persons for the damage caused, it may be shared or joint and several. Other types of liability by branch of consequences (administrative, criminal) should not be left out.

Mediation, in spite of its apparent simplicity, carries complexity and ambiguity in understanding and, as a consequence, in the possibility of its application in practice. The success of the latter is ensured by the unambiguous understanding of the essence and place of this institution in the domestic legal system.

Today, we can say with certainty that mediation may well be considered an independent way of settling private law conflicts. We should not exclude the applicability of mediation to the resolution of public law conflicts.

Noting the general understanding of mediation, it should be known that the success of the mediator's activity should not be based on the simple organization and conduct of the negotiation process, but on a *special technology of conducting* the mediation procedure, which is different from other related procedures. The mediator's role in the conduct of conciliation should be to reduce the parties to the conflict to the point where they come to their own decision, based on the position of interest rather than on the position of right or force. Such an approach contains evaluative properties, with the help of which a party to a conflict can take the most favorable position in a legal conflict. It should also be emphasized that the mediator does not have the authority to make a binding decision for the parties.

Thus, mediation is a method of peaceful dispute resolution, which is a formal process of agreeing on positions, carried out with the active participation of a neutral person (mediator), chosen jointly by the parties to the dispute or selected in accordance with the procedure established by them.

The purpose of mediation is not to determine who is right, but to find a compromise solution that will be acceptable and best for the parties to the conflict. The term "search" is not accidental. It gives a wide opportunity for the mediator to show initiative, to demonstrate his knowledge, skills, experience, and competence in achieving the goal of mediation. Just as every case in court is unique, every

[15] See, Par. 2of Art. 1 of the Federal Law of 31.05.2002 No. 63-ФЗ "On advocacy and advocacy activities in the Russian Federation" // Collection of Legislation RF. 2002. No. 23. Art. 2102.

[16] The Basics of Legislation of the Russian Federation on Notarial System of 11.02.1993 // Bulletin of the Congress of National Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation 1993. No. 10. Art. 357.

case in mediation is unique by analogy. All the more so because the psychological component of the latter has an important place. The issue of it deserves separate attention and study.

In order to conduct mediation in a dispute, the parties to the dispute must agree to it. Such consent must have a formal manifestation in the form of an agreement, which must have a written form and may be part of the contract concluded between the parties, because of which the disagreement arose, or be a separate document drawn up before or after the dispute.

The preparatory stage of mediation, which is the selection and appointment of a mediator, should be emphasized. The decision on this issue shall be made by the parties to the dispute by mutual consent. If no agreement is reached, the mediator's candidacy shall be determined by the organization that organizes the mediation procedure (Article 9 of the Mediation Law).

The stages that make up a mediation procedure include:

1. Opening statement. Its purpose is to prepare the parties for the negotiations, to make the mediation process clear and predictable for the negotiators.
2. Presentation of the parties. The purpose is to give each party an opportunity to tell what happened and how they see their conflict situation.
3. Discussion. The purpose of the stage is to formulate issues for negotiation.
4. Cocus. The purpose is to identify the true (real) interests of the parties, to formulate issues for discussion in the wording of this party, to prepare the parties to work at the general session.
5. Exchange of proposals.
6. Preparation and signing of the agreement.

Article 11 of the Law on Mediation defines the procedure for conducting the mediation procedure. It should be understood that the above-mentioned stages of mediation do not constitute the content of this norm. It enshrines the possibility of establishing the procedure by agreement, referring to the rules approved by the organization, which cannot be done by the mediator, such as: to put any of the parties in an advantageous position by his actions, as well as to diminish the rights and legitimate interests of one of the parties.

The relationship of mediation procedure exists within a certain period of time. Thus, according to Article 13 of the Mediation Law, the mediation procedure may not exceed more than 60 days, and in case of complexity of dispute resolution not more than 180 days, except for cases referred for resolution from a court or arbitration court, when the general time limit of 60 days may not be changed.

The final result of the mediation procedure may be a settlement agreement, dismissal of the lawsuit, recognition of the lawsuit, or a mediation agreement, the content of which is defined in Article 12 of the Mediation Law. The latter, unlike other results, is not provided for in either the Civil Procedure Code of the Russian Federation or the Arbitration Procedure Code of the Russian Federation, in connection with which, following the principle of procedural form, the court is not competent to approve such an agreement by its ruling, and therefore it is not subject to enforcement, the list of which is exhaustively defined in Article 12 of the Federal Law of October 2, 2007, No. 229-Ф2 "On enforcement proceedings".[17] Likewise, there is no provision for challenging a mediation agreement. However, it is possible to resort to a method that makes it possible to enforce the provisions of the mediation agreement. This can be done by applying to the arbitral tribunal to have the mediation agreement formalized as a Decision of the arbitral tribunal. For example, according to the Regulations of the United Mediation Service under the Russian Union of Industrialists and Entrepreneurs (Employers) (hereinafter – RUIE), a dispute settlement agreement concluded by the parties as a result of conciliation may be submitted by them to the arbitration court for resolution of corporate disputes under the RUIE for formalization as a Decision of the Arbitration Court (Paragraph 14.2 of the Regulations). Subsequently, this decision may be enforced in accordance with the procedure provided for by Chapter 8 of the Federal Law dated 29.12.2015 No. 382-Ф3 "On Arbitration (Arbitration Proceedings) in the Russian Federation"[18] and Paragraph 2 of Chapter 30 of the Arbitration Procedure Code of the Russian Federation.

Mediation principles. The fundamental ideas and principles on which the mediation procedure is based are called principles. Their theoretical and practical importance cannot be overestimated. They include:

- voluntariness
- confidentiality
- impartiality and independence
- mutual cooperation and equality.

The principles of incentives, full control, permissive orientation, responsibility, transparency, procedural flexibility, direct participation of the parties to the conflict, focus on the individual and on preserving relationships, creativity, leadership role of the mediator, etc., which are also quite acceptable for mediation, contribute to the success of ADR. S.I. Kalashnikova groups them into two categories –organizational

[17] Federal Law of 02.10.2007 No. 229-Ф3 (ed. of 25.12.2023) "On enforcement proceedings" // Collection of Legislation of the Russian Federation. 2007. No. 41. Art. 4849.

[18] Federal Law of 29.12.2015 No. 382-Ф3 "On arbitration (arbitration proceedings) in the Russian Federation" // Collection of Legislation. 2016. no. 1 (part 1). Art. 2.

and procedural, which greatly simplifies their assimilation.[19] Despite the fact that each of the principles is independent, they all form a system, which facilitates their deep understanding and practical application.

Legal regulation of mediation

The sources that determine the mediation activity on dispute settlement include the norms of international law and international treaties of the Russian Federation, as well as domestic normative legal acts.

The first group includes:

1) UNCITRAL Model Law "On the international commercial conciliation and Recommendations for its adoption and application".[20] This act is a set of provisions that are recommended to States for inclusion in their national law; 14 articles cover its content. As the text of the UNCITRAL Model Law is based on the practice of conciliation in many countries, its use in national law by different States is intended to promote uniformity in the law of conciliation. The Model Law on Conciliation includes uniform rules on conciliation with a view to promoting conciliation and providing greater predictability and certainty in its application. In order to avoid uncertainty resulting from the absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including the appointment of conciliators of peace, the commencement and termination of conciliation, the conduct of conciliation, communication between the conciliator and the other parties, confidentiality and admissibility of evidence in other proceedings, as well as issues specific to the post-conciliation period, such as: the execution of the conciliator's duties as an arbitrator, and ensuring that the conciliation process is conducted in accordance with the rules of the Model Law.

2) Directive 2008/52/EC of the European Parliament and of the Council of the European Union of 21.05.2008 concerning certain aspects of mediation in civil and commercial matters.[21]

According to Article 1 of the Directive, its objective is to facilitate access to dispute resolution by promoting the use of mediation and ensuring a balance between mediation and judicial procedures. The Directive shall apply to disputes at international level in civil and commercial matters, except for rights and obligations which the parties are not entitled to decide for themselves under applicable law. This applies in particular to tax, customs and administrative matters, as well as to

[19] KALASHNIKOVA, S.I. Commentary to the Federal Law "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)" / ed. by S.K. Zagainova, V.V. Yarkov (M., 2011).

[20] UNCITRAL Model Law "On the international commercial conciliation and Recommendations for its adoption and application", https://www.singaporeconvention.org/model-law/text.

[21] Court of Arbitration. 2008 No. 5. Pp. 139-148.

questions of state responsibility for acts and omissions in the exercise of public authority (asta iure imperii).[22]

3) European Code of Conduct for Mediators (developed by an initiative group of practicing mediators (mediators)), with the support of the European Commission and adopted at a conference in Brussels on 02.06.2004.[23]

In connection with the adoption of the Federal Law of 28.02.2023 No. 43-ФЗ "On the termination of international treaties of the Council of Europe with respect to the Russian Federation"[24], on March 16, 2022, the international treaties, in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms (Concluded in Rome on 04.11.1950) and a number of protocols there to ceased to apply to the Russian Federation.

The second group includes:

1) *Federal constitutional laws*. Thus, according to the provisions of the Constitution of the Russian Federation: its preamble affirms civil peace and harmony in the Russian Federation, the realization of itself as part of the world community; Paragraph 3 of Article 17 "the realization of human and civil rights and freedoms shall not violate the rights and freedoms of other persons"; Article 37 "everyone has the right to freely dispose of his/her abilities to work, to choose an occupation and profession" and others.

2) *Federal laws*. First, this is the Law on Mediation. In essence, this law is based on the provisions of the UNCITRAL Model Law on International Commercial Conciliation. It is also worth noting separate norms and Chapter 14.1 of the Civil Procedure Code of the Russian Federation, Chapter 15 of the Arbitration Procedure Code of the Russian Federation, Articles 137-137.1 of the Administrative Procedure Code of the Russian Federation.

3) *Subordinate normative acts*: decrees of the President of the Russian Federation, resolutions of the Government of the Russian Federation, departmental acts.

4) *Corporate acts may well be included among the sources*.

According to the Law on Mediation, organizations engaged in mediation procedure provision, established as legal entities in the form of associations or non-profit partnerships, have the right to issue acts that are mandatory for such organizations and their members in the form of internal corporate standards on the

[22] European Code of Conduct for Mediators, https://mpc-info.kz/en/description/item/1822-european-code-of-conduct-for-mediators.

[23] Court of Arbitration. 2005. No. 5. Pp. 160-162.

[24] Federal Law of 28.02.2023 No. 43-ФЗ "On the termination of international treaties of the Council of Europe with respect to the Russian Federation" // Collection of Legislation of the Russian Federation. 2023. No. 10. Art. 1566.

rules of mediation procedure, including additional requirements for mediators, as well as standards and rules of professional activities of mediators.

Types of mediation. It is known that classification contributes more deeply and in detail to the understanding of the integrity of a legal phenomenon or category. Mediation is subject to classification.

1) *Depending on the branch affiliation of legal relations in which conflicts arise*: mediation in the sphere of private-law conflicts, mediation in the sphere of public-law conflicts, mediation of labor legal relations; environmental, etc. Mediation in the sphere of private-law conflicts, mediation in the sphere of public-law conflicts, mediation in the sphere of labor legal relations, mediation in the sphere of environmental, etc. Perhaps the first type is the most widespread. Initially, the elements, the totality of which forms today's mediation, were proposed to assist the courts in resolving commercial and other civil cases. Despite the "young" age of the mediation institute in Russia, the possibility of public mediation, which fits in well with modern legal structures, is assumed today. Thus, according to Article 190 of the APC of the Russian Federation, economic disputes arising from administrative and other public legal relations may be settled by the parties according to the rules established in Chapter 15 of the APC, by concluding an agreement or using other conciliation procedures, unless otherwise established by federal law.

2) *Depending on the basis*: voluntary and mandatory mediation. The Russian legislators have adopted the concept of voluntary mediation. Thus, many provisions of the Mediation Law explicitly confirm this and enshrine the principle of voluntariness of the mediation procedure. Mandatory mediation, which means a compulsory procedure for dispute resolution with the participation of a mediator established by law or court, is known in Canada, Australia, in a number of Western European countries, including England and Germany. Thus, according to Paragraph 15a of the Introductory Act to the German Code of Civil Procedure, the legislation of the states may provide for mandatory pre-trial use of mediation in certain categories of cases, in particular: property and legal disputes, the subject of which in monetary terms does not exceed 750 EUR, disputes between neighbors, cases on protection of honor, dignity, if violations were not committed in the press or radio air.[25] Mandatory mediation is always a topic of lively discussion, and in order to learn more about the institution of mediation, it is possible to consider this issue in the framework of a report or written work performed by trainees.

3) Depending *on the subject of application of conflict resolution*: judicial (Germany), out or near judicial (Republic of Belarus); notarial (Germany). The last

[25] German Code of Civil Procedure, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

type is known from the history of domestic law. Thus, according to Article 1359 of the Statute of Civil Procedure, a settlement transaction was considered valid if it was made by a notary with the necessary procedure (Article 89 of the Notarial Regulation). No further verification by the court was required, unless it was the witnessing of the signatures of those requesting the reconciliation. In this case, a judicial procedure of the rite was required (Article 1362 of the Statute).[26] In accordance with Article 1 of the Fundamentals of Legislation on Notarial System of February 11, 1992, the Notarial System in the Russian Federation is also called upon to ensure, in accordance with the Constitution of the Russian Federation, the constitutions of the republics within the Russian Federation, the protection of the rights and legitimate interests of citizens and legal entities, through the performance of notarial acts on behalf of the Russian Federation by notaries stipulated by legislative acts. It seems that in the context of the problems under consideration, the role of notaries today is undeservedly underestimated, they could also be given the competence to give a civil-law transaction – a settlement agreement – not only substantive, but also procedural-legal significance. Another function that can be assigned to notaries today, and which is directly related to the reconciliation of parties in conflicts with private law content, is their possible mediation activities. This direction has been qualitatively developed in notarial activity in Germany.[27] In fact, notarial mediation is rational, economical and is a friendly form of conflict resolution and settlement.[28]

4) Depending *on funding*: private and public mediation. The latter is characterized by the fact that it is financed not by a private or corporate owner, but by the relevant budget (municipal, constituent entity of the Russian Federation or the Russian Federation). Such projects are not widespread. However, the author proposed the possibility of creating regional state programs for training and work under district inspectors of internal affairs bodies – public mediators, who would be from among a certain active group of citizens living in a certain territory, would resolve conflicts on domestic grounds among citizens, which in the natural course of events will acquire the independence of cases with the jurisdiction of their resolution by the executive (police) or judicial authority (magistrate, court).[29]

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[26] The Statute of Civil Procedure. Ed. 5th, revised, supplemented and newly processed. Ekaterinoslavl, 1913. Pp. 685, 686.

[27] See, e.g.: FAHR, P. Mediation in Notarial practice (Alternative ways of conflict resolution) / Edited by Katharina Grefin von Schlieffen and Bernd Wegmann (Wolters Kluwer, 2005); WALTZ, R. The technique of negotiation by notaries: Practical textbook (Center for Notary Research at the Federal Notary Chamber, 2005).

[28] YARKOV, V.V. Mediation in notarial practice (Alternative ways of conflict resolution). P. 10.

[29] KUZBAGAROV, A.N. Mediation in resolving the conflict of its participants with the participation of the IAB of the Russian Federation (police): from the idea to the realities, Actual problems of administrative and administrative-procedural law, 1, 26, 2012.

5) Mediation *with or without the use of modern technical* means should be singled out. Thus, there are known face-to-face mediation and mediation using the Internet (online),[30] which are actively used in different countries.[31]

6) Depending on the *elements of different procedures*, there are: mediation in the classical form and combined mediation. To the latter E.I. Nosyreva refers:

- mediation-arbitration - dispute resolution with the help of a mediator-arbitrator, who in case of fiasco will resolve the dispute on the merits as an arbitrator (for the domestic model this type is acceptable only for mediation in the arbitration court);
- mini-court - dispute resolution with the participation of heads of economic entities (holding, non-profit partnerships), lawyers and an independent third party who presides over the hearing of the case;
- independent expertise to establish the factual circumstances of the case - the parties reach an agreement based on the conclusion of a specialist who has studied the case from the point of view of the factual composition;
- ombudsman - settlement of disputes by an authorized person reviewing a complaint case where there are deficiencies in the activities of state and local authorities or their officials and a private owner;
- private court system or judge for hire - dispute resolution by a retired judge who is authorized both to conciliate the parties and to make a decision on the case that will be binding on the parties.[32]

Each type of mediation is equally valuable and can be applied to the settlement of a particular dispute, especially all of them (except mediation in domestic conflicts) have been tested both in theory and in practice and are quite applicable to the development of civil society in Russia.

4 Conclusion

In conclusion, in the development of this topic I believe it is necessary to consider the following problematic issues of formation and improvement of mediation.

Firstly, theoretical and practical aspects of the application of the mediation procedure, which may include the questions: 1) about Self-regulatory organizations

[30] MAIA, A., FLÓRIO, R.A. Online Dispute Resolution (ODR) / Mediação de Conflitos On-line Rumo à Singularidade Tecnológica? Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, pp. 39-51, 2023.

[31] MIROVNOVA, S.N. Utilization of possibilities of the Internet in the resolution of civil-law disputes (M., 2010).

[32] NOSYREVA, E.I. Alternative resolution of civil-law disputes in the USA (Voronezh, 1999), P. 53.

(certification); 2) on abuses in mediation; 3) the mechanism of resolving intra-corporate conflicts; 4) financing; 5) mediation agreement that is not a settlement agreement.

Secondly, the Problematic aspects in the field of education (training in mediation technologies or in the direction of additional education). The need to apply mediation procedures was introduced in the USA. In the theory of civil procedure law is known document "McCreight Report", which was the result of a study of the effectiveness of education in U.S. law schools, conducted in the late 1980s. The document noted the importance of the study of ADR in the framework of legal education, which today is a section in the study of law.[33]

The issues named are not intended to be exhaustive, which can be supplemented independently and studied.

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GROMOVA E., IVANC T. Regulatory Sandboxes (Experimental Legal Regimes) for Digital Innovations in BRICS. BRICS Law Journal, 7(2), 10-36, 2020. https://doi.org/10.21684/2412-2343-2020-7-2-10-36

[33] NOSYREVA E.I. Alternative resolution of civil-law disputes in the USA. Voronezh, 1999. P. 17.

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Arbitragem e energia elétrica no Brasil

Barbara Bianca Sena

Procuradora Federal, em exercício na Agência Nacional de Energia Elétrica (ANEEL) há 13 anos. Mestre em Administração Pública pelo Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa (IDP). Pós-Graduada em Direito Público com ênfase em Direito Regulatório pela Universidade de Brasília (UnB). Possui curso de aperfeiçoamento em Economia da Eletricidade e Novas Tendências de Mercado pela Fundação Getulio Vargas (FGV). Professora da Pós-Graduação em Direito de Energia pela PUC Minas. E-mail: barbara.sena@terra.com.br. ORCID: https://orcid.org/0009-0002-0373-6577.

Resumo: A indústria elétrica abrange os segmentos de geração, transmissão e distribuição de energia, caracterizados por investimentos intensivos em infraestrutura, e a comercialização de energia. Eventos ligados à transição energética e inserção de tecnologias disruptivas têm alterado o panorama do setor, exigindo flexibilidade do sistema e maior proatividade regulatória; além disso, demandam mudanças estruturais, operacionais e mercadológicas. Há um cenário de ruptura no setor, tanto em termos de governança quanto em termos operacionais, mercadológicos e jurídicos. Nos anos 2000, a introdução de áreas de competição na indústria elétrica foi o primeiro passo para a inserção da arbitragem, impulsionado pelas reformas regulatórias e em resposta à crise energética do país, o que também culminou na primeira arbitragem no setor elétrico brasileiro envolvendo a Administração Pública. Atualmente, a Lei nº 10.848/2004 torna obrigatório o uso da arbitragem em contratos de comercialização de energia geridos pela CCEE. A arbitragem também encontra espaço em outras formas de negociação de energia, como contratos de mini e microgeração distribuída e derivativos de energia. O contexto de modernização, aumento da produção de energia renovável e abertura do mercado cria oportunidades para a expansão da arbitragem. Também há potencial para maior desenvolvimento nas relações habilitadoras da exploração de atividades da indústria elétrica intensivas em capital. O texto traz dados sobre o estado da arte desses contratos no setor elétrico brasileiro, indicando em que hipóteses a arbitragem poderia contribuir para o aprimoramento da governança no setor.

Palavras-chave: Energia. Indústria elétrica. Transição energética. Disrupção tecnológica. Geração. Transmissão. Distribuição. Comercialização de energia. Arbitragem.

1 Introdução

O setor de energia se desdobra em duas grandes indústrias conectadas entre si: a indústria energética e a indústria elétrica. Ambas as indústrias produzem relevantes impactos para o cotidiano dos brasileiros e têm importante função para que as atividades econômicas de produção de bens e serviços sejam realizadas.

A indústria elétrica brasileira é composta por três grandes segmentos de infraestrutura intensiva em capital: a geração, a transmissão e a distribuição de energia. Esses segmentos demandam investimentos estruturantes muitas vezes realizados a partir de custos afundados.

Nesses segmentos, tem-se verificado a inserção de tecnologias disruptivas para o setor elétrico brasileiro. O sistema energético tem se tornado cada vez mais dependente de fontes renováveis, o que requer o uso de ferramentas de flexibilidade para assegurar a sua eficiência.

Há, ainda, o segmento de comercialização de energia, no qual se realizam as transações comerciais relativas à capacidade e potência, energia elétrica e seus derivativos. Muitas vezes, essas transações sofrem as repercussões da inserção das tecnologias disruptivas e de eventos climáticos, que aumentam o grau de volatilidade do preço da energia.

Outrossim, os objetivos da política de transição energética têm, ao fundo e ao cabo, conferido relevância à indústria elétrica, já que se espera que a eletricidade substitua, em grande medida, o consumo dos combustíveis fósseis em outros setores da economia. Por isso, mais disrupções tecnológicas são esperadas e até mesmo desejadas para que se possa viabilizar o alcance da meta do *net zero* até 2050.

Nesse cenário, uma série de elementos, como o crescimento das fontes variáveis, a migração dos agentes de mercado para o mercado livre, a crescente abertura do mercado, a inserção de tecnologias disruptivas, a necessidade de tratamento de dados etc., deve demandar atuação apropriada e proativa do órgão regulador diante dos desafios estruturais, operacionais e mercadológicos que têm ocasionado. Além disso, as relações jurídicas no setor elétrico têm se tornado cada vez mais intrincadas, relacionais e complexas.

Diante desse panorama de rompimento de paradigmas, este breve estudo pretende avaliar se a arbitragem será relevante para o setor elétrico no contexto da transição energética. Indicaremos qual o *status* da arbitragem no setor elétrico brasileiro e quais são as perspectivas de sua utilização. Em outros termos, pretende-se investigar de que maneira ou em quais hipóteses a arbitragem poderia contribuir para a segurança das relações jurídicas no setor elétrico brasileiro. Portanto, o recorte metodológico deste trabalho será a arbitragem no setor elétrico brasileiro com o objetivo de contextualizar a arbitragem no setor elétrico, considerando o cenário de transição energética e inserção de novas tecnologias.

Para isso, trataremos brevemente sobre a conexão entre a indústria elétrica e a indústria energética, os reflexos da inserção de novas tecnologias e do *target net zero* em aspectos sistêmicos, operacionais, econômicos e mercadológicos no setor elétrico brasileiro, e os aspectos gerais do setor elétrico: da indústria,

do seu regime jurídico e das alterações na sua conformação. Por fim, trazendo um panorama sobre os segmentos da indústria, apontaremos em que medida a arbitragem poderia contribuir para a sua governança.

2 O setor elétrico e sua conexão com a indústria energética e o instituto da arbitragem

O setor de energia se desdobra em duas grandes indústrias conectadas entre si: a indústria energética e a indústria elétrica. Ambas as indústrias produzem relevantes impactos para o cotidiano dos brasileiros e têm importante função para que as atividades econômicas de produção de bens e serviços sejam realizadas.

A indústria elétrica brasileira é composta por três grandes segmentos de infraestrutura intensiva em capital: a geração, a transmissão e a distribuição de energia. Esses segmentos demandam investimentos estruturantes muitas vezes realizados a partir de custos afundados.

Nesses segmentos, temos presenciado a inserção de tecnologias disruptivas para o setor. O sistema energético tem se tornado cada vez mais dependente de fontes renováveis, o que requer o uso de ferramentas de flexibilidade para assegurar a sua eficiência.

Para a produção de energia, vemos a crescente inserção de usinas eólicas, *onshore* e *offshore*, usinas fotovoltaicas, usinas térmicas a partir de biomassa e biocombustíveis etc. No ramo da distribuição, a disrupção tecnológica deve-se notadamente ao incremento dos recursos energéticos distribuídos. Muito se fala também sobre redes inteligentes, armazenamento de energia a partir de baterias e outros aspectos que são verdadeiramente disruptivos para a gestão das redes.

De outro lado, há o segmento de comercialização de energia, que, embora parta da realidade física – o fornecimento de eletricidade propriamente dito, regido pelas leis da física e estruturado pela lógica da engenharia –, dela se distancia quando se realiza a contabilização das transações comerciais. Nesse ambiente, realizam-se os mais diversos tipos de negócio, que podem dizer respeito diretamente ao insumo energia ou ao insumo potência, mas, também, a produtos derivados, como seriam, por exemplo, as operações de *hedge*.

O próprio segmento de consumo também tem passado por transformações relevantes. O consumidor tem se tornado mais proativo na indústria ao introduzir e se beneficiar dos recursos energéticos distribuídos. Torna-se, ele mesmo, produtor da energia que utiliza e mais capaz de dar respostas ao mercado (é a chamada "resposta de demanda", no jargão setorial) e com ele interagir à medida que ocorrem as oscilações de preços da energia.

Por outro lado, a indústria elétrica e sua regulação têm conexão direta com várias outras atividades econômicas, a começar pela própria indústria energética. No mercado de eletricidade, as relações jurídicas envolvem mais do que a energia elétrica propriamente dita. Vislumbra-se, na verdade, um contexto energético, particularmente no Brasil.

Com isso, enfrentamos grandes desafios relacionados às fontes de energia. Pode-se citar, como exemplo, a produção de energia elétrica, de gás, de petróleo e de biocombustíveis. Cada indústria demanda tecnologias específicas relacionadas à respectiva fonte energética e, igualmente, tecnologias habilitadoras e novas tecnologias.

Nesse cenário, há uma conexão entre a indústria da eletricidade e a indústria energética, como, por exemplo, a utilização de gás para suprir as usinas termelétricas, a oferta de combustíveis pela indústria petrolífera e a oferta de biocombustíveis, que se inserem na cadeia de produção de energia elétrica.

Todas essas circunstâncias também se inserem no cenário de transição energética. Embora o mundo inteiro enfrente a busca por meios de descarbonizar a economia, não se pode olvidar a existência, nessa realidade de transição sob a perspectiva brasileira, de contratos legados de contratação de eletricidade ou potência à base de combustíveis fósseis.

Por outro lado, o processo de transição energética confere maior relevância à indústria elétrica na medida em que se espera ampliar o uso da eletricidade para substituir, naquilo que for possível, o consumo dos combustíveis fósseis em outros setores da economia. Por isso, mais disrupções tecnológicas são esperadas e até mesmo desejadas para que se possa viabilizar o alcance da meta do *net zero* até 2050.

Um dos protagonistas nas discussões sobre transição energética é a produção de hidrogênio verde. O Brasil é um candidato natural para o crescimento do mercado de hidrogênio; além disso, as características físicas e energéticas que permeiam o seu sistema de redes são propícias à inserção de outras tecnologias de armazenamento, como ocorre com as baterias.

São fatores que podem, igualmente, ocasionar novas disrupções no mercado e demandar uma atuação apropriada do órgão regulador. O crescimento das fontes variáveis – como eólica e solar – na produção de energia também tem introduzido desafios estruturais e mercadológicos relevantes.

Tudo isso ocorre em meio à abertura e crescimento acelerado do mercado livre de energia, surgimento de modelos de negócio que permitem permuta de energia entre consumidores e entre consumidores e distribuidoras e demandas legislativas para que prossumidores também sejam autorizados a atuar, em alguma medida, como comercializadores de energia.

Todos esses fatores – somados ou individualmente considerados – são aptos a produzirem maiores disrupções no próprio mercado de energia. Pode-se dizer que o mercado de energia se encontra em verdadeira ebulição e demanda ajustes legais e regulatórios relevantes e urgentes.

O leitor deve estar se perguntando: onde a arbitragem se insere nesse contexto?

A realidade emergente do setor elétrico brasileiro, conectada aos novos paradigmas da transição energética, demanda a edição de novos atos regulatórios e o surgimento de novos modelos de negócio. Nesse contexto, traz uma ampla gama de questões regulatórias, de interesses difusos ou privados, e questões negociais ou contratuais que podem ser discutidas e que podem gerar litígios relacionados diretamente à matéria da eletricidade ou a outros setores que ingressam na cadeia atrelada à indústria elétrica.

Outrossim, contratos que envolvem investimentos em infraestrutura com custos afundados são normalmente firmados com longo prazo de maturação. O Brasil possui contratos regulados originários de leilões realizados pelo Poder Público Federal cuja vigência perdurará até a década de 2050. Muitos deles foram redigidos num cenário eletroenergético completamente diverso do atual.

É precisamente no campo da segurança jurídica necessária ao enfrentamento dessa realidade e à criação de um cenário propício ao desenvolvimento ou à continuidade dos negócios nessa indústria ou nos negócios em indústrias a ela atrelados que o instituto da arbitragem poderá dar a sua contribuição.

Assim, estudando, em breve síntese, a evolução regulatória do setor elétrico brasileiro, poderemos visualizar o estado da arte da arbitragem nessa indústria, bem como eventual espaço para o incremento da utilização desse instituto nos negócios relacionados à indústria elétrica brasileira.

3 Relações jurídicas no âmbito da indústria elétrica brasileira

Como se viu, a indústria elétrica é fisicamente dividida em três segmentos: a produção de energia, a transmissão de energia por longas distâncias e em redes de alta tensão e a distribuição de energia para os centros de carga.

Cada um dos ramos dessa indústria enseja uma ampla gama de complexas relações jurídicas embutidas ou relacionadas a duas grandes relações jurídicas consideradas fundamentais ou primárias. Quer dizer que essas relações jurídicas primárias serão juridicamente orientadoras dos demais negócios, das interações entre os agentes de mercado e da aplicação dos institutos do direito na solução de conflitos. Mais do que isso, elas orientam as operações físicas, as decisões de investimento, a definição de políticas, a atuação de órgãos de regulação e fiscalização etc.

Assim, no setor elétrico brasileiro, há duas relações jurídicas fundamentais: uma entre fornecedores de energia e consumidores (cativos ou livres) e outra entre o Estado e agentes econômicos para autorização de atividades relacionadas à energia.

A primeira diz respeito aos direitos e deveres reciprocamente considerados entre fornecedores e consumidores de energia. Trata-se da relação jurídica de transação da utilidade (energia elétrica e, por vezes, a potência ou capacidade sistêmica) ao consumidor (o usuário final). É a relação jurídica necessária porque conforma a relação de fornecimento de energia. Para institucionalizar essa relação primária, a forma mais comum é o contrato de compra e venda, mas ela também pode ser conformada como mútuo, doação, permuta etc. Ademais:

> A esmagadora maioria dessas relações está inserida em uma rede muito complexa de outras relações jurídicas que vinculam vários fornecedores entre si, fornecedores e sujeitos responsáveis pelas redes (transmissores, distribuidores). Há, consequentemente, uma teia de contratos (de energia, de rede, de transações de curto prazo etc.), acessórios ou instrumentais, escritos ou não escritos, que propiciam, juridicamente, a relação básica.[1]

A segunda aborda a habilitação ou a outorga para operar no setor por meio de concessões, autorizações ou permissões. Essa habilitação, no Brasil, é dada por órgãos públicos ligados ao Poder Executivo Federal. Tais relações desempenham um papel crucial na organização do mercado de energia e estão sujeitas a complexas redes de contratos e à regulamentação constitucional, legal e regulatória.

No Brasil, o Estado tem forte presença no setor elétrico, seja na forma de executor de atividades relacionadas à energia, seja na forma de conformador das políticas que orientam o setor ou da regulação das suas atividades. Isso acontece por diversas razões históricas. No campo jurídico, que ora nos interessa, isso se deve ao fato de a Constituição trazer a indicação de que a energia é uma atividade reservada ao Estado e por ele titularizada. O Estado, então, poderá optar por explorar os serviços, atividades e utilidades a ela relacionados de forma direta ou delegá-los a terceiros.

Nesse cenário, quando o Estado opta pela delegação, estabelecem-se relações jurídicas de direito público, que também contam com premissas gerais desenhadas na própria Constituição. Em todo caso, essas atividades – a depender das características técnicas e econômicas que possuírem – podem ser desempenhadas tanto em regime de serviço público, similarmente ao que ocorre

[1] KAERCHER LOUREIRO, Gustavo. *Instituições de Direito da Energia Elétrica*: Volume I – Propedêutica e Fundamentos. São Paulo: Quartier Latin, 2020. p. 49.

em outros países que adotam a *civil law*, ou em regime de competição, mais assemelhando-se à ideia de *public utilities* da regulação de países de *common law*. Com efeito, "ela se manifesta nos diferentes títulos jurídicos habilitantes, como concessões de serviços públicos, de uso de bem público, autorizações e permissões".[2]

Essa rápida passagem pela conformação jurídica do setor elétrico serve para apontar que se cuida de uma indústria permeada por uma rede intrincada de contratos complexos e relacionais, podendo esses contratos serem de curto, médio ou longo prazo.

O funcionamento dessa indústria ocorre em rede, e os contratos que conformam suas operações econômicas estão altamente relacionados entre si. Dessa forma, mesmo litígios bilaterais podem ensejar repercussões econômicas relevantes para *stakeholders* que não integram diretamente a relação contratual conflituosa.

Isso ocorre porque, em termos tecnológicos, o funcionamento do setor elétrico brasileiro também se dá de maneira sistêmica, complexa e dinâmica, com operações físicas realizadas em tempo real, mas com planejamento operacional e energético, horário, diário, de curto, médio e longo prazo.

Por suas próprias características, logo se vê que, nesse setor, há um campo fértil para a utilização da arbitragem.

4 A evolução regulatória do setor elétrico e a inserção da arbitragem nos contratos de compra e venda de energia

A utilização da arbitragem no setor elétrico brasileiro já é uma realidade. Porém, ainda há espaço para o seu desenvolvimento.

O instituto está consolidado nos contratos de comercialização livre e regulada operacionalizados com registro no âmbito da Câmara de Comercialização de Energia Elétrica (CCEE). O procedimento arbitral é o meio obrigatório para a solução de conflitos entre agentes da CCEE quando há disputa sobre direitos patrimoniais disponíveis que podem afetar obrigações multilaterais do mercado de energia elétrica. Existe previsão para isso em lei especialmente editada para reger a comercialização de energia no Brasil: a Lei nº 10.848/2004.

Nem sempre foi assim. A arbitragem é inserida no âmbito do setor elétrico brasileiro a partir da evolução regulatória do modelo setorial adotado.

[2] KAERCHER LOUREIRO, Gustavo, *op. cit.*, p. 50.

Na década de 1990, o setor elétrico brasileiro, assim como ocorreu em outros setores de infraestrutura, passa a sofrer modificações relevantes e coerentes com a reforma de Estado por que passava a Administração Pública brasileira.

Em termos jurídicos, passamos de um paradigma constitucional de Estado Social para um regime mais liberal, em que o Estado deixava de ser executor direto de serviços públicos ou atividades de relevante interesse social para transferir essa responsabilidade a agentes privados. Havia, portanto, a necessidade de atração de investimentos privados para desenvolvimento dos setores de infraestrutura no país.

Em 1995, com a edição da Lei nº 9.074, houve uma modificação significativa no modelo do setor elétrico: a introdução de áreas de competição.

No segmento de geração, foi criada a figura do Produtor Independente de Energia Elétrica (PIE). Esse agente poderia produzir energia e realizar a sua comercialização, por sua conta e risco, segundo regras operacionais e comerciais próprias que seriam fixadas pelo Poder Público.[3] O comércio de energia, por sua vez, poderia ocorrer em benefício de consumidores cativos por meio das concessionárias de distribuição e de consumidores livres.[4]

Assim, criou-se um regime jurídico especial para os PIEs, sendo titulado por meio de autorizações ou concessões de uso de bem público a fim de que lhes fosse atribuída liberdade empresarial e contratual. Com isso, a concessionária de distribuição de energia perdia exclusividade de fornecimento de energia a determinados tipos de consumidores.

E, em 1998, com o projeto Re-SEB, cuja elaboração teve início em 1996, editaram-se a Lei nº 9.648/1998 e o Decreto nº 2.655/1998. O projeto propunha, entre outras questões: introdução da competição na produção de energia; a não exclusividade de fornecimento de energia pelas distribuidoras; a criação do comercializador "puro" de energia; a ampliação do universo de consumidores; e a criação do mercado de curto prazo (ambiente de contabilização e liquidação das diferenças). Portanto, os pontos que ainda não estavam normatizados foram acrescentados na Lei nº 9.648/1998 e no Decreto nº 2.655/1998 ou foram objeto de regulação pela Agência Nacional de Energia Elétrica (ANEEL).

Assim, a introdução do regime de competição na produção de energia foi um precursor da introdução da arbitragem nesse mercado. Nessa época, o que permeava as discussões sobre a criação de um novo modelo de mercado era a natureza jurídica da energia elétrica. Seria ela um serviço, público ou privado, um produto ou uma *commodity*?

[3] O poder público atua como "poder concedente" dos títulos habilitadores ora referidos.

[4] No mercado livre, há também a figura dos "consumidores especiais". Devido ao escopo deste trabalho, não teceremos maior detalhamento sobre o assunto.

A criação desse novo modelo buscava trazer sinais de segurança regulatória para atração de investidores.

Em 2001, o país passava por um período de racionamento de energia, com a superveniência de um aparato normativo que previu a criação de uma Câmara de Gestão da Crise de Energia Elétrica e de um Programa Estratégico Emergencial de Energia Elétrica para aumento da oferta de energia visando ao pleno atendimento da demanda.

Nesse período, foi criada a Comercializadora Brasileira de Energia Elétrica (CBEE) – Decreto nº 3.900/2001 –, empresa pública vinculada ao Ministério de Minas e Energia que tinha como objetivos a celebração de contratos e a prática de atos destinados: (i) à viabilização do aumento da capacidade de geração e da oferta de energia elétrica de qualquer fonte em curto prazo; e (ii) à superação da crise de energia elétrica e reequilíbrio de oferta e demanda de energia elétrica.

Esses contratos também traziam a potencialização de conflitos entre os agentes de mercado e as instituições do setor. Vale rememorar que os contratos que envolvem investimentos em infraestrutura tendem a ser de longo prazo para viabilizar a maturação dos investimentos. Nesse contexto, uma das arbitragens em que a Administração Pública Federal se envolveu dizia respeito a litígio derivado de contrato firmado pela CBEE, sucedida pela União Federal, com a empresa Proteus Power Brasil Ltda.[5]

Em todo caso, nesse momento, também houve a criação do Comitê de Revitalização do Modelo do Setor Elétrico, que trouxe várias propostas; aqui, destaco a proposta de criação de um novo sistema de oferta de preços de geração, mais sensível a variações de oferta e procura, com o objetivo de melhor capturar o nível de aversão ao risco dos agentes.

Em 2002, a Lei nº 14.433 autoriza a criação do Mercado Atacadista de Energia Elétrica (MAE), que posteriormente foi sucedido pela CCEE (Lei nº 10.848/2004). Aquela lei trouxe, pela primeira vez, a previsão de arbitragem para solução de divergências entre os agentes setoriais que integravam o MAE. A jurisdição dos árbitros, no entanto, se limitaria a discussões relativas aos chamados

[5] Caso 01/2003. A arbitragem foi administrada pela Câmara FGV de Mediação e Arbitragem e teve sede na cidade do Rio de Janeiro. O contrato havia sido firmado para venda de energia nova com a implantação de uma usina termelétrica em curto espaço temporal. A contratação havia sido realizada no cenário de risco de apagão. Nesse caso, figurou, como parte, a União enquanto sucessora da extinta CBEE. A Proteus buscava indenização devido ao não cumprimento de um contrato para construção de usina térmica, alegando dificuldades com licenciamento e obtenção de autorizações. O pedido foi negado, considerando que os fatos suscitados correspondiam a riscos que a empresa havia assumido naquele contrato. Como a arbitragem havia sido suspensa por força de uma decisão judicial, a sua sentença somente veio a ser expedida em julho de 2022. As informações sobre esse caso podem ser encontradas na página do Núcleo Especializado em Arbitragem da Advocacia-Geral da União. Caso Proteus. Disponível em: https://www.gov.br/agu/pt-br/composicao/cgu/cgu/neadir/casos-de-arbitragem-2/caso-proteus. Acesso em: 16 mar. 2024.

direitos patrimoniais disponíveis. Conforme a disciplina legal, seriam considerados disponíveis os direitos relativos a créditos e débitos decorrentes das operações realizadas no MAE.

Veja que a abertura do mercado de produção de energia para o regime de competição foi o aspecto precursor da inserção da arbitragem no mercado de comercialização de energia no Brasil. Então, a edição da Lei nº 14.433/2002 assume relevância para o instituto da arbitragem na medida em que definiu que os direitos e deveres pecuniários relacionados aos contratos de comercialização de energia elétrica poderiam ser considerados disponíveis. Com essa definição, a arbitragem pôde ser adotada no mercado de energia elétrica, afastando eventuais discussões sobre arbitrabilidade objetiva ou sobre o exercício da jurisdição arbitral.

Em 2004, foi editada a Lei nº 10.848, que resultou da conversão das Medidas Provisórias[6] nº 144 e nº 145/2003. Essa lei foi responsável pela criação da CCEE. A lei também define um novo modelo que suplanta, em alguns aspectos, o modelo liberal que havia derivado do projeto Re-SEB. Uma das premissas desse novo modelo era assegurar a confiabilidade e segurança sistêmica, certificando a disponibilidade da energia no curto, no médio e no longo prazo. Foi, portanto, um modelo instituído para prevenir novos apagões ou racionamentos de energia, como havia ocorrido em passado recente à sua criação.

Nessa oportunidade, foram criados dois ambientes de contratação de energia: o ambiente livre e o ambiente regulado. Outrossim, a Lei nº 10.848/2004 manteve a previsão (obrigação) de uso da arbitragem para solução de conflitos entre os agentes setoriais integrantes da CCEE. Quanto aos aspectos que interessam a este estudo, a Lei nº 10.848/2004 foi regulamentada pelo Decreto nº 5.163/2004 e pelo Decreto nº 5.177/2004. Este último versa sobre a estrutura organizacional e o funcionamento da CCEE. As regras de governança da CCEE foram recentemente alteradas pelo Decreto nº 11.835/2023. Para os agentes de mercado, essas alterações não foram consideradas positivas porque permitiriam maior ingerência do Estado na governança da Câmara, incrementando o risco político nas operações e transações no mercado de energia.

De toda forma, o Decreto nº 5.177/2004 traz a previsão de que a comercialização de energia deve ser regida por uma convenção editada pela ANEEL – agência reguladora criada em 1996 no âmbito da reforma de Estado antes mencionada –, e essa convenção de comercialização deve dispor sobre a convenção arbitral,

[6] O instituto da medida provisória está previsto na Constituição brasileira. Trata-se de ato produzido pelo presidente da República, sem a participação imediata do Poder Legislativo, mas com força de lei. Após a sua edição, o ato é remetido para discussão do Legislativo, que poderá aprová-lo para convertê-lo em lei ou rejeitá-lo oportunamente.

redigida de comum acordo entre os agentes integrantes da CCEE e a própria CCEE, mas de firma obrigatória por todos eles.

Para que a convenção arbitral seja válida, há necessidade de homologação prévia de seus termos pela ANEEL. Existe, no entanto, um entendimento jurídico segundo o qual o papel da ANEEL se restringiria à avaliação de aspectos de legalidade, na medida em que a convenção arbitral deve ser regida pela autonomia da vontade dos agentes do mercado.[7]

A primeira convenção arbitral foi homologada no ano de 2007 e, portanto, com essa homologação, a convenção arbitral passou a ser de adesão obrigatória para todos os agentes registrados na CCEE.

Como a arbitragem no setor de energia elétrica era um instituto em ascensão, optou-se por determinar que todas as arbitragens fossem administradas por uma única câmara. A Câmara FGV de Conciliação e Arbitragem foi escolhida. Por longos anos, a Câmara FGV obteve esse monopólio e, como resultado, adquiriu ampla experiência na administração de arbitragens em energia elétrica. Agora, no entanto, a administração dessas arbitragens está aberta para qualquer câmara que tenha sido credenciada pela CCEE.

Então, pode-se dizer que todo esse arcabouço normativo preveniu a discussão sobre a natureza dos direitos eventualmente em conflito nesses contratos: eles seriam, conforme previsão legal, patrimoniais disponíveis e passíveis de serem submetidos à jurisdição privada.

Em 2016, no âmbito da própria CCEE, tiveram início as discussões para ajuste e modernização da convenção arbitral tomando por base o aprendizado sobre o funcionamento do mercado ao longo desses anos. Essa discussão foi finalizada na CCEE em 2021, quando a nova convenção arbitral foi encaminhada à ANEEL para homologação. A homologação ocorreu em fevereiro de 2023 e trouxe algumas alterações relevantes, dentre elas: (i) a liberdade de escolha da instituição arbitral; (ii) a especificação de que contratos bilaterais de compra e venda de energia que não repercutam em operações da CCEE não estão abrangidos pela convenção; (iii) a confirmação de que a cobrança da inadimplência será realizada via jurisdição estatal; (iv) a previsão de mecanismos de proteção ao mercado, como a possibilidade de que árbitros exijam a apresentação de garantias pelas partes se o resultado da arbitragem puder repercutir em outros *players* do mercado; (v) a obrigatoriedade de divulgação de emendas das sentenças arbitrais; (vi) a exclusão de previsões de hipóteses de impedimento de árbitro, que poderão ser tratadas como causas de mera suspeição.

[7] Nesse sentido, a CCEE apresentou à ANEEL o "parecer sobre proposta de nova redação da cláusula compromissória da Convenção de Comercialização da CCEE ('Proposta 2021')", elaborado por Pinheiro Neto Advogados.

Além disso, a convenção arbitral traz a previsão de que o tribunal será composto por três árbitros, ressalvada a possibilidade de acordo em sentido diverso pelas partes, a lei aplicável às arbitragens será a brasileira, elas serão conduzidas em língua portuguesa e sua sede será São Paulo.

Para além desse cenário, a mencionada abertura do mercado e a ampla gama de relações jurídicas que derivam dos negócios na indústria elétrica ensejam também contratos de comercialização e outras formas de negociação da energia que não demandam o registro da CCEE. Dentre tantas possibilidades, citam-se, como exemplo, as contratações provenientes dos modelos de negócio que foram criados com o arcabouço legal e regulatório da mini e microgeração distribuída, os contratos de compra e venda de energia excepcionados pela própria convenção arbitral e os derivativos de energia. Todos esses negócios jurídicos seriam passíveis de terem, na sua formalização, a indicação da arbitragem para solução de eventuais litígios.

5 Aspectos gerais do mercado de energia elétrica: o estado da arte

A CCEE é uma associação civil, sem fins lucrativos, que tem como finalidade viabilizar a comercialização de energia (art. 4º da Lei nº 10.848/2004). A instituição presta relevante atividade de interesse público e se submete à fiscalização da ANEEL.

As políticas e diretrizes gerais para funcionamento do mercado de energia estão estabelecidas em lei. Elas devem ser complementadas pelos decretos regulamentares e pelas regras de comercialização editadas pela ANEEL (Convenção de Comercialização) e pela Convenção Arbitral no que é pertinente à solução extrajudicial dos conflitos.

O mercado de energia elétrica brasileiro envolve diversos ambientes de comercialização.

O primeiro deles é o mercado de curto prazo (MCP), mercado *spot* ou mercado de liquidação das diferenças. Nele, conforme o próprio nome indica, são liquidadas as diferenças entre as entregas do mundo comercial e o que, de fato, ocorreu no mundo físico e operacional do fornecimento de energia.

Há também os ambientes de contratação regulada (ACR) e de contratação livre (ACL).

A comercialização de energia elétrica no Brasil pode ser proveniente de leilões regulados e realizados pelo poder público. Cuidam das contratações realizadas no ambiente regulado. Seu objetivo é o atendimento do mercado cativo das concessionárias de distribuição de energia elétrica. Conquanto os chamados

produtores independentes de energia comercializem no ambiente regulado do leilão, eles firmarão contratos bilaterais e de natureza privada com cada uma das distribuidoras, que atuaram como representantes do segmento de consumo. Porém, esses contratos permanecem regulados não apenas pelas regras dos leilões de que participaram, como também pelos contratos firmados e por toda legislação e regulação setorial vigentes.

Os leilões que foram realizados desde a criação do novo modelo de 2004 são: leilões de energia existente, leilões de energia nova, leilões de ajuste, leilões de fontes alternativas, leilões de projetos estruturantes e leilões de energia de reserva e de reserva de capacidade.[8] Os conflitos derivados dos contratos que decorrem desses leilões são, como regra, regidos pela convenção arbitral antes mencionada.

Portanto, um exemplo de contrato firmado no ACR é o Contrato de Comercialização de Energia no Ambiente Regulado, denominado CCEAR. Ele instrumentaliza a obrigação de entrega de energia derivada de um procedimento de concorrência pública no ACR. Assim, sua natureza é híbrida, porque se trata de um contrato privado fortemente regulado por normas de direito público brasileiro. Como deriva da adjudicação do objeto resultante do leilão, a sua lógica é similar a um contrato de adesão; o produtor independente firma o contrato com a distribuidora e as partes não podem alterar suas cláusulas.[9]

A comercialização também pode ocorrer de forma livre, ou seja, os produtores independentes de energia, os comercializadores e os consumidores negociam livremente entre si e firmam contratos contendo condições explicitadas conforme a sua própria conveniência. Opera-se a ampla liberdade de contratação, fundada na autonomia da vontade das partes, quanto a prazos, quantidade e demais condições do negócio jurídico.

Trata-se, portanto, das contratações realizadas no ambiente de contratação livre. Os contratos são normalmente denominados Contratos de Comercialização de Energia no Ambiente Livre (CCEAL). Nesses contratos, as partes contratantes assumem todos os riscos dessa contratação, dentre eles: o risco político, o risco regulatório, o risco econômico-financeiro, o risco da volatilidade dos preços da energia, o risco de insolvência de uma das partes contratantes ou mesmo de outros agentes de mercado, etc.

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[8] Registre-se que, no sítio da ANEEL, são disponibilizados todos os editais de leilões e minutas de contrato que seguiam os editais. Para consultar, acesse: https://www.gov.br/aneel/pt-br/empreendedores/leiloes. Acesso em: 17 mar. 2024.

[9] Assim, por exemplo, poder-se-ia discutir se eventual inadimplemento das faturas poderia ensejar, de imediato, a incidência da regra da *exceptio non adimpleti contractus*, porque, pela própria natureza essencial do objeto contratado, persistiriam a obrigação de entrega de energia e a observância das regras de comercialização.

A despeito da ampla liberdade de negociação existente entre os agentes de mercado, esses contratos também são altamente regulados por se tratar de uma atividade reservada ao Estado e exercida sob algum dos regimes habilitadores antes mencionados. Como regra, os produtores independentes de energia detêm uma autorização para produção de energia ou uma concessão de uso de bem público. Nesse mercado, também atuam comercializadores de energia, consumidores livres e consumidores especiais.

O ambiente de contratação livre tem substituído o protagonismo que antes era conferido ao ACR. Trata-se de uma disrupção fática do modelo setorial que ainda não foi acompanhada pelas devidas alterações legislativas e regulatórias. O setor elétrico brasileiro vivencia uma verdadeira revolta dos fatos contra o direito. Antes, mais propício ao planejamento e à governança central, agora, recebe os influxos do crescimento descentralizado e independente de centrais geradoras a partir de fontes renováveis e variáveis. É, portanto, um cenário propício para conflitos e popularização da arbitragem.

Segundo o informativo de mercado disponibilizado pela CCEE referente à contabilização de janeiro de 2024, o montante transacionado, no mercado como um todo e em todo o país, foi de aproximadamente 171.381 MW médios (*megawatts* médios) de energia; 72% (setenta e dois por cento) desse volume foram comercializados no mercado livre. Em contraposição, até a maior abertura do mercado, ocorrida em janeiro de 2024, as distribuidoras, que estão no mercado regulado, segundo dados de junho de 2023,[10] representavam 65% do consumo.

Observe que, a despeito da grande representatividade do mercado cativo, as negociações acontecem, em grande parte, no ambiente livre. Isso demonstra que a mesma energia é renegociada mais de uma vez nesse ambiente. Como consequência, há um montante maior de contratação quando comparado com o montante efetivo de geração e consumo.

Mais uma vez, os conflitos que eventualmente derivam desses contratos são um campo fértil para a utilização do instituto da arbitragem.

6 As relações jurídicas regidas pelo direito público e a arbitragem no setor de energia elétrica

Consideradas aquelas relações jurídicas habilitadoras fundamentais sobre as quais nos referimos antes, temos que a União, ao optar por delegar o exercício

[10] Nessa mesma época, 160 mil mega médios de energia haviam sido comercializados e 69% desse volume haviam sido comercializados no mercado livre. O Infomercado da CCEE pode ser encontrado no sítio: https://www.ccee.org.br/documents/80415/27035879/InfoMercado-mensal_jan_24_199.pdf/1d779ed9-4bfa-022e-0c37-00bbbc3f0d3e. Acesso em: 16 mar. 2024.

de atividades de energia elétrica, também o faz por meio de certames públicos no âmbito dos três segmentos da indústria.

A partir desses certames, são adjudicadas as concessões de geração, transmissão e distribuição. Em todos esses segmentos, ainda existem contratações oriundas do período em que o Estado atuava como executor direto da produção de bens e prestação de serviços. Muitos desses contratos foram simplesmente prorrogados e, por vezes, sujeitos a meras transferências de controle acionário, escapando à lógica de leilões tradicionalmente aplicada para observância dos ditames constitucionais para a delegação de serviços e utilidades de interesse público titularizados pelo Estado. Assim, existem contratos que foram meramente aditivados e, nessa oportunidade, não houve a escolha da arbitragem para solução de eventuais conflitos.

Ainda, no campo da produção de energia, a União realizou alguns leilões estruturantes. Um projeto estruturante é aquele de grande porte, de caráter estratégico, com possibilidade de aumentar a capacidade de geração ou de transmissão de energia de forma considerável. Os contratos de usinas estruturantes[11] possuem cláusulas compromissórias para solucionar discordâncias sobre indenizações na extinção do contrato, incluindo reversão de bens. São contratos de uso de bem público firmados pela União numa época em que o Brasil tinha uma base hidrotérmica predominante.

Embora a atividade não seja regida na forma de serviço público, é de utilidade pública e, portanto, pode haver interesse da União na reversão de bens necessários à realização da atividade ao final da vigência do contrato.

O interessante nesses casos é que os contratos foram firmados diretamente pela União, mas há cláusula de arbitragem indicando que a parte requerida será a ANEEL, enquanto gestora desses contratos. Conquanto a ANEEL seja uma autarquia especial vinculada ao Ministério de Minas e Energia da União (Poder Concedente), ANEEL e União são pessoas jurídicas de direito público distintas. Aliás, essa é uma característica do regime jurídico da agência reguladora: a ideia de autonomia e independência do Poder Executivo central. Em todo caso, de fato, a lei de criação da ANEEL prevê que está entre as suas competências a gestão dos contratos de concessão ou de permissão de serviços e atividades relacionados à energia. Nesse sentido, a União, enquanto Poder Concedente, é titular desses contratos, mas optou por delegar à ANEEL a sua gestão, inclusive no caso de eventual requerimento de arbitragem para solução de conflitos derivados desses contratos.

[11] São eles: (i) Contrato de Concessão nº 01/2008-MME-UHE Santo Antônio; (ii) Contrato de Concessão nº 02/2008-MME-UHE JIRAU; e (iii) Contrato de Concessão nº 01/2010-MME-UHE Belo Monte. Disponível em: https://antigo.aneel.gov.br/contratos-de-geracao. Acesso em: 17 mar. 2024.

A cláusula compromissória traz previsão de aplicação das regras da CCI e caberá à ANEEL nomear um árbitro para compor o tribunal arbitral. Assim, a União aceita o uso desse mecanismo, mas a ANEEL, como gestora dos contratos, participaria como parte na arbitragem.[12]

A participação da União em arbitragens envolvendo agências reguladoras tem sido discutida juridicamente, e seu papel não está claramente definido. A questão tem relação com o consentimento das partes e necessidade de que ele seja ou não expresso. Em situações em que um terceiro não signatário consinta com a cláusula compromissória e entre na arbitragem, sua posição pode variar entre ser considerada parte, *amicus curiae*, assistente ou interventor anômalo.[13]

Para esses casos de produção independente de energia a partir de projetos estruturantes, ainda não tivemos exemplos de conflitos submetidos à arbitragem.

Além disso, até 2031, estima-se que 85 contratos que autorizam a produção de energia por meio de usinas hidroelétricas e correspondem a 29 GW instalados tenham sua vigência finalizada.[14] Nesse cenário, o poder público poderá avaliar se prorroga esses contratos ou se relicita a exploração da atividade. Pode ser oportuna a discussão sobre eventual inclusão de cláusulas arbitrais na novação desses negócios jurídicos. Outrossim, podem surgir conflitos sobre a necessidade ou não de reversão dos bens que foram utilizados para a produção de energia ao longo dos anos, bem como debates sobre valores devidos a título de indenizações para cobertura de bens eventualmente não amortizados, o que, também, poderia ensejar a firma de compromissos arbitrais caso não haja consenso entre poder concedente e eventuais beneficiários dessas indenizações.

Já no segmento de transmissão, ainda não existem contratos de concessão que originariamente tenham previsto cláusula compromissória. Existe apenas um contrato que foi aditivado para inclusão da cláusula compromissória e que foi logo seguido da firma de um compromisso arbitral para dar efetividade à referida cláusula. Cuida-se do Contrato de Concessão de Transmissão de Energia Elétrica nº 03/2012, proveniente do Leilão nº 04/2011.

Trata-se de empreendimento bastante peculiar, cujo objetivo é a interligação (Manaus-Boa Vista) do último sistema isolado do país. É também um empreendimento considerado de relevante interesse para a defesa nacional e que ganhou destaque entre as políticas públicas prioritárias do governo federal.

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[12] Embora haja essa previsão, os contratos estão em curso. Até o momento, nenhuma arbitragem foi requerida em face da ANEEL nesse segmento da indústria.

[13] Confira-se o caso MSVIA v. ANTT, em que o tribunal arbitral deferiu a intervenção anômala da União. Disponível em: https://www.gov.br/agu/pt-br/composicao/procuradoria-geral-federal-1/subprocuradoria-federal-de-consultoria-juridica/equipe-nacional-de-arbitragens-enarb/CCI24957DecisoCautelar.pdf. Acesso em: 17 mar. 2024.

[14] DUTRA, Joisa Campanher; PINTO JUNIOR, Mario Engler (orgs.). *Concessões no setor elétrico brasileiro*: evolução e perspectivas. 1. ed. Rio de Janeiro: Synergia, 2022. p. 12.

Havia previsão de que o corredor da linha de transmissão passaria por uma terra indígena e por área de floresta pouco antropizada. Isso dificultou os trâmites do licenciamento ambiental. Os riscos do licenciamento estavam originariamente alocados ao concessionário, mas a ANEEL deferiu o pleito de reequilíbrio econômico-financeiro da concessão considerando que o atraso havia se prolongado por aproximadamente dez anos. O concessionário considerou, no entanto, que o incremento de receita autorizado pela ANEEL não seria suficiente para o reequilíbrio total do contrato. Essa divergência foi levada à arbitragem.[15]

Quanto aos demais contratos de transmissão em curso, conquanto não haja previsão expressa para uso da arbitragem na solução de eventuais conflitos, há previsão legal expressa que possibilita a firma de aditivos contratuais para inserir a cláusula compromissória ou para a firma do termo de compromisso arbitral, desde que se justifiquem as vantagens da medida conforme as circunstâncias do caso.

Como regra geral, para justificar a utilização da arbitragem nos contratos de que é parte, a Administração Pública tem aplicado o disposto na Lei Geral de Arbitragem, notadamente após a alteração promovida em 2015, que deu grande abertura para o uso da arbitragem para a Administração Pública, na Lei de Licitações e Contratos, na Lei Geral de Concessões, na Lei de Parcerias Público-Privadas, na Lei de Relicitações e no Decreto nº 10.025/2019, embora este último tenha sido elaborado especificamente para o setor de transportes.

Para os contratos de natureza pública firmados no âmbito do setor elétrico, não existe uma norma específica que determine quais questões se enquadram no escopo de eventuais arbitragens. Não existe, portanto, uma delimitação prévia sobre o alcance da jurisdição arbitral para além da norma geral que se refere aos direitos patrimoniais disponíveis. Assim, a análise de arbitrabilidade objetiva também tem se baseado naqueles atos normativos antes referidos.

Para os leilões de transmissão porvindouros, não há indicativos de que a ANEEL pretenda inserir uma cláusula arbitral para os contratos que preveem a implantação de linhas de transmissão. Todavia, todos os editais de leilões de transmissão são submetidos à consulta pública antes de serem publicados. Nessa oportunidade, os investidores interessados podem sugerir a inserção da cláusula compromissória caso entendam conveniente para a realização de seus investimentos. Salvo melhor juízo, não se tem notícias de que tenha havido contribuições nesse sentido.

[15] Arbitragem CCI nº 27.016/RLS.

Ademais, até 2032, há previsão de término de vigência de 24 (vinte e quatro) concessões de serviços públicos de transmissão,[16] o que demandará do poder público a decisão sobre aditivar esses contratos para a prorrogação da sua vigência ou relicitar esses serviços. Em qualquer caso, apresenta-se uma oportunidade para debater sobre o interesse na inserção de cláusulas compromissórias para solução de conflitos derivados dessas avenças.

Por fim, o segmento de distribuição. Este segmento – já tão relevante para o funcionamento do setor – assumirá uma importância ainda maior no contexto da transição energética. Isso porque, em cada espaço geográfico atendido pelas redes de distribuição de energia elétrica, notadamente nos centros de carga urbanos, o consumo tende a ser crescente. Ademais, espera-se que novas tecnologias de descentralização e digitalização das redes[17] sejam amplamente disseminadas. Ainda, no contexto de eventos climáticos cada vez mais severos e extremos, as redes precisarão se tornar mais resilientes. Todos esses fatores tendem a demandar vultosos investimentos das concessionárias de distribuição.

Portanto, esses investimentos deverão financiar as novas tecnologias e a resiliência das redes contra eventos climáticos extremos e, como consequência, assegurar a qualidade e a universalidade do fornecimento de eletricidade para seus usuários finais.

Esses desafios e adversidades não são apenas uma prerrogativa brasileira. A temática vem ganhando a atenção de formadores de políticas públicas das principais economias mundiais, tais como EUA, União Europeia e China.

A atividade de distribuição de energia elétrica também é intensiva em capital, demandando grandes volumes de investimento com longo prazo de amortização. Como ocorre no segmento de transmissão, a distribuição também se sujeita ao regime de monopólio natural, assim considerada a forma mais eficiente de exploração econômica desse serviço. Em termos jurídicos, a distribuição é explorada em regime de serviço público, e os concessionários têm assegurada a remuneração dos seus investimentos prudentemente realizados, exigindo-se deles o cumprimento de obrigações de prestação de serviço com qualidade, bem como de universalização do fornecimento de energia elétrica. Trata-se, também, de um serviço altamente regulado e sujeito a uma fiscalização sistemática pelo órgão regulador.

Os contratos de concessão, nesse segmento, foram licitados ou prorrogados, conforme o caso. Certas concessões também se sujeitaram a meras transferências de controle acionário (por final de vigência ou retomada do serviço). São

[16] DUTRA, Joisa Campanher; PINTO JUNIOR, Mario Engler, *op. cit.*, p. 12.

[17] Fala-se em *smart grids* ou redes inteligentes, medidores inteligentes, veículos elétricos, geração distribuída fotovoltaica, mecanismos de incentivo à resposta da demanda, armazenamento por baterias, etc.

contratos complexos no âmbito dos quais frequentemente surgem discussões sobre o teor de suas cláusulas de alocação de riscos e a respectiva assunção dos ônus financeiros diante da materialização de certos eventos. No que interessa ao mercado de arbitragem, atualmente, nenhum desses contratos traz cláusulas compromissórias.

Alguns contratos, no entanto, encontram-se em final de vigência. Até 2031, 20 (vinte) concessões de distribuição terão seu prazo de vigência encerrado. Juntas, elas representam aproximadamente 60% (sessenta por cento) do mercado de distribuição. Percebe-se, portanto, que esse segmento da indústria passa por um momento estratégico.[18]

O governo já deu início às discussões com os *stakeholders* envolvidos com o objetivo de estabelecer um regramento que permita a prorrogação dessas concessões em face da nova realidade setorial.[19] Foi firmado o entendimento de que não haveria justificativa econômica para licitar as concessões ou cobrar pelas outorgas de prorrogação, mantendo-se a aplicação de uma metodologia de regulação por incentivos aprimorada por regras tecnicamente discutidas e elaboradas com a participação de todos os *players*.

Além das constantes interações havidas com o Tribunal de Contas da União, o setor vem sendo submetido a uma intensa intervenção política e, historicamente, o segmento de distribuição tem se mostrado bastante sensível ao intervencionismo político.

No caso das concessões a serem prorrogadas, os agentes de mercado esperavam que o poder concedente apresentasse uma proposta de regulamentação técnica dos novos contratos. Porém, o Poder Legislativo apresentou uma proposta de projeto de lei[20] que vem sendo severamente criticada pelo mercado pela ausência de caráter técnico. Há uma percepção de que o risco político nesse segmento está intensificado.

Nesse cenário disruptivo, que engloba a necessidade de implementação de novas tecnologias e de investimentos contra eventos climáticos extremos e que agora se soma à intensificação de riscos políticos, eventuais conflitos entre as concessionárias e o poder concedente em torno de questões financeiras e econômicas do contrato não assumirão contornos triviais.

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[18] DUTRA, Joisa Campanher; PINTO JUNIOR, Mario Engler, *op. cit.*, p. 12. Nota Técnica nº 14/2023/SAER/SE-Ministério de Minas e Energia.

[19] Conferir: Consulta Pública MME nº 152/2023. Disponível em: https://antigo.mme.gov.br/pt/web/guest/servicos/consultas-publicas?p_p_id=consultapublicammeportlet_WAR_consultapublicammeportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_consultapublicammeportlet_WAR_consultapublicammeportlet_view=detalharConsulta&resourcePrimKey=4826123&detalharConsulta=true&entryId=4826125. Acesso em: 17 mar. 2024.

[20] Projeto de Lei (PL) nº 4.831/2023 apresentado à Câmara dos Deputados. Disponível em: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2393677. Acesso em: 17 mar. 2024.

Todavia, as discussões técnicas, ao menos da forma como têm sido representadas em documentos oficiais, relacionam-se exclusivamente à modelação do negócio de distribuição. Há, de fato, um contexto que configura terreno fértil para o uso da arbitragem, mas essa via não tem sido aventada no âmbito das discussões oficiais. Uma das possíveis causas dessa desconsideração do instituto pode residir na falta de conhecimento desses investidores a respeito do instituto e das vantagens da sua aplicação.

7 Conclusões

O instituto da arbitragem começa a ganhar espaço no setor elétrico brasileiro nos anos 2000, quando tiveram início as medidas de reformulação de aspectos regulatórios propostos no âmbito do Projeto Re-SEB. Essas medidas foram editadas em resposta à crise energética vivenciada no país.

A introdução de áreas de competição na indústria elétrica foi a medida precursora da inserção do instituto da arbitragem no setor elétrico brasileiro. A primeira arbitragem em que a Administração Pública se envolveu no setor elétrico ocorreu, inclusive, nesse campo, quando surgiu um litígio em contrato firmado para enfrentamento do apagão de 2001. A União figurou como sucessora da então CBEE.

Atualmente, a Lei nº 10.848/2004 torna obrigatório o uso da arbitragem em contratos de comercialização de energia registrados nas CCEEs. Há a previsão de que a comercialização de energia deve ser regida por regras de comercialização editadas pela ANEEL, que, por sua vez, devem dispor sobre a convenção arbitral. A convenção arbitral é redigida de comum acordo entre os agentes integrantes da CCEE e a própria CCEE e de firma obrigatória por todos eles.

Em fevereiro de 2023, a convenção arbitral foi atualizada e trouxe algumas alterações relevantes para a normatização do tema, dentre elas: (i) a liberdade de escolha da instituição arbitral; (ii) a especificação de que contratos bilaterais de compra e venda de energia que não repercutam em operações da CCEE não estão abrangidos pela convenção; (iii) a confirmação de que a cobrança da inadimplência será realizada via jurisdição estatal; (iv) a previsão de mecanismos de proteção ao mercado, como a possibilidade de que árbitros exijam a apresentação de garantias pelas partes se o resultado da arbitragem puder repercutir em outros *players* do mercado; (v) a obrigatoriedade de divulgação de emendas das sentenças arbitrais; (vi) a exclusão de previsões de hipóteses de impedimento de árbitro, que poderão ser tratadas como causas de mera suspeição.

Para além da utilização da arbitragem para litígios em contratos sujeitos à liquidação no mercado de curto prazo gerido pela CCEE, a abertura do mercado e a ampla gama de relações jurídicas que derivam dos negócios na indústria elétrica

ensejam também contratos de comercialização e outras formas de negociação da energia que não demandam o registro da CCEE. Entre tantas possibilidades, citam-se como exemplo as contratações provenientes dos modelos de negócio que foram criados com o arcabouço legal e regulatório da mini e microgeração distribuída, os contratos de compra e venda de energia excepcionados pela própria convenção arbitral e os derivativos de energia. Todos esses negócios jurídicos seriam passíveis de terem, na sua formalização, a indicação da arbitragem para solução de eventuais litígios.

Assim, o instituto da arbitragem está bem consolidado no âmbito da comercialização de energia sob gestão da CCEE, mas ainda há espaço para maior desenvolvimento no campo dos negócios de energia, na comercialização de energia e no mercado de derivativos, bem como a possibilidade de sua inserção de forma mais significativa nos ramos da indústria elétrica que são intensivos em capital.

Isso porque passamos por um novo contexto de modernização, de inserção de novas tecnologias, de eventos climáticos extremos, de políticas públicas voltadas para a transição energética e de severas disrupções no setor, como, por exemplo, o aumento da produção de energia a partir de fontes renováveis e variáveis, a abertura do mercado, o crescimento exponencial do mercado livre e da inserção de recursos energéticos distribuídos.

Além disso, o ACL tem substituído o protagonismo que antes era conferido ao ACR, operando uma ruptura no modelo setorial, que não tem sido rapidamente acompanhada pelas devidas alterações legislativas e regulatórias. O tema envolve uma disrupção no modelo de governança e planejamento setorial, sujeito aos influxos do crescimento cada vez mais descentralizado e independente do mercado de produção de energia, notadamente a partir de fontes renováveis e variáveis.

Dados da CCEE demonstram que, embora o mercado cativo e regulado ainda detenha a maior representação da demanda ou da carga, como regra, mais de setenta por cento do volume de energia têm sido comercializados no mercado livre. Isso demonstra que a mesma energia pode ser renegociada inúmeras vezes nesse ambiente. Como consequência, há um montante maior de contratação quando comparado com o montante efetivo de geração e consumo.

Esses e tantos outros fatores têm colocado em xeque o funcionamento do setor elétrico segundo o regime pensado e elaborado na década de 2000. Isso requer reformas legais e regulatórias urgentes. Somado ao crescimento das transações comerciais no mercado de energia, é também um cenário de incremento de riscos regulatórios e políticos propício para conflitos e popularização da arbitragem.

Nos segmentos intensivos em capital, nos quais surgem relações jurídicas habilitadoras entre Estado e privados que se prontificam à exploração das

atividades de energia elétrica – geração, transmissão e distribuição –, há também um panorama favorável à inserção de cláusulas compromissórias nos negócios jurídicos.

Em todos os três segmentos da indústria, ainda existem contratos que foram meramente aditivados e, nessa oportunidade, não houve a escolha da arbitragem para solução de eventuais conflitos. Porém, esses contratos – muitos com vigência até a década de 2050 – foram firmados num ambiente eletroenergético totalmente diferente do atual, o que pode requerer maior abertura para o sistema multiportas, com a utilização de meios mais dinâmicos e especializados de solução de conflitos, inclusive a arbitragem.

No campo da produção de energia, a União realizou alguns leilões estruturantes, que deram origem a contratos de concessão de uso de bem público firmados entre o poder concedente e os produtores independentes de energia. Esses contratos possuem cláusulas compromissórias para solucionar discordâncias sobre indenizações quando da extinção das concessões, incluindo reversão de bens. Embora a atividade não seja exercida sob a forma de serviço público, é de utilidade pública e, portanto, pode haver interesse da União na reversão de bens necessários à sua realização ao final da vigência do contrato. Tais contratos foram firmados diretamente pela União, mas há cláusula de arbitragem indicando que a parte requerida será a ANEEL, enquanto gestora desses contratos. Para esses casos de produção independente de energia a partir de projetos estruturantes, ainda não tivemos exemplos de conflitos submetidos à arbitragem.

Já no segmento de transmissão, ainda não existem contratos de concessão que originariamente tenham previsto cláusula compromissória. Há o caso do Contrato de Concessão de Transmissão de Energia Elétrica nº 03/2012, proveniente do Leilão nº 04/2011, em que o contrato foi aditivado para inclusão da cláusula compromissória e que foi logo seguido da firma de um compromisso arbitral para dar efetividade à referida cláusula. A arbitragem encontra-se em curso, e a principal discussão requer a avaliação dos árbitros sobre a metodologia de equilíbrio econômico-financeiro aplicada pela agência reguladora.

Quanto aos demais contratos de transmissão em curso, conquanto não haja previsão expressa para uso da arbitragem na solução de eventuais conflitos, existe previsão normativa que possibilita a firma de aditivos contratuais para inserir a cláusula compromissória ou para a firma do termo de compromisso arbitral, desde que se justifiquem as vantagens da medida conforme as circunstâncias do caso.

Para os leilões de transmissão porvindouros, não há indicativos de que a ANEEL pretenda inserir uma cláusula arbitral para os contratos que preveem a implantação de linhas de transmissão. Todavia, todos os editais de leilões de transmissão são submetidos à consulta pública antes de serem publicados. Nessa

oportunidade, os investidores interessados podem sugerir a inserção da cláusula compromissória caso entendam conveniente para a realização de seus investimentos. Salvo melhor juízo, não se tem notícias de que tenha havido contribuições nesse sentido.

Tanto no segmento de geração quanto no segmento de transmissão, entre os anos de 2031 e 2032, estima-se que uma quantidade considerável de contratos tenha o seu término de vigência. Na geração, eles se referem à produção de energia por meio de usinas hidroelétricas e correspondem a 29 GW instalados, tendo sua vigência finalizada.

Nesse cenário, o poder público poderá avaliar se prorroga esses contratos ou se relicita a exploração da atividade. Ademais, não se descarta a possibilidade de conflitos relativos e eventual reversão dos bens que foram utilizados para a produção e/ou transporte em alta tensão de energia ao longo dos anos. Em qualquer caso, apresenta-se uma oportunidade para debater sobre o interesse na inserção de cláusulas compromissórias para solução de conflitos derivados dessas avenças, notadamente numa perspectiva de novação desses negócios jurídicos.

Situação semelhante também se apresenta no segmento de distribuição. Alguns contratos encontram-se em final de vigência. Até 2031, 20 (vinte) concessões de distribuição terão seu prazo de vigência encerrado. Juntas, elas representam aproximadamente 60% (sessenta por cento) do mercado de distribuição. Trata-se de segmento da indústria que tem se mostrado bastante suscetível às disrupções tecnológicas e de mercado, aos eventos climáticos, bem como ao risco político, mas que passa por um momento estratégico na modelação do negócio e para sua sustentabilidade no setor. Outrossim, conflitos entre as concessionárias de serviços públicos de distribuição e o poder concedente em torno de questões financeiras e econômicas do contrato não têm assumido contornos triviais, painel que não deve ser alterado no curto e médio prazo.

Todavia, as discussões técnicas em torno da prorrogação desses contratos têm se voltado à modelação do negócio de distribuição. Embora haja um contexto fático fértil para o uso da arbitragem, essa via não tem sido aventada no âmbito das discussões oficiais. Uma das possíveis causas dessa desconsideração do instituto pode residir na falta de conhecimento desses investidores a respeito do instituto e das vantagens da sua aplicação.

Percebe-se, assim, que o instituto da arbitragem, antes já considerado de grande relevância para todos que atuam no setor elétrico, notadamente para os advogados e outros profissionais que trabalham em áreas de infraestrutura do país, poderia também ser amplamente utilizado no âmbito do setor elétrico com vistas a reduzir o nível de insegurança jurídica das relações complexas, em rede e intrincadas que são formalizadas na indústria.

Todavia, para que isso ocorra, é preciso que os *stakeholders* conheçam, avaliem as vantagens e desvantagens da sua utilização e, então, demonstrem, para o poder público, maior interesse na previsão desse instituto em seus contratos firmados com a Administração Pública Federal.

Abstract: The electric industry encompasses the segments of energy generation, transmission, and distribution. It comprises intensive infrastructure investments and energy commercialization. Events related to energy transition and the integration of disruptive technologies have altered the sector's landscape, requiring system flexibility and increased regulatory proactivity. Additionally, it demands structural, operational, and market changes. The sector is disruptive in terms of governance and operational, market, and legal aspects. In the 2000s, the introduction of competitive areas in the electric industry was the first step towards the use of arbitration, driven by regulatory reforms and in response to the country's energy crisis, which also led to the first arbitration in the Brazilian electric sector involving the Public Administration. Law nº 10.848/2004 currently makes arbitration mandatory in energy trading contracts managed by the CCEE. Arbitration also finds space in other forms of energy negotiation, such as contracts for mini and micro-distributed generation and energy derivatives. The context of modernization increased renewable energy production and market opening create opportunities for arbitration expansion. There is also potential for further development in enabling relationships of capital-intensive electric industry activities. The paper provides data on the state of the art of these contracts in the Brazilian electric sector, indicating under what circumstances arbitration could enhance governance in the industry.

Keywords: Energy. Electric industry. Energy transition. Technological disruption. Generation. Transmission. Distribution. Energy marketing. Arbitration.

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Digital opportunities for promotion of multi-door courthouse concept

Damir Valeev

Assistant to the Dean for Scientific Work. Faculty of Law of Kazan (Volga Region) Federal University. Honored Lawyer of the Republic of Tatarstan. Holder of an Advanced Doctorate in Law. Professor. E-mail: valeev55@gmail.com. ORCID: https://orcid.org/0000-0002-3233-2400.

Anas Nuriev

Deputy Director of the Kazan Branch of the Russian State University of Justice. Honored Lawyer of the Republic of Tatarstan. Holder of an Advanced Doctorate in Law. E-mail: anasnuriev@yandex.ru. ORCID: https://orcid.org/0000-0001-7373-5938.

Abstract: The article presents the prospects and new horizons of realization of a multi-door courthouse concept concerning modern digitalization processes. The legal system of contemporary Russia, deprived of several ideological institutions of the Soviet-era past, faced the same problem, which was relevant for the U.S.A. when creating the multi-door courthouse concept. The procedural legislation in force up to October 2019, which provided the possibility of non-judicial forms of protection of rights since the codification of 2002, proved ineffective in creating a worthy alternative to the state judicial procedure for protecting rights. Ground has been established to introduce the multi-door courthouse concept into Russian realities in a new way: a digital multi-door courthouse. This paper analyzes the modern approach to a "multi-door courthouse" in the Russian Federation, addressing its evolution, current issues and future perspectives. To achieve the paper's aim, the authors used comparative legal analysis to show the development of the concept in different countries and a systemic approach to study the implementation of a "multi-door courthouse" in the Russian Federation.

Keywords: Digital economy. Digitalization of law. Digital justice. Multi-door courthouse. Court system.

1 Introduction

In the 1980s in the United States, the judicial system was under serious stress and faced a number of challenges to ensure the functioning of an effective system of subjective rights defense. Predictably, at this time the concept of "multi-door

courthouse", proposed by Professor Sander,[1] immediately found supporters.[2] This concept was further developed in the modern period[3] and put on the agenda the very important issue of "access to justice" in general. "Pandemic" restrictions of 2020 and the "post-covid distance" development of society prompted the Russian doctrine to look at the implementation of the "multi-door courthouse" concept in a new digital key as the concept of "digital multi-door courthouse", taking into account the experience of the world community.

The concept is an idea that not all disputes should be referred to a court and accompanied by complex formalized procedures that require significant material and time resources. A single center for the estimation of complaints and disputes should be created, which would get, sort and forward complaints received by the court to public authorities, which could compete with judicial procedures and offer an alternative to continue proceedings subject to non-judicial forms of protection of rights.

The employees of the center will try to resolve the conflict in one of the ways best suited to the criteria of the dispute and thus alternative ways of resolving the conflict will be institutionalized in the justice system. There are five objectives of creation of the multi-door courthouse: (1) nationals should be aware of the possible ways for dispute resolution available in their society; (2) nationals should be assisted in finding appropriate alternative forms for adjudication of their disputes; (3) rendering aid to alternative ways of protecting rights in receiving relevant applications with regard to cases and improving the level of coordination of services between judicial and non-judicial forms of protection of rights; (4) development of methods of sorting cases based on criteria that may help to choose a particular

[1] Address by Professor of Law at Harvard University Frank E.A. Sander at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976). reprinted in The Pound Conference, F.R.D., 70, 79, 111, 1976.

[2] RAY L., CLARE A.L. The Multi-Door Courthouse Idea: Building the Courthouse of the Future... Today // Ohio State Journal on Dispute Resolution, 1(1), 7, 1985; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. *Int J Semiot Law* 36, 2261, 2023; FERREIRA, D.B., GROMOVA, E. & TITOVA, E.V. The Principle of a Trial Within a Reasonable Time and JustTech: Benefits and Risks. Hum Rights Rev, 25, 47, 2024; KESSLER, G., FINKELSTEIN, L.J. The Evolution of a Multi-Door Courthouse, Catholic University Law Review, vol. 37, no. 3, 577, 1988.

[3] CORTES, P. Using Technology and ADR Methods to Enhance Access to Justice // International Journal of Online Dispute Resolution, Vol 5. Is. 1, 103-, 2001; SCHMITZ, A.J. Measuring "Access to Justice" in the Rush to Digitize // Fordham Law Review, Vol. 88. Is. 6, 2381, 2020; RABINOVICH-EINY, O. Beyond efficiency: the transformation of court through technology. UCLA Journal of Law & Technology, Vol. 12. Is. 1, 1, 2008; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dipute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, p. 153-175, jul./dez. 2023; FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", Technology in Society, 68, 101872, 2022; FERREIRA, D.B., GROMOVA, E.A, FARIAS, B.O., GIOVANNINI C.J. Online Sports Betting in Brazil and conflict solution clauses, Revista Brasileira de Alternative Dispute Resolution, Vol. 4, nº 7, 75-86, 2020.

form of protection; and (5) stimulate sharing experience of the single center for the estimation of complaints and disputes.

Nowadays there are many followers of this concept in foreign literature[4] and there are many examples of the practical implementation of this concept in individual states.[5]

The authors of the concept associate the reasons for creation of this concept with the following reasons, which should be stated and which are becoming increasingly important for modern Russia:

- the courts are overloaded with the cases under consideration, which results in long delays in considering complaints;
- a number of cases require niche specialization or experience in certain professional activities;
- alternative ways of resolving conflicts may assume the functions of moral and ethical control, which were performed by families and communities more fully in the past;
- alternative forms of dispute resolution can deal with the cause rather than the effect, as it is possible to correct not only the specific legal violation but also to eliminate the cause of it.[6]

The aim of this paper is to analyze the modern approach to the concept of "multi-door courthouse" the Russian Federation, address its evolution, current issues and future perspectives. To achieve the aim of the paper authors used comparative legal analysis to show the development of the concept in different countries, and systemic approach to study the implementation of the concept "multi-door courthouse" in the Russian Federation.

2 Russian historical experience of the establishment of non-judicial forms of remedy

The historical experience of the development of the Russian legal system in the twentieth century shows that great efforts were made to consolidate the role of public institutions as opposed to state institutions, which were understood as

[4] EDWARDS, B.C. Renovating the Multi-Door Courthouse: Designing Disputing Resolution Systems to Improve Results and Control Costs. Harvard Negotiation Law Review, 18, 281, 2018; MALACKA, M. Multi-Door Courthouse established through the European Mediation Directive?, International and Comparative Law Review, vol. 16, no. 1, Pp. 127, 2016; ABRAMSON, H. Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks, Harvard Negotiation Law Review, Vol. 23, 319, 2018.

[5] AJIGBOYE, O. The Concept of Multi-Door Courthouse in Nigeria: Rethinking Frank Sander's Concept (November 16, 2014). Available at SSRN: https://ssrn.com/ abstract=2525677.

[6] RAY L., CLARE A. The Multi-Door Courthouse Idea: Building the Courthouse of the Future... Today. Ohio State Journal on Dispute Resolution, 1, 1, 12, 1985.

old-rule institutions at the initial stage of creation. In other words, the Russian Federation actually had all the prerequisites for the development of non-judicial forms of protecting rights.

Thus, the Council of People's Commissars by the Decree on the Court[7] passed on November 22, 1917 abolished all existing judicial bodies: district courts, chambers of appeals. The Preamble to the Constitution of the RSFSR 1925 expressly provided that the Constitution (Fundamental Law) of the Russian Socialist Federative Soviet Republic was tasked with destroying the exploitation of a man by a man and there would be no state power.[8] Denying the principle of separation of powers and following the idea of union of both legislative and executive power in one body of is one of the theoretical postulates laying the foundation for creation of the Soviet state.[9]

It should be noted that bodies of non-judicial protection of rights are beginning to play a big role,[10] which Soviet theorists are beginning to include into the number of the bodies that protect violated rights. N. B. Zeider explicitly states in his work, which is of great importance for the Soviet legal science, that during extensive building of communist society in the USSR the consideration of property and other disputes was very important, due to the fact that it was made by various public organizations that is community courts, which considered property and some other civil disputes; trade unions, which considered large group of disputes that is disputes related to compensation of damages caused by the fault of the enterprise; commercial courts; administrative procedure. The implementation of the mentioned methods of protecting rights takes place according to a definite procedure established by law. Simplicity of these rules for the resolution of disputes concerning rights by some bodies and multiplicity and relative complexity of these rules in regulating the activities of dispute resolution by other bodies are caused by the nature of the dispute, the nature of the bodies resolving the dispute, etc. However, the rules of any body for the protection of rights are characterized by the fact that in any case they perform law-based dispute resolution and full and effective protection of rights.[11] Actually, N. B. Zeider laid the ground for the analogous multi-door courthouse concept in the Soviet doctrine.

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7 Decrees of the Soviet regime. T.I. (Moscow: State House for Publishing of Political Literature, 1957).

8 Constitution (Fundamental Law) of the Russian Socialist Federative Soviet Republic (adopted under Decree of the 12th All Russian Congress date May 11, 1925) // Official website of the Constitution of the Russian Federation. Verified: http://constitution.garant.ru/history/ussrrsfsr/1925/red_1925/185477/chapter/baf8d0298b9a3923e3794eecbe3d1996/.

9 DUBAVITSKAYA, O. N. Approaches to the Essence of Law during the Soviet Political Regime. Herald of Tomsk State University, Vol. 11, 355, 2011.

10 ARSENYEV, V. D. The Increasing Role of the Public in the Activities of the Soviet State Bodies (Irkutsk, 1961).

11 ZEIDER, N. B. The Subject-Matter and System of the Soviet Civil Procedure Law, Jurisprudence, No. 3, 69, 1962.

Unfortunately, the actual realization of these postulates, as well as many progressive ideas, lost out to the dogma of the existing ideology based on one-line directive rule[12] and despite the possibility of implementation of the analogous multi-door courthouse concept for protection of the rights of nationals and organizations in the last period of its existence, our Soviet state was able to lay only a state court in the foundation of a new Russian state, which was an only body capable of effectively protecting violated civil rights.

3 The modern experience of the establishment of non-judicial forms of remedy in the Russian Federation

The legal system of modern Russia devoid of a number of ideological institutions of the Soviet-era past faced the same problem that was urgent for the United States at the time when the multi-door courthouse concept was created, when a perfectly organized institutional formalized system of protecting rights that is the court being, in fact, the only link that protects violated civil rights, may lose, due to increasing quantitative indicators, its quality and partially express the crisis of the paradigm of the formalized judicial procedure for protecting rights, which can be concisely named as “the wider access for everybody is, the less it is for everybody.[13] According to the latest public statistics, 26,893,533 civil and administrative cases were submitted to general jurisdiction courts in 2019,[14] the growth was 13.6%, that was all-time record in recent years,[15] with an average annual increase of 12.7% in the number of cases. Of course, the increase in the number of cases only confirms the need of the Russian Federation to study and possibly introduce the multi-door courthouse concept or the analogous concept of the broad subject-matter of the civil process proposed by N. B. Zeider.

Accordingly, the item of development of non-judicial alternative forms of protecting violated rights appeared on the agenda, which forms could, on the one part, relieve state courts of the number of considered cases and thus improve the quality and, on the other part, it was possible to try to eliminate the cause of

[12] AVAKYAN, S. A. Constitution of Russia: Nature, Evolution, Modernity (M: RYuID. 2000).

[13] ABOLONIN, V.O. Judicial Mediation: Theory - Practice – Perspectives (M.: Infotropik, 2014).

[14] Forensic statistics // Official web-site of Judicial Department under the Supreme Court of the Russian Federationhttp://w. Address: ww.cdep.ru/index.php?id=79.

[15] The following cases were submitted to general jurisdiction courts:
- 23,212,755 civil and administrative cases in 2018 (11.6% increase compared to the previous year);
- 20,507,499 civil and administrative cases in 2017 (13% increase compared to the previous year);
- 17,839,527 civil and administrative cases in 2016 (10.7% increase compared to the previous year);
- 15,928,860 in 2015 (12% increase compared to the previous year);
- 13,935,450 civil and administrative cases in 2014 (13% increase compared to the previous year).

the matter in controversy with the use of non-judicial forms, rather than to try to eliminate the consequences resulting in a number of associated conflict situations.

The procedural legislation in force up to October 2019, which provided the possibility of non-judicial forms of protection of rights since the codification of 2002, proved to be ineffective in creating a worthy alternative to the state judicial procedure for protecting rights. Thus, according to Article 150 of the Civil Procedural Code of the Russian Federation[16] in order to prepare a case for trial, a judge took measures to conclude an amicable agreement between the parties, including the results of the mediation, which the parties had a right to perform at any stage of court proceedings in accordance with the procedure established by federal law, and explained to the parties their right to submit the dispute to arbitration and the consequences of such actions. The Arbitration Procedural Code of the Russian Federation[17] had a separate Chapter 15 dedicated to settlement arrangements, amicable agreement, which reduced itself to an indication of a possibility to settle a dispute, having concluded the amicable agreement or applying other settlement arrangements, including procedure of mediation, if it did not contravene the federal law.

Absence of legally identified non-judicial forms of protecting rights, specific mechanisms for their implementation resulted only in the declaration of such a possibility, which could not affect the reduction of court statistics with an increase in alternative non-judicial one. Thus, according to the information contained in the latest public sources that is the Certificate of Application by Courts of Federal Law No. 193-FZ dated July 27, 2010 On Alternative Procedure for Settlement of Disputes with the Participation of a Mediator in 2015 approved by the Presidium of the Supreme Court of the Russian Federation on June 22, 2016[18] by means of mediation in general jurisdiction courts in 2015, the dispute was resolved in 1,115 cases (total 15,928,860 cases) (0.007% of cases considered during the year), whereof 916 cases were considered with conclusion of an amicable agreement under the mediation. In 2014, 1,329 cases were solved through mediation (0.01 per cent of cases solved). In 2015, a mediator was involved by the parties in 44 arbitration cases (total 1,531,473 cases) (0.002 % of the total number of cases considered), of which 7 cases were considered with conclusion of an amicable agreement by the court and in 37 cases a claimant abandoned a claim or a defendant admitted a claim. In 2014, a mediator was involved by the parties in 51

[16] Civil Procedural Code of the Russian Federation dated November 14, 1992, Official Gazette of the Russian Federation - November 18, 2002. No. 46. Art. 4532.

[17] Arbitration Procedural Code of the Russian Federation dated 24.07.2002 No. 95-FZ, Official Gazette of the Russian Federation, 29.07.2002, No. 30. Art. 3012.

[18] Certificate of Application by Courts of the Federal Law dated July 27, 2010 No. 193-FZ “On Alternative Procedure for Settlement of Disputes involving a Mediator for 2015 // Garant reference retrieval system”. Address: https://www.garant.ru/products/ipo/prime/doc/71329664/#review.

cases, of which in 14 cases the court approved an amicable agreement and in 32 cases a claimant abandoned a claim or a claim was admitted by a defendant. At the same time, other settlement arrangements in generalization of non-judicial forms of protecting rights were not taken into account at all due to their low demand.

Despite the fact that the Russian legal doctrine has been stating for many years that the paradigm of the judicial form of protecting rights is in crisis and that there are prospects for the development of alternative forms of protecting rights,[19] the case law shows that despite the certain crisis and increasing pressure on the judiciary, the will of the State is required to establish new standards for development of non-judicial forms of protecting rights.

In our opinion, such standards are the latest legislative changes in the field of procedural relations. On October 25, 2019, amendments to the Civil Procedural Code came into force, which added new Chapter 14.1[20] to the Code and provided peaceful settlement of a dispute as one of the main tasks of civil proceedings. The new added chapter consolidated the types of settlement arrangements that are negotiation, mediation, judicial conciliation, and leaving the list hanging in midair, provided a possibility of use of other settlement arrangements, unless it contravenes the federal law. A fundamental innovation, a peculiar tectonic upheaval is introduction of judicial conciliation as a settlement arrangement involving a retired judge.

In addition to increase in alternative methods of dispute resolution in court, it has become possible to resolve a dispute in the pre-trial order through a mediation agreement, which, if notarized, has a force of a writ of enforcement.

4 Prospects of digital transformation of the “multi-door courthouse” concept in the Russian Federation

Accordingly, there was a ground for introduction of the multi-door courthouse concept into the Russian realities. A quite reasonable question may arise: what has changed nowadays, which may contribute to the promotion of this concept in the Russian Federation and in the world?[21] The answer is the level of digitalization of social relations, which we have seen during the last five years.

According to Decree No. 203 dated 09.05.2017, the President of the Russian Federation approved the strategy of development of an information

[19] PETROVA, N. YE. Crisis of Traditional Justice and Appearance of the Alternative Forms of Resolution of Disputes concerning Rights, Arbitration Tribunal, 6 (54), 109, 2007.

[20] Federal Law No. 197-FZ dated 26.07.2019 On Amendments to Certain Legislative Acts of the Russian Federation // Official Gazette of the Russian Federation dated 29.07.2019. No. 30. Article 4099.

[21] FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. *BRICS Law Journal*. 8(3), 5-26, 2021.

society in the Russian Federation for 2017 – 2030,[22] which defines objectives in the field of application of information and communication technologies aimed at the development of the information society. The Government of the Russian Federation adopted the Decree No. 234 dated 02.03.2019 On the System for Management of Digital Economy of the Russian Federation National Program[23] in order to implement the Digital Economy of the Russian Federation national program. The digital economy program aims to create the necessary conditions for development of the digital economy so that digital data become a key factor in all areas of social relations. According to the demand for digital technologies in the field of administration of justice and gradual transition of public bodies to the use of information infrastructure, it is necessary to identify possible growth areas of the multi-door courthouse concept in the Russian Federation.

Beginning from 2017 a constitutional right to relief in court can be exercised in digital form (Part 1, Article 3 of the Civil Procedural Code of the Russian Federation; Part 2, Article 45 of the Administrative Procedural Code of the Russian Federation; Part 1, Article 474.1 of the Administrative Procedural Code of the Russian Federation)[24] by creating an electronic document or an electronic image of the document. Grounds for institution of a case, listing for trial or rejecting[25] were specified by Order No. 251 of the Judicial Department under the Supreme Court of the Russian Federation dated 27.12.2016 On Approval of the Procedure for Submission of Digital Documents to the Federal General Jurisdiction Courts (hereinafter referred to as Order No. 251).[26]

Only persons, who have an enhanced encrypted and certified digital signature or a confirmed account in the Unified System of Identification and Authentication (hereinafter referred to as the USIA) may bring the matter in digital form before the court. According to statistics, more than 20 million citizens were registered in the USIA[27] as of the effective date of the amendments for filing digital appeals to a court and the number of registered users was over 100 million citizens[28] in three years at the beginning of 2020, there was an increase of 500 % registered users.

[22] Decree of the President of the Russian Federation No. 203 dated 09.05.2017 On Approval of the Strategy of Development of an Information Society in the Russian Federation for 2017 - 2030. // Official Gazette of the Russian Federation dated 15.05.2017. No. 20. Article 2901.

[23] Resolution of the Government of the Russian Federation dated 02.03.2019 No. 234 System for Management of Digital Economy of the Russian Federation National Program // Official Gazette of the Russian Federation dated 18.03.2019. No. 11. Article 1119.

[24] Criminal Procedural Code of the Russian Federation dated December 18, 2001 // Official Gazette of the Russian Federation. - dated December 24, 2001. - No. 52 (part one). - Article - 4921.

[25] It can be identified as a technical phase of presentation of the procedural document in digital form.

[26] Bulletin of Regulations for a Judiciary System. 2017. No. 2 (February).

[27] Rossiyskaya Gazeta. Date of publication 30.12.2016. Access mode: https://rg.ru/2016/12/30/podat-v-sud-iski-cherez-internet-smogut-20-millionov-grazhdan.html.

[28] Digital Economy 2024 National Program // Access mode: https://digital.ac.gov.ru/news/1621/.

As noted by A. Gusev, Director General of the Judicial Department under the Supreme Court of the Russian Federation, in his last interview,[29] these electronic services became popular among nationals and representatives of legal entities almost immediately (*the author means the period starting from 01.2017*), the demand for them is evidenced by the fact that the number of digital documents submitted to courts increases quarterly by 30-40 percent. Thus, in 2017, federal general jurisdiction courts received about 280 thousand claims and other procedural documents in digital form, almost 700 thousand claims in 2018, already over a million claims in 2019.

Accordingly, in case of exercising the right to judicial protection in digital form, the claimant files its appeal through Pravosudie State Automated System (State Automated System) https://ej.sudrf.ru/. It is noteworthy that at this stage the claimant is given only the opportunity to appeal to a judicial authority, no provision of non-judicial alternative forms of protecting rights is stated. In our opinion, the electronic presentation module in the reference and information plan shall include additional modules

1. explaining the possibility of non-judicial forms of protecting rights and their advantages in comparison with formalized court procedures;
2. a service for submission of applications for the alternative non-judicial procedure chosen by a claimant, which provides for a confirmation reply from the defendant. At present, such services can include:
   - service of filing an appeal to a mediator;
   - service of filing an appeal to arbitration;
   - service of filing an appeal to a mediator (with respect to an initiated case).

Availability of an apparent alternative for a claimant on the date of filing an appeal to the court may be an efficient instrument for development of non-judicial forms of protecting rights at the first stage.

The next stage, which today should be the key for the implementation of the multi-door courthouse concept, is the stage of processing of the digital appeal.

According to the provisions of Chapter 2.1 of Order of the Judicial Department under the Supreme Court of the Russian Federation No. 36 dated 29.04.2003 On Approval of a Guide for Judicial Procedure in a District Court,[30] the President Judge appoints a person responsible for processing of the digital documents submitted to the court (Clause 2.1.1). If digital documents are received, an authorized court

[29] Participants to trials may create my accounts on the sites of courts // Rossiyskaya Gazeta - Federal Issue No. 89 (8143) dated April 23, 2020. Address: https://rg.ru/2020/04/14/uchastniki-processov-mogut-sozdavat-lichnye-kabinety-na-sajtah-sudov.html. Free access.

[30] Rossiyskaya Gazeta. No. 246. 05.11.2004.

administrator checks compliance with the conditions of submission of documents provided by Order No. 251 and can take the following decision: 1) send a notice on receipt of the documents; 2) send a notice on rejection of the documents.

We propose at this stage to confer additional powers on responsible court administrators to send the parties a proposal for alternative settlement of a dispute concerning a right or send a well-trained court administrator the relevant notice with an order to assume functions of a conflict manager. Here, we face the possibility of implementation of the multi-door courthouse concept at the pre-trial technical stage[31] of filing an appeal to the court, when the claim has not yet been allowed by the court, as noted by Larry Ray and Anne L. Clare[32] it is possible to estimate claims and disputes in order to create competition with judicial procedures. The estimation can be performed in two possible models. That one is at the court administrative office and the other by creating a single digital conflict center, the employees of which will try to resolve a conflict according to one of the alternative ways of conflict resolution. In this context, we can speak of the implementation of the multi-door courthouse concept in a new way that is digital multi-door courthouse.

5 Conclusion

The implementation of the "digital multi-door courthouse" concept will contribute to further strengthen the availability of judicial remedy, on the one hand, and the expansion of possible non-judicial forms of remedy for the parties to the disputed legal relations, on the other hand.

In addition, "digitalization" and "institutionalization" of non-judicial forms of remedy at the stage of court proceedings will contribute to the implementation of the principle of equality before the law and the court, regardless of the "geographical" location of the parties to the dispute.

We believe that this paper will contribute to limited literature on the digital multi-door courthouse. Moreover, the key findings of the paper can be used in law-making process in the sphere of alternative dispute resolution and civil procedure.

Mentioned findings and conclusions can also be used as the basis for future research in the sphere of multi-door courthouse.

[31] VALEYEV, D. KH., NURIYEV, A.G. Pre-Trial Technical Stage of Submission of a Digital Statement of Claim and its Peculiarities in a Context of Exercise of the Constitutional Right to Judicial Protection in conditions of the Digital Economy, Rossiysky Sudya, 4, 3, 2019; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56, 2023.

[32] RAY L., CLARE A. The Multi-Door Courthouse Idea: Building the Courthouse of the Future... Today. Ohio State Journal on Dispute Resolution, 1,1, 12, 1985.

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Legal anomie in the sphere of alternative (out-of-court) dispute resolution

Dmitry Lipinsky

Doctor of Legal Sciences, Professor. Togliatti State University (Russia, Togliatti). ORCID: 0000-0003-1870-069X.

Zavdat Safin

Doctor of Law. Professor. Head of the Department of Environmental. Labor Law and Civil Procedure. Kazan Federal University. E-mail: zsafin56@gmail.com. ORCID ID: 0000-0001-6010-618X.

Abstract: The study aims to identify the manifestations of legal anomie in the legal regulation of alternative conflict resolution in Russia's legal system and, based on the analysis of regulation in foreign countries, to offer possible ways to minimize anomie manifestations. Dialectical, formal-legal and comparative-legal methods were used in the research process. The article considers the legal regulation of mediation in Russia in a comparative-legal aspect with foreign countries and analyzes the current legislation and practice of its implementation. The study also revealed anomalous manifestations at the institutional and other levels of Russia's legal system. Declarative fixation of legal responsibility of mediators, as well as insufficiency of normative requirements to their professional level; absence of normative fixation of mandatory centralized bodies (associations) of mediators, which in turn generates insufficiency of corporate regulation of their activities. The study proposes to borrow foreign experience in the legal regulation of mediators' certification. The study also makes proposals to improve the current legislation.

Keywords: Legal anomie. Mediation. Alternative methods of dispute resolution. Conciliation procedures. Judicial conciliation.

1 Introduction

The development of social relations, including economic relations, inevitably leads to the complication of legal regulation, which consists of the adoption of new normative legal acts; the increase in the subjects of economic activity; the growth of various transactions. It is a deal of a certain law of "critical mass" of normative legal acts, and also of participants of public relations, the more they are, the more, respectively, increases the number of various disputes between them, as in many

cases public relations themselves conflicts and do not assume full coincidence of interests of the parties,[1] actually as most of the legal activity has initially conflicted character or there are conditions for the emergence and development of conflicts.[2] Accordingly, the workload of the judicial system is growing, which can no longer cope with the huge number of cases of civil and other characters and is unable to resolve them quickly and effectively, and the timeliness of justice is one of the guarantees of its fairness. Therefore, the state itself becomes interested in creating mechanisms of legal regulation, which would allow extrajudicial ways to resolve arising disputes, thereby contributing to the restoration of justice and social relations.

The institution of out-of-court dispute resolution is relatively new for the Russian legal system, largely borrowed from foreign legal systems. The very concept of "Alternative Dispute Resolution" is a generalization and includes various mechanisms by their legal character, namely, such as mediation, in some foreign countries – arbitration.[3] The manual of the International Institute for Conflict Prevention and Resolution (CPR) on mediation and Alternative Dispute Resolution in Europe notes: "the key can be considered the division of these processes into judicial, which results in a binding decision (for example, in the case of arbitration or expert opinion), and extrajudicial, which results in a non-binding decision (if it is, for example, an independent preliminary assessment or mediation)".[4] In the Russian legal system, the mediation procedure is regulated by the Federal Law of the Russian Federation dated June 27, 2010, No. 193-ФЗ "On Alternative Dispute

1 LIPINSKY, D., BOLGOVA, V., MUSATKINA, A., KHUDOYKINA, T. The notion of legal conflict, Conflict-Free Socio-Economic Systems: Perspectives and Contradictions (Bingley, West Yorkshire, 2019).

2 LIPINSKY, D.A., MUSATKINA, A.A., BOLGOVA, V.V., KHUDOYKINA, T.V. Violation of Law As A Legal Conflict, Conflict-Free Socio-Economic Systems: Perspectives and Contradictions (Bingley, West Yorkshire, 2019).

3 FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", Technology in Society, 68, 101872, 2022; FILIPCZYK, H. ADR in Tax Disputes in Poland – The State of Play and Perspectives. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, 205, 2023; FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5, 2021; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law, 36, 2261, 2023; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, 153, jul./dez. 2023; GROMOVA E., IVANC T. Regulatory Sandboxes (Experimental Legal Regimes) for Digital Innovations in BRICS. BRICS Law Journal, 7(2), 10-36, 2020; HALOUSH, H.A. The Liberty of Participation in Online Alternative Dispute Resolution Schemes. International Journal of Legal Information, 36(1), 102, 2008; MAIA, A., FLÓRIO, R.A. Online Dispute Resolution (ODR) / Mediação de Conflitos On-line Rumo à Singularidade Tecnológica? Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, 39, 2023; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56, 2023.

4 International Institute for Conflict Prevention and Resolution (CPR) Guidelines on Mediation and Alternative Dispute Resolution in Europe (New-York, 2015).

Resolution Procedure with the Participation of a Mediator (Mediation Procedure)".[5] In view of the fact that in foreign countries the mediation procedure emerged much earlier than in Russia, there is a need to conduct research, which will be conducted on the basis of comparative-legal and formal-legal methods, as well as taking into account the achievements of such branches of scientific knowledge as general sociology and sociology of law.

The aim of the study is to identify the manifestations of legal anomie in the sphere of legal regulation of alternative conflict resolution in the legal system of Russia, as well as on the basis of the study of regulation in foreign countries to offer possible ways to minimize anomie manifestations. Methodology – dialectical, formal-legal and comparative-legal methods were used in the research process.

2 The concept of "legal anomie"

The concept of anomie was introduced into scientific circulation by the famous French sociologist E. Durkheim,[6] further developed in the works of R. Merton,[7] and since the second half of the XX century and up to the present time has become one of the central trends in sociology.

The concept of legal anomie, in contrast to Western legal thought for Russian legal science, is relatively new. In its most general form, anomie means "normlessness" or the absence of normativity itself. However, to say that anomie is "normlessness" inherently does not mean to reveal its legal characteristics.[8] Normlessness is only one of the manifestations of legal anomie, which consists of the absence of legal norms themselves in the presence of the necessity (need) of nominal legal regulation of social relations.

Manifestations of legal anomie are diverse, they may consist of the internal rejection of existing legal norms by a significant part of the population of the country; mass non-compliance with regulations; substitution of legal norms with rules and the use of so-called "situational law", which is not really a right, and so on.

Another extreme of legal anomie is excessive regulation of social relations by the presence of requirements that are practically impossible to fulfill.[9] It is always noted that anomie processes intensify during various crises occurring in the state-organized society.

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5 Collection of Legislation of the Russian Federation. 2010. No. 31. Art. 4162.

6 DURKHEIM, E. Suicide. Sociological study. M., 1994. P. 234; DURKHEIM, E. On the separation of social labor. Method of research (M.: Nauka, 1990). P. 230.

7 MERTON, R.K. Social theory and social structure (M.: AST, 2006). 873 p.

8 MALKO, A.V. Legal life of society, anomie and problems of unity of legal space in modern Russia, State and law, 3, 5, 2023.

9 LIPINSKIY, D.A., IVANOV, A.A. Review of the concepts of legal anomie in foreign and Russian sociological and legal thought, State and law, 11, 49, 2023.

Unlike Russian legal thought, foreign science has developed various concepts of legal anomie, which can be conditionally divided into several groups: legislative;[10] status;[11] state-legal;[12] cultural[13] and others. We are primarily interested in the concepts related to legislative, cultural and state-legal factors.

3 Alternative resolution of legal disputes and legal anomie

At first glance, there may be an impression that it has nothing to do with legal anomie in the sphere of alternative resolution of legal disputes, in our case – with mediation. However, it is not by chance that we have indicated that the mediation procedure is regulated by one normative legal act – the Federal Law "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)". Is it possible to argue here about normlessness as one of the manifestations of legal anomie? On the one hand, there is a system of interrelated norms enshrined in the above-mentioned normative legal act. On the other hand, article 17 of this law, which states that "with the aim of developing and establishing standards and rules of professional activities of mediators, as well as the procedure for monitoring compliance with the requirements of these standards and rules of mediators who are engaged in professional activities, and (or) organizations engaged in activities to ensure the conduct of mediation procedures, may establish self-regulatory organizations of mediators". Thus, the legislator assumed that in the course of time self-regulatory organizations, and possibly their associations, would emerge, which would adopt corporate normative legal acts mandatory for this sphere of activity, i.e., the state delegated its powers in this case. For example, such a normative act could become a "Code of Ethics for Mediators", by analogy with the "Code of Ethics for Lawyers", but alas, in the 13 years that have passed since the adoption of this normative legal act, this has not happened. It should be noted that there are separate codes of very limited scope by subject, for example, the "Code of Professional Ethics of Mediators of the Mediation Center of the Russian Union of Industrialists and Entrepreneurs" or the "Code of Mediators of Russia of the National Organization of Mediators".

[10] GOLDIN, A. Sobre los Derechos del Trabajo de América Latina: evolución y perspectivas, Trabajo y Derecho, 48, 12, 2019.

[11] ANDRADE SALAZAR, O.L., GALLEGOS, S.B., ROSILLO ABARCA, L.V. The incidence of legal certainty and collection analysis by means of third party intervention in ecuadorian legislation, Universidad y Sociedad, 14, 541, 2022.

[12] ALWAZNA, R. Y. Culture and law: The cultural impact on islamic legal statements and its implications for translation, International Journal of Legal Discourse, 2, 225, 2017.

[13] ANDRADE SALAZAR, O.L., GALLEGOS, S.B., ROSILLO ABARCA, L.V. The incidence of legal certainty and collection analysis by means of third party intervention in ecuadorian legislation, Universidad y Sociedad, 14, 541, 2022.

Despite the fact that the term "national organization of mediators" is used in the title, it cannot be called an all-Russian organization. In this sense, there should be a single local normative act for all mediation subjects. However, in order for it to be adopted, it is necessary to create the Chamber of Mediators of the Russian Federation and its branches functioning in the constituent entities of the Russian Federation, again by analogy with the Chamber of Advocates of the Russian Federation. However, the creation of such non-state bodies requires appropriate legal regulation and addition of new norms of organizational character to the Federal Law of the Russian Federation "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)".

Logically, the question may arise as to why another body is needed, and whether it will not create bureaucracy and not contribute to the development of mediation. It seems to us that it should take on the role of a corporate standard-setter. So, if we turn to foreign experience of legal regulation of mediation, we can see that according to the International Institute for Conflict Prevention and Resolution they have developed regulations for mediation.[14] "Some other Administrative Dispute Resolution Centers have also issued a number of procedural rules that can be used both when the parties have agreed in advance in a dispute resolution clause and when they agree to a mediation procedure when a dispute already exists. For example, the Arbitration Chamber of Milan; the Center for Effective Dispute Resolution in London; the Center for Mediation and Arbitration in Paris".[15] Foreign countries have developed mediation rules for specific sectors of the economy. Thus, in the sphere of commodities turns over, the use of arbitration rules of GAFTA (Grain and Feed Trade Association) is widespread. In the field of shipping and water rescue, there are several sets of rules. For example, the rules of the Society of Maritime Arbitrators. The CPR Group has also issued guidelines on the use of mediation in patent disputes, the Rules for Rapid Mediation and Arbitration, it has developed principles for mediation in disputes between insurers and policyholders, and so on. We do not seek to analyze and name all corporate regulations adopted in other countries, but our aim is to show the role of mediators' associations in regulating their actions.

Thus, in this case we are faced with legal anomie, which is limited in character. It can be called the minimum manifestation of legal anomie in the considered sphere of legal regulation, which is local in character, because, in addition to

[14] International Institute for Conflict Prevention and Resolution (CPR) Guidelines on Mediation and Alternative Dispute Resolution in Europe, https://www.cpradr.org/RulesCaseServices/CPRRules/MediationProcedure.

[15] International Institute for Conflict Prevention and Resolution (CPR) Guidelines on Mediation and Alternative Dispute Resolution in Europe, https://www.cpradr.org/RulesCaseServices/CPRRules/MediationProcedure.

local anomie, there may be more global anomie manifestations, which, as a rule, are associated with the change of socio-economic formation. For example, Russia experienced such anomie in 1917-1924, as well as in the 90s of the last century, which it successfully coped with, but anomie manifestations, which are alien to our society, legal culture, mentality remained at present.

Researchers who analyzed the experience of mediation in foreign countries point out that there are different approaches to its regulation, not in terms of its implementation, but in terms of organization and control. In particular, the UK is characterized by the presence of various bodies controlling the activities of mediators; in Germany, part of the mediation activities are carried out by notaries;[16] in Holland only control of mediation activities is regulated;[17] China in the field of labor relations is characterized by the presence of mediation as a mandatory stage of the process, which is aimed at reconciliation of the parties,[18] and in Italy mandatory pre-trial conflict resolution is provided for most cases.[19] At the same time, the popularity of mediation procedures in China is higher than in the USA.[20] Conventionally, the approaches to mediation regulation existing in different countries can be divided into two large groups. The first group includes countries with strict legal regulation of both mediators' activities and mediation procedures themselves. The countries in the second group are more characterized by regulation at the level of corporate acts. It is difficult to refer Russia to any of these groups, for reasons that will be discussed later.

If we compare Russia and China, where the legal regulation of mediation began at about the same time, we can note the undoubted popularity of pre-trial settlement in China, which has surpassed even the United States of America in the number of cases. Mediation is not popular in Russia, but it could significantly relieve the judicial system.

Over the last two years, Russia has become very skeptical of Western legal institutions and constructions that we are trying to implement in the Russian legal system. As A.V. Malko correctly notes, "A balanced approach is necessary, and it is inadmissible to criticize everything indiscriminately, only on the grounds that it is "Western" or foreign. In the conditions of globalization, the borrowing of legal

[16] REUTOV, S.I. Mediation in modern legal practice: opportunities and prospects (Perm, 2015).

[17] ELISEEVA, T.S. Foreign experience of legal regulation of alternative dispute resolution procedure // Legal World. 2015. No. 6. Pp. 20-21.

[18] MARKOV, S.M. Chinese model of labor dispute mediation: a sociological perspective // International scientific research journal. 2015. Vol. 6. Pp. 40-47.

[19] GAYDAENKO, N.I. Mandatory mediation: the Italian experience. Court of Private Arbitration, 1 (79), 156, 2012.

[20] GUBAYDULLINA, E. KH. Foreign experience in the development of mediation as an out-of-court dispute resolution institution and its comparison with the experience of the Russian Federation. Issues of economics and law, 9, 21, 2023.

constructions and ideas, if it goes naturally and corresponds to the culture of the "host" country, is quite justified. If properly integrated, foreign institutions can be effective in the process of their implementation in practice. Besides, there are common, and to some extent universal, normative and value principles, on which the legal systems of many states are based. A different situation is observed if in the process of interaction there is a "blind" (mechanical) borrowing, in which legal constructions and ideas do not correspond to the nationally verified interests and legal culture of society as a whole, as well as the legal consciousness of the majority of its citizens".[21]

Thus, when attempting to implement a foreign legal institution, first, it is necessary to assess its compliance with existing values, mentality, spiritual, cultural and other traditions. It seems that there are no norms in the mediation institute that do not correspond to our values. The reasons why citizens do not seek mediation services are most likely in the sphere of their legal consciousness and are closely related to legal infantilism and often legal ignorance.[22] Moreover, this problem cannot be solved overnight, as it requires appropriate legal propaganda and raising the level of legal culture of citizens.[23]

The question arises naturally as to which path Russia should follow in the future? In the direction of improving legal regulation by the state or self-regulation at the level of corporate normative legal acts. In self-regulation, taking into account the specifics of our mentality and the level of legal culture, there is a danger of turning the law into a "wrong".[24] On the other hand, the state should not create only prohibitions with obligations in order to regulate the activities of mediators. It is also necessary to stimulate mediation, as well as to create the necessary socio-economic, organizational and other conditions for its implementation. The legal literature points to the need to create standards for the provision of qualified legal assistance in the Russian Federation,[25] it seems that part (section) of such standards should be the requirements for the provision of mediation services, because in essence it is also part of legal assistance.

It is believed that the Federal Law of the Russian Federation "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation

[21] MALKO, A.V., LIPINSKIY, D.A., MARKUNIN, R.S. Legal anomie in the legal system: theoretical and methodological foundations of research // Law enforcement. 2023. T. 7. No. 3. Pp. 5-14.

[22] MALKO, A.V., LIPINSKIY, D.A., ZRYACHKIN, A.N., MUSATKINA A.A. Psychological aspects of deformation of legal consciousness and legal responsibility, Psychology and law, 4, 153, 2022.

[23] MALKO, A.V., GURYEV, V.V., ZATONSKIY, V.A., KROTKOVA, N.V. Legal culture, legal policy and human rights (review of the materials of the scientific-practical conference), State and law, 2, 159, 2021.

[24] MALKO, A.V., TROFIMOV, V.V., ZATONSKIY, V.A. Once again about right and wrong, or why legal life is called legal life, State and law, 10, 55, 2020.

[25] MALKO, A.V., AFANASYEV, S.F., ERMAKOV, A.N. Standards for the provision of qualified legal assistance in the Russian Federation, State and law, 2, 166, 2019.

Procedure)" contains a number of significant gaps and shortcomings. Thus, Articles 15 and 16 of the said law establish requirements for mediators. In particular, it is stated that "persons who have reached the age of eighteen, have full legal capacity and have no criminal record may carry out mediation activities on a non-professional basis". The following requirements are established for professional mediators: the age of 25 years; higher education and additional professional education in the application of mediation procedures. Retired judges constitute a separate category. There are no additional requirements for retired judges, which is quite reasonable and logical. The admission of persons without higher education as mediators, even if not on a professional basis, is immediately objectionable. Theoretically, a subject who has received only basic general education, which is compulsory in the Russian Federation, can act as a mediator. In this case, the quality of mediation is not asserted, but it is logical to assume that the parties who have chosen an alternative method of conflict resolution rely on the professionalism of the mediator. Perhaps, this is one of the reasons why citizens distrust the mediation procedure. In addition, the availability of higher non-legal education and additional education cannot be a guarantee of mediators' professionalism. In this regard, we believe that it is necessary to introduce an educational qualification for both professional and non-professional mediators – higher legal education. If we turn to foreign experience of mediation regulation, Germany, Belgium, Austria provide various procedures for certification of mediators, after which they are allowed to operate independently.[26] At the same time, there are also standards of mediator training.

Another aspect that draws attention is the liability of mediators. In the previously mentioned law, Article 17 is devoted to it; however, it does not contain any specifics. In particular, it is stated that "mediators and organizations engaged in mediation activities shall be liable to the parties for damage caused to the parties as a result of such activities in accordance with the procedure established by civil legislation". The civil legislation does not contain special norms, the subjects of which would be mediators. It remains only to refer to the general norms of the Civil Code of the Russian Federation (Articles 1064-1101), which do not take into account the peculiarities of mediators' activities.

The legal responsibility of mediators can be viewed from another angle. With a certain degree of conventionality, it can be argued that the state has delegated to mediators a part of its powers to administer justice, as the mediator tries to resolve the dispute through reconciliation of the parties. In addition, administrative disputes can also be resolved through mediation in Russia, which brings mediation

[26] DAVYDENKO, D.L. Mediation procedures in the European legal tradition (M.: Infotropik Media, 2013).

from the private to the public sphere. However, there are no rights without duties and no duties without responsibility, and there are no rights without responsibility for abuse of law. It can be assumed that the mediator will be bribed by one of the parties, but under the Criminal Code of the Russian Federation they are not a subject of bribery or commercial bribery. It is not excluded that the mediator will abuse their rights for one reason or another. Such actions are clearly socially dangerous, and civil liability measures alone are not sufficient to prevent possible offenses. It seems that depending on the consequences of abuse or bribery, administrative or criminal liability should be established for mediators. By analogy, as it is provided for abuse of authority by private notaries and auditors in Article 202 of the Criminal Code of the Russian Federation. In addition, the article of the Criminal Code of the Russian Federation on commercial bribery should be supplemented with a separate part, the subject of which would be the mediator.

Thus, such amendments to the current legislation can partially increase the level of citizens' trust in mediators. These gaps in the current legislation emphasize the presence of anomalous processes in the sphere of implementation of mediation procedures. In this case, anomie is manifested at the institutional level, i.e., in the absence of legal norms that are necessary to regulate social relations. Meanwhile, we are not in favor of the fact that the adoption of a new normative legal act or amendment of the existing one will overnight solve all the problems of legal regulation in the field of mediation. Legal anomie can manifest itself at several levels: institutional, enforcement and legal consciousness. Accordingly, a set of measures is necessary to minimize its manifestations. At the same time, one should not completely reject the Western experience of legal regulation of mediation only on the grounds that it is foreign.

4 Conclusion

In the sphere of mediation in the legal system of Russia there are anomalous processes, which are manifested at several levels: institutional; enforcement; subjective (in the sphere of legal consciousness). The institutional level is characterized by partial normlessness (insufficiency of legal regulation), which consists in gaps in the existing Federal Law of the Russian Federation "On Alternative Dispute Resolution Procedure with the Participation of Mediator (Mediation Procedure)", namely, declarative fixation of legal responsibility of mediators; insufficiency of normative requirements for their professional level; lack of normative fixation of mandatory centralized bodies (associations) of mediators, which, in particular, in the absence of a centralized mediator's association. In this connection, we believe that it is advisable to borrow Western experience of legal regulation both in terms of certification of mediators and the introduction of

a stricter educational qualification for mediation activities. The enforcement level is closely related to the subjective level and consists of insufficient enforcement, lack of a significant number of cases resolved with the help of mediators, which, in turn, is due to the lack of confidence of citizens and legal entities in the mediation institution as a whole. In order to level this process, it is necessary to take state measures to carry out legal propaganda, as well as to stimulate applications to mediators rather than to courts.

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Mediation and judicial conciliation in family disputes in Russia: issues and perspectives for development

Farida Khamidullina

Doctor of Legal Sciences, Professor, Professor of the Civil Law Department of Kazan (Volga Region) Federal University. E-mail: inbox7575@inbox.ru. ORCID: https://orcid.org/0000-0002-7418-993X.

Pavel Yakushev

Chairman of the Judicial Composition of the Vladimir Regional Court. Doctor of Law. Associate Professor. E-mail: yakushev.pa@yandex.ru. ORCID ID: 0000-0002-5829-2574.

Abstract: The article considers the factors influencing Russia's insufficient spread of mediation and judicial conciliation. It is substantiated that eliminating these factors will contribute to the development of conciliation procedures. The article aims to analyze the factors influencing the insufficient spread of mediation and judicial conciliation in Russia and offers ways to overcome them. The authors applied formal legal analysis to investigate the legal regulation of mediation and judicial conciliation. A systemic approach was used to address the mediation and judicial conciliation issues in Russia and offer ways to solve them. The article gives examples from court practice illustrating positive results in the form of concluded amicable and mediation agreements with the court's assistance in achieving reconciliation by the parties to the dispute and studies the terms of amicable agreements. It also substantiates the ability of family disputes to be resolved by mediation and reveals procedural violations, which courts allow when approving amicable agreements.

Keywords: Alternative dispute resolution. Conciliation procedures. Mediation. Judicial conciliation.

1 Introduction

In Russia, mediation and judicial conciliation are relatively new legal institutions that do not have a long historical and legal tradition, which is one of the factors influencing the insufficient application of these institutions in modern Russian society.

Legal literature notes that the legislation on mediation and judicial conciliation began to regulate "relations that have not yet developed in society as factual", which led to the lack of use of new legal conciliation institutions.[1]

According to statistical data, in Russia in 2021 only 287 family disputes and 25 labor disputes were settled through mediation and judicial conciliation.[2] At the same time, the total number of civil cases considered by the courts in 2021 amounted to more than 30 million cases.[3] In 2022, 434 family disputes and 33 labor disputes were settled through mediation and judicial conciliation.[4] The total number of civil cases heard by courts in 2022 amounted to more than 34 million cases.[5]

These statistics indicate systemic problems of mediation and judicial conciliation institutions in Russia, which requires analyzing them and finding ways to overcome them.

The article aimed at analysis of the factors influencing the insufficient spread of mediation and judicial conciliation in Russia, and offers the ways to overcome it. To achieve mentioned aim of the paper, the set of methods were used. Thus, authors applied formal-legal analysis to analyze legal regulation of mediation and judicial conciliation. Systemic approach was used to address the issues of mediation and judicial conciliation in Russia and offer ways to solve it.

2 Mediation and judicial conciliation: legal regulation and court practice in family disputes

In Russia, mediation is both one of the alternative (out-of-court or pre-trial) methods of dispute resolution and one of the types of conciliation procedures that applies after a case has been accepted for court proceedings.[6]

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1 Nosyreva E.I. Mediation as a social and legal institution // Mediation: Textbook / Edited by A.D. Karpenko, A.D. Osinovskiy. Moscow: Statut, 2016; CLAYTON, G.; DORUSSEN, H. The Effectiveness of Mediation and Peacekeeping for Ending Conflict. Journal of Peace Research, vol. 59, n. 2, 107-301, 2022; DHIAULHAQ, A., DE BRUYN, T., GRITTEN, D. The Use and Effectiveness of Mediation in Forest and Land Conflict Transformation in Southeast Asia: Case Studies from Cambodia, Indonesia and Thailand. Environmental Science & Policy, vol. 45, pp. 132-145, 2015; FENG, Zh., LI, Y. Natural Resource Curse and Fiscal Decentralization: Exploring the Mediating Role of Green Innovations and Market Regulations in G-20 Economies. Resources Policy, vol. 89, 2024.

2 Summary statistical data on the activities of federal courts of general jurisdiction and justices of the magistrate for 2021. Report on the work of courts of general jurisdiction on the consideration of civil, administrative cases at first instance (Sections 1-2, column 14), http://www.cdep.ru/index.php?id=79&item=6120 (date of address: March 1, 2024).

3 *Ibid.*

4 Summary statistical data on the work of federal courts of general jurisdiction and justices of the magistrate for 2022. Report on the work of courts of general jurisdiction on consideration of civil, administrative cases at first instance (sections 1-2, column 14), http://www.cdep.ru/index.php?id=79&item=7645 (date of access: March 1, 2024).

5 *Ibid.*

6 VERSHININA, E.V., KONOVALOV, D.V., NOVIKOV, V.S., KHOKHLACHEVA, S.V. The concept and types of mediation in the legislation and legal doctrine of Russia, France, Spain and the USA, Bulletin of Civil Procedure, 137-176, 2020.

The basic normative legal act regulating legal relations related to mediation is Federal Law No. 193-ФЗ dated July 27, 2010 "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)", which came into force on January 1, 2011.[7]

The mentioned Federal Law defines the mediation procedure as a method of dispute resolution with the assistance of a mediator based on the voluntary consent of the parties in order for them to reach a mutually acceptable solution (Paragraph 2 of Article 2), establishing the following principles of the mediation procedure: voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independence of the mediator (Article 3). The parties may conclude an agreement on the use of mediation by setting a period of time during which they undertake not to apply to court for the resolution of a dispute that has arisen or may arise between them; if the dispute is pending in court, the parties may apply mediation at any stage of the process until the decision on the case (Article 4, Paragraphs 2 and 3 of Article 7); mediators work both on a paid and unpaid basis (Article 10).

Article 59.1 of the Fundamentals of the Legislation of the Russian Federation on Notarial System[8] provides for the procedure for certifying a mediation agreement. At the same time, according to Paragraph 3.1 of Article 12 of Federal Law No. 229-ФЗ of October 2, 2007 "On enforcement proceedings",[9] notarized mediation agreements or their notarized copies are enforcement documents.

In addition, a number of provisions on judicial mediation in relation to the relevant types of legal proceedings are contained in the following normative legal acts: the Arbitration Procedure Code of the Russian Federation, the Civil Procedure Code of the Russian Federation (hereinafter – the CPC of the Russian Federation), the Code of Administrative Procedure of the Russian Federation and others.

In Article 153.3 of the CPC of the Russian Federation to conciliation procedures the legislator refers: *negotiations*, *mediation*, *judicial conciliation*, as well as "other conciliation procedures", if their use does not contradict the federal law.

In accordance with Article 153.1 of the Civil Procedure Code of the Russian Federation, the court shall take measures to reconcile the parties, assist them in settling the dispute, guided by the interests of the parties and the objectives of legal proceedings. The reconciliation of the parties carries out on the basis of the principles of voluntariness, cooperation, equality, and confidentiality.

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7 Federal Law of July 27, 2010, No. 193-ФЗ "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)" // Collection of Legislation of the Russian Federation. 2010. No. 31. Art. 4162.

8 The Basics of the Legislation of the Russian Federation on Notarial System of February 11, 1993 // Bulletin of the Congress of National Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation. 1993. No. 10. Art. 357.

9 Federal Law of October 2, 2007, No. 229-ФЗ "On enforcement proceedings" // Collection of Legislation of the Russian Federation. 2007. No. 41. Art. 4849.

The parties shall enjoy equal rights to choose a conciliation procedure, to determine the terms of its conduct, as well as the candidacy of a mediator, court conciliator. The parties may conclude an agreement on these issues.

By virtue of Article 153.2 of the Civil Procedure Code of the Russian Federation, conciliation proceedings may be conducted at the request of the parties or at the suggestion of the court.

In this case, the court's proposal to conduct conciliation may be contained in the ruling on acceptance of the statement of claim for proceedings, on preparation of the case for trial or in another ruling on the case, as well as may be made orally by the court.

For consideration by the parties of the possibility of using a conciliation procedure, the court may declare a break in the court hearing.

If the parties agree with the court's proposal to conduct conciliation, the court shall issue a ruling on conducting conciliation and, if necessary, on postponing the trial.

The ruling on conciliation shall specify: the identity of the parties, the subject of the dispute and the range of issues for the settlement of which conciliation may be used, the terms of conciliation, other instructions necessary for the proper conduct of conciliation.

At the request of a party, the conciliation procedure may be extended by the court.

Of all the categories of cases considered by the courts, the most suited for resolution via mediation, in our opinion, are cases involving disputes arising out of family legal relations. As rightly noted by O.I. Velichkova, family disputes are one of the most beneficial for mediation procedures, since the parties to a family conflict are bound by personal relations, they are far from indifferent to how this conflict will be resolved, and with all the heat of passion in family disputes, they, more than anyone else, are ready to compromise for the sake of preserving normal relations in the future, which is especially acute when it comes to a child.[10]

The signs of capability of family disputes to be resolved by mediation are: regulation of family relations not only by law, but also by other social regulators (morals, traditions, customs, religious rules, etc.), which provides the mediator with additional instruments to assist the parties to the dispute to reach a mutually acceptable solution; the personal character of family relations; the connection of the subjects of the family conflict not only by the subject of the dispute, but also by other relations, which makes it possible to contribute to the regulation of the

[10] VELICHKOVA, O.I. Improvement of family legislation on mediation, Actual issues of Russian law, 1, 55, 2017.

conflict in a complex manner; the ongoing character of the relations between the parties to the dispute; and the fact that the parties to the dispute have not yet reached a mutually acceptable solution.

With regard to cases involving disputes over the upbringing of children as a special category of family cases, such cases are the culmination of a family drama, and the main objective of a judge considering a case involving a dispute over the upbringing of a child is to reduce the level of conflict in the parents' relations and to take exhaustive measures to reconcile the parties.

In certain constituent entities of the Russian Federation, disputes related to the upbringing of children are quite often resolved through the conclusion by the parties of amicable agreements and their approval by the court, which testifies to the active role of the court in reducing the level of conflict in parental relations and taking measures to reconcile the parties.

For example, every year in the Vladimir region, about 30% of cases on disputes about children end with the conclusion of amicable agreements. This figure is higher than in any other category of cases. It should be emphasized that we are not talking about mediation procedures or judicial conciliation, but about amicable agreements reached by the parties with the assistance of the court, with subsequent approval by the court.

Thus, in 2014, in relation to the conclusion of amicable agreements, proceedings were terminated in 38% of all cases considered on disputes on determining the place of residence and determining the order of communication with the child, in 2015 – in 37% of cases, in 2016 – in 35% of cases, in 2017 – in 34.3% of cases, in 2018 – in 33.7% of cases, in 2019 – in 29% of cases, in 2020 – in 40% of cases, in 2021 – in 31% of cases.[11]

In some courts, the figure is significantly higher. For example, in 2021 in the Gus-Khrustalny City Court of the Vladimir region 100% of cases (5 cases) on disputes on determining the order of communication with the child by the parent living separately, were ended by approval of amicable agreements.

Undoubtedly, the measures taken by the courts to encourage the parties to conclude amicable settlements are commendable, since they contribute to the establishment of friendly relations between the parties and, consequently, are in the interests of the children and make it possible to resolve the dispute without traumatizing the psychology and health of the child living with one of the parents.

[11] YAKUSHEV, P.A. The role of the court in conciliation procedures in cases of disputes on child-rearing, Harmonization of private and public interests in family law of the Russian Federation. Scientific School of Doctor of Legal Sciences, Professor, Honorary Worker of Education of the Russian Federation O.Yu. Ilyina: monograph. (Moscow: UNITI-DANA: The Act and the Law, 2023); LOHVINENKO, M.; STARYNSKYI, M.; RUDENKO, L.; KORDUNIAN, I. Models of Mediation: Theoretical and Legal Analysis. Conflict Resolution Quarterly, vol. 39, n. 1, 51, 2021.

Settlement agreements are approved not only in cases of child-rearing disputes in the courts of first instance, but also in cases on appeal.

For example, in October 2022, the Vladimir Regional Court considered a case on the appeal of the mother of a 6-year-old girl against the decision of the district court, which determined the order of communication of the child with the father and grandmother, who live separately from the child.[12] The main controversy between the parties was the moment at which the child should start communicating with the grandmother and father. According to the out-of-court psychologist's report, which was provided by the mother, since neither the father nor the grandmother had not communicated with the child before, the child's mother had entered into a new marriage and the child perceived the mother's new husband as the father, it was necessary to prepare the child psychologically for such communication, and the communication should not begin before the child reached the age of 7. According to the conclusion of the forensic examination, the most important thing for the child is certainty, so the sooner the child is informed that he has his own father and grandmother, the better, so the communication should begin right now, when the child is 6 years old. The court agreed with this position and communication was established in the absence of the mother.

During the consideration of the case, the judicial board explained to the parties to the dispute that the child, on the one hand, is very lucky that all the gathered love the child very much, want to communicate with them, and the Judicial Collegium sees and feels this; on the other hand, the child is unlucky that the parents cannot agree, and it is in the power of all those present to maximize all the advantages of the situation.

As a result, the parties concluded a settlement agreement, under the terms of which communication with the child by the father and grandmother begins when the child reaches the age of 6 years and 6 months, and in the first year the communication will take place in the presence of the mother. Overall, the initial level of conflict between the parties was significantly reduced.

The reconciliation of the parents and the actual resolution of the dispute in the interests of the child is evidenced not only by the conclusion of amicable agreements, but also by *the termination of proceedings* in connection with the *dismissal of the lawsuit* or *the recognition of the lawsuit*. This is expressly mentioned in Paragraph 1 of Article 153.7 of the Civil Procedure Code of the Russian Federation. Such cases are also not uncommon.

[12] Appellate Order of the Judicial Collegium for Civil Cases of the Vladimir Regional Court of October 27, 2022, in case No. 33-3808/2022 // Archive of the Vladimir Regional Court.

For example, the appellate definition of the Judicial Collegium for civil cases of the Vladimir regional court of 12.01.2021 accepted the refusal of the lawsuit for dissolution of marriage, determination of the place of residence of the child and the collection of alimony and terminated the proceedings in the case.[13]

A promising way to popularize mediation is the interaction of courts with mediators. For example, in the Vladimir region, the courts interact with the non-profit partnership "Vladimir Regional Association of Mediators", which since 2017 has been implementing a project to develop family mediation, supported by the Presidential Grants Fund. Every year, the Vladimir Regional Association of Mediators conducts at least 100 mediations (mostly pre-trial and out-of-court). Mediators conduct lectures for expectant mothers at maternity schools, a *reconciliation lounge* operates in the marriage palace, and a *mediation restaurant* was created as an experiment in the prevention of family dysfunction. The trainings held there are aimed at helping young people to better understand themselves and each other.[14]

A unique experience in the development of mediation operates in Ivanovo region, where mediator's systems are paid for at the expense of the municipal budget on the basis of the Resolution of the head of the administration of the Teikovo urban district of September 7, 2012, No. 506 "On approval of the Complex of measures for the application of the mediation procedure in the territory of the Teikovo urban district".

As practice shows, after a family dispute goes to court, in most cases the parties turn to mediators after they have been informed about the mediation procedure by the court, and, as a rule, the mediation procedure ends with the conclusion of a mediation agreement, the legal part of which is approved by the court as a settlement agreement.[15]

Thus, by the ruling of the Leninsky District Court of Vladimir city dated March 6, 2023, on the case on the lawsuit of the children's father against the children's mother to determine the place of residence of two minor children: a son, born in 2010, and a daughter, born in 2013,[16] in the period from March 1, 2023, to February 14, 2023, mediation procedure was conducted with the assistance of a

[13] Appellate Order of the Judicial Collegium for Civil Cases of the Vladimir Regional Court of January 12, 2021, in case No. 33-64/2021 // Archive of the Vladimir Regional Court.

[14] FOMINA, E.V. Interagency interaction in the field of application of mediation in family disputes to protect the rights and interests of children. Legal and psychological aspects of consideration by the courts of civil cases on disputes about the upbringing of children: materials of the interregional scientific-practical conference. Vladimir: Transit-ICS, 45, 2022.

[15] Information on the results of the study of the application of mediation procedures by courts in the Vladimir region for the period of 2021 - 9 months of 2023 (prepared by the Judicial Collegium for Civil Cases of the Vladimir Regional Court) // Archive of the Vladimir Regional Court.

[16] Order of the Leninsky District Court of Vladimir city of March 6, 2023, in case No. 2-549/2023 // Archive of the Leninsky District Court of Vladimir.

mediator. Under the terms of the settlement agreement, the place of residence of the son and daughter was determined at the father's place of residence.

The mentioned settlement agreement also established the procedure for communication between the mother and the children. In particular, the parties agreed on the following: a mother living separately has the right to communicate with her children, participate in their upbringing and resolve issues regarding the children's education and medical intervention; the father with whom the children live should not interfere with the children's communication with their mother, if such communication does not damage the physical and mental health of the children or their moral development; communication between the mother and her daughter and son will take place at the place of residence of the mother or at the place of residence of the father, or in places of rest for the children by prior agreement; during the working week (from Monday to Friday), the mother has the right to meet with her son and daughter, as well as to visit the son and daughter at the address of their place of residence with the father at least 3 times, the visiting time is determined by prior agreement; every weekend (Saturday, Sunday), the mother has the right to see her son and daughter at her place of residence with the right to leave her daughter and son for an overnight stay (overnight), visit places of recreation and walks with her children, as well as communicate and spend time with her relatives; by mutual agreement of the parties, the period of meeting between the mother and the children can be increased, namely from Friday evening before Saturday; the parties, by prior agreement, determine which days off in the current calendar month the children spend with each parent, while the children spend at least half of the days off in the calendar month with their mother; on vacations, holidays and non-working days with a continuous duration of 4 or more calendar days, the mother has the right to see her son and daughter for at least half of their duration; if the duration of holidays is less than 4 calendar days, then the parties, by mutual agreement, taking into account the interests of the children, determine their pastime; during the children's summer holidays, the mother has the right to see the children in the above order, including the right to a joint holiday with the children, the total duration of which must be at least 1 month; each of the parents is given the right to separately travel with their children on vacation both on the territory of the Russian Federation and abroad, provided that the parent has agreed in advance, no less than 15 calendar days in advance, with the other parent on the time, period, conditions and a place for such rest; preliminary agreement of the parties in all cases is achieved by exchanging messages using SMS or WhatsApp messenger; each party is obliged to notify the other party of a change in their place of residence and telephone number for communication on issues of communicating with children, or a change in significant circumstances within

one day from the date of the corresponding change; the parties equally undertake to take care of the welfare and health of their son and daughter; the parent with whom the children are at a certain moment undertakes, upon first request, to provide the other parent with detailed information about the whereabouts of the children, their state of health, and other information on issues relating to the children; parents undertake, by mutual agreement, to resolve all issues related to the health, upbringing, and education of children, including jointly choosing specific educational institutions, medical institutions, institutions of additional education, deciding when, where and with whom the children will relax; each of the parents, in the presence of children, excludes and does not allow critical statements regarding the other parent, in conversations with children or in their presence does not give negative assessments of the children's grandparents; each parent does everything in their power to prevent their relatives, friends, and acquaintances from making negative statements about the other parent and their relatives in the presence of children; Parents maintain friendly relations in the presence of children and do not discuss problems of personal relationships.

The agreement states that it is concluded for a period of 1 year. In the future, the parties prolong it or conclude a new one.

The Decision of the Oktyabrsky District Court of Vladimir city of December 22, 2022, on the case on the lawsuit of the father of the children to their mother to determine the place of residence of the son, born in 2013, daughter, born in 2016, and the recovery of alimony approved the settlement agreement on the results of the mediation procedure, conducted in the period from October 4, 2022, to December 5, 2022, with the assistance of a mediator, under the terms of which the place of residence of the daughter is determined at the place of residence of the mother, the place of residence of the son – at the place of residence of the father[17]. Also established the order of communication between parents and children and the amount of alimony paid by each of the parents (1/2 of the minimum subsistence level).

When considering the Sobinsky city court of the Vladimir region of the case on the lawsuit of N. to M. on the determination of the place of residence of the son, born in 2016, the court Decision of February 15, 2023, at the request of the plaintiff the consideration of the case postponed for the settlement of the dispute through mediation, the result of which was a mediation agreement concluded by the parties as a settlement. The Decision of the Sobinsky City Court of the Vladimir region of April 26, 2023, approved the amicable agreement, under the terms of

[17] Order of the Oktyabrsky District Court of Vladimir city of December 22, 2022, in case No. 2-3891/2022 // Archive of the Oktyabrsky District Court of Vladimir.

which the place of residence of the son is determined at the place of residence of the mother, established the order of communication between the father and the child.[18]

Article 153.6 "Judicial conciliation" is dedicated to judicial conciliation in the Civil Procedure Code of the Russian Federation, according to which judicial conciliation is carried out on the basis of the principles of independence, impartiality and good faith of the judicial conciliator.

The procedure for judicial conciliation and the requirements for a judicial conciliator are established by the Regulations on judicial conciliation approved by Resolution of the Plenum of the Supreme Court of the Russian Federation No. 41 "On approval of the Regulations on judicial conciliation" dated October 31, 2019.[19]

A retired judge may be a judicial conciliator. The list of judicial conciliators shall be formed and approved by the Plenum of the Supreme Court of the Russian Federation[20] on the basis of proposals of cassation courts of general jurisdiction, appeal courts of general jurisdiction, supreme courts of republics, territorial, regional courts, courts of cities of federal significance, courts of autonomous regions, courts of autonomous districts, district (fleet) military courts on candidates for judicial conciliators from among retired judges who have expressed a desire to act as a judicial conciliator.

The candidacy of a judicial conciliator is determined by mutual agreement of the parties from the list of judicial conciliators and approved by a court Decision. Since the court conciliator is a retired judge, the parties have the opportunity to receive the assistance of an experienced, highly qualified professional.

The judicial conciliator has the right to negotiate with the parties and other persons involved in the case, to study the documents submitted by the parties, to familiarize themselves with the case file with the consent of the court and to take other actions necessary for the effective settlement of the dispute.

The judge shall have the right to request information on the progress of the conciliation procedure no more often than once every fourteen calendar days.

Judicial conciliation is an accessible conciliation procedure for the parties, since it is paid for from the federal budget.

The institution of judicial conciliation was not widespread. Speaking at the plenary session of the Council of Judges of the Russian Federation on December

[18] Order of the Sobinsky city court of Vladimir region dated April 26, 2023, in case No. 2-431/2023 // Archive of the Sobinsky city court of Vladimir region.

[19] Resolution of the Plenum of the Supreme Court of the Russian Federation of October 31, 2019, No. 41 "On approval of the Rules of judicial reconciliation" // Bulletin of the Supreme Court of the Russian Federation. 2020. No. 1.

[20] Resolution of the Plenum of the Supreme Court of the Russian Federation from January 28, 2020, No. 1 "On approval of the list of judicial conciliators" // Legal Reference System "Consultant Plus".

5, 2023, the Chairman of this body of the judicial community V.V. Momotov noted that currently "the potential of judicial conciliation has not been fully discovered", the number of judicial conciliators is 351, which is insufficient for Russia given the number of population and remoteness of settlements; in 2020 the number of settlement agreements approved as a result of judicial conciliation amounted to 163, in 2021 – 399, in 2022 – 439, i.e., there is a positive dynamics, most of the resolved cases belonged to the category of family disputes.[21]

Despite the fact that judicial conciliation is not widespread in the Russian Federation as a whole, there is a positive practice of using this conciliation procedure in some subjects. For example, in Ivanovo region in 2021, the parties turned to the assistance of a court conciliator in 90 cases, including in disputes over child-rearing, and amicable agreements were concluded in 47 disputes.[22]

3 The issues of mediation and judicial conciliation in Russia and ways to solve it

The following circumstances can be attributed to the main issues related to the application of mediation and judicial conciliation in the resolution of cases on family disputes.

1. Lack of historical experience in the application of mediation and judicial conciliation in Russia.

According to E.A. Borisova,[23] the formation of mediation as a social institution requires: the emergence of a social need for this procedure; the formation of a special social environment in which mediation and other conciliation procedures would take their place in the system of values; the availability of the necessary material, financial, labor, organizational resources to offer the services of specialists for conflict resolution.

Legal literature also notes that a characteristic feature of the institution of mediation in Russia is the fact that this institution initially appeared as a legal one, and only then the work on its formation as a social one began.[24]

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[21] Electronic resource, http://ssrf.ru/news/vystuplieniia-intierv-iu-publikatsii/52649 (date of address: 10.02.2024).

[22] MALYSHEVA, O.B. Practice of application by the courts of the Ivanovo region of the procedure of judicial reconciliation in disputes about the upbringing of a child, Legal and psychological aspects of consideration by the courts of civil cases on disputes about the upbringing of children: materials of the interregional scientific-practical conference (Vladimir: Transit-ICS, 2022).

[23] BORISOVA, E.A. The general characteristic of mediation. Alternative dispute resolution: Textbook / Edited by E.A. Borisova (Moscow: Gorodets Publishing House, 2019).

[24] MINKINA, N.I. Mediation as an institution of modern Russian society // Journal of Russian Law. 2023. No. 10. Pp. 55-67; FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", Technology in Society, 68, 101872, 2022; FERREIRA, D.B., SEVERO, L. Multiparty Mediation as Solution

In this regard, in order to create a "social basis" for the spread of mediation, it is necessary to: improve the legal framework for mediation procedures and the activities of mediators and court conciliators; promote mediation and judicial conciliation, explaining the benefits of mediation procedures to the population; create and develop professional associations of mediators; disseminate mediation through network associations of mediators.[25]

2. The time limits established by the procedural legislation for consideration of the case.

It is extremely difficult to reconcile warring parents of a child within two months. Civil procedure law does not grant the court the right to suspend the proceedings for conciliation, the court can only postpone the trial (Paragraph 2 of Article 153.2 of the Civil Procedure Code of the Russian Federation). In 2019, the CPC RF was amended:[26] Article 154 was supplemented with Paragraph 4.1, according to which the period for which the trial was postponed for the purpose of reconciliation of the parties is not included in the time limits for consideration of cases, but is taken into account in determining a reasonable period of legal proceedings. Nevertheless, the construction of suspension of the proceedings is preferable, since in case of postponement it is necessary to immediately specify the date of the next court hearing, which may prevent the parties from conducting a quality conciliation procedure.

3. Obstacles to reconciliation of parents on the part of their representatives, for whom, sometimes, the main thing is to make money on the family conflict, and not to settle it.

4. The true motives for going to court: jealousy and resentment of the other parent, the desire to "keep" the former spouse, the desire to solve material issues, using the child as an object of bargaining, various forms of abuse of rights on the part of parents, etc. Sometimes only in the court of appeal instance (knowing about other cases between parents) it is possible in a complex to consider all family relations, to reveal the real motives of appeal to the court and, having understood them, to induce the parties to peaceful resolution of the situation.

5. Possibility to appeal against amicable agreements only in cassation procedure. In accordance with Paragraph 11 of Article 153.10 of the Civil Procedure Code of the Russian Federation, the Order to approve a settlement agreement is

for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5-26, 2021; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law, 36, 2261–2281, 2023.

[25] Karpenko, A.D., Merenkova, E.A. The modern state of mediation development in Russia, Conflictology of the XXI century. Ways and means of strengthening peace: Proceedings of the Second St. Petersburg International Congress of Conflictologists (St. Petersburg, 2014).

[26] Federal Law No. 197-ФЗ of July 26, 2019 "On amendments to certain legislative acts of the Russian Federation" // Collection of Legislation of the Russian Federation. 2019. No. 30. Art. 4099.

subject to immediate execution and may be appealed to the court of cassation within one month from the date of issuance of such Order. The impossibility of appealing to the appellate instance court against an Order to approve a settlement agreement reduces the possibility of reconciliation between the parties to a dispute about the upbringing of a child.

The elimination of the above factors will contribute to the development of conciliation procedures in resolving disputes about the upbringing of children.

6. Procedural violations committed by courts when approving amicable agreements based on the results of conciliation procedures.

When courts approve amicable settlements, they do not always take into account the following circumstances:

a) the requirement of the legislation on the need to seek the opinion of the child must also be observed when the court approves a settlement agreement.

A child who has reached the age of ten must express their opinion on the subject of the settlement agreement. This circumstance is pointed out in section six "Consideration by the courts of the case of determining the place of residence of children in the event of separation of parents" of the Review of the practice of the courts in resolving disputes related to the upbringing of children.[27]

At the same time, sometimes when approving a settlement agreement, some courts do not ascertain the opinion of the child, which is inadmissible. Thus, when approving the amicable agreement in the case on the lawsuit of S.K. against S. Yu. to determine the place of residence of minors K., born in 2001, and D., born in 2005, and on the counterclaim for the same, the Gus-Khrustalny City Court of Vladimir region did not find out the opinion of the children;[28]

b) when approving an amicable settlement agreement in a case involving a dispute over the upbringing of a child, the guardianship and custody agency's report on the living conditions of the child and of the person claiming to raise the child, as well as the opinion of the guardianship and custody agency, must be examined.

Since any court Order on disputes concerning the upbringing of children must be taken in their interests, when approving an amicable settlement agreement, the court must verify whether the child's rights and legitimate interests will be respected in the implementation of its terms. Therefore, when approving a settlement agreement, the court must examine the report of the guardianship and custody agency on the inspection of the living conditions of the child and the

[27] Review of the practice of resolving by courts of disputes related to the upbringing of children (approved by the Presidium of the Supreme Court of the Russian Federation 20.07.2011) // Bulletin of the Supreme Court of the Russian Federation. 2012. No. 7.

[28] Order of the Gus-Khrustalny City Court of the Vladimir region of September 7, 2016, in case No. 2-1535/2016 // Archive of the Gus-Khrustalny City Court of the Vladimir region.

person claiming to bring up the child, as well as the opinion of the guardianship and custody agency. The opinion of the guardianship and custody body may be expressed by its representative in the court session or contained in a written opinion of the guardianship and custody body on the conclusion of a settlement agreement (the draft settlement agreement must be sent to the guardianship and custody body).

The above rule is not always observed by the courts. For example, the Kirzhach District Court of the Vladimir region, approving on November 3, 2020, the amicable settlement agreement in the case on the lawsuit of S. to E. to determine the order of communication with the children, the opinion of the guardianship and custody agency did not identify the opinion of the guardianship and custody agency, acts of inspection of the living conditions of the child and the plaintiff did not examine.[29] In the decision to approve the settlement agreement, the court limited itself to a formal indication that "the settlement agreement is not contrary to the law, made in the interests of the parties and the children, their fulfillment of the terms of the settlement agreement does not violate the interests of other persons".

In most cases, however, when courts approve amicable agreements in cases involving disputes over the upbringing of children, they send their drafts to the guardianship and custody agencies, which provide opinions on the compliance of the terms of the amicable agreements with the interests of the children;[30]

c) the court is not entitled to approve the settlement agreement in part, change or exclude from it any conditions agreed by the parties.

This rule is contained in Paragraph 8 of Article 153.10 of the Civil Procedure Code of the Russian Federation.

The court may not exclude any terms from the settlement agreement agreed by the parties or change its content. The settlement agreement shall either be approved as a whole, or the court shall issue a ruling refusing to approve the settlement agreement.

However, the court has the right to propose to the parties to exclude certain terms that contradict the law or violate the rights and legitimate interests of other persons from the amicable settlement agreement. If certain terms of the settlement agreement do not correspond to the interests of the child, it is necessary to raise this issue for discussion and propose the parties to adjust these terms.

[29] Order of the Kirzhachsky District Court of the Vladimir region of November 3, 2020, in case No. 2-695/2020 // Archive of the Kirzhachsky District Court of the Vladimir region.

[30] Information on the results of the study of the application of mediation procedures by courts in the Vladimir region for the period of 2021 - 9 months of 2023 (prepared by the Judicial Collegium for Civil Cases of the Vladimir Regional Court) // Archive of the Vladimir Regional Court.

4 Conclusion

Thus, for the development of institutions of mediation and judicial conciliation in Russia it is necessary: to improve the legal foundations of conciliation procedures and the activities of mediators and judicial conciliators; promote mediation and judicial reconciliation, explaining to the population the benefits of conciliation procedures; create and develop professional associations of mediators; distribute mediation through network associations of mediators; improve procedural legislation (in particular, give the court the right to suspend proceedings in a case to conduct a mediation procedure; provide for the possibility of appealing rulings on the approval of settlement agreements on appeal); at the level of the Supreme Court of the Russian Federation, analyze violations committed by the courts when approving settlement agreements based on the results of conciliation procedures, and develop recommendations to prevent them.

In addition, support for the traditional family values existing among the peoples of Russia, which include a special attitude towards family and children, and the desire to preserve human relations between relatives regardless of the severity of the conflict, will promote the spread of amicable agreements, mediation procedures and judicial conciliation in the consideration of family disputes.

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Mediation as an effective way to settle economic disputes: current experience and prospects for development

Fatima Konova

Arbitrator of the Arbitration Centre of The Russian Union of Industrialists and Entrepreneurs (RUIE), Moscow. Mediator of the Mediation Centre under The Russian Union of Industrialists and Entrepreneurs (RSPP), Moscow. Associate Professor of Law, Department of Civil and Administrative Litigation, Moscow State Law University, PhD in Law. E-mail: fatimar.konova@gmail.com. ORCID: https://orcid.org/0000-0001-5081-1459.

Adel Abdullin

Doctor of Law. Professor. Head of the Department of International and European Law. Kazan Federal University. E-mail: adelabdoulline@yandex.ru. ORCID ID: 0000-0001-6078-8029.

Abstract: The mediation procedure is considered the most effective method of settling business conflicts in the system of alternative ways of dispute resolution through the prism of fundamental principles. The article reveals the advantages of settling cross-border economic disputes through mediation, including out-of-court procedures. The article examines doctrinal approaches to the mediation procedure, analyses the main problems of its unpopularity in the country and suggests ways to improve it and popularize it in Russian society through amendments to the mediation legislation, such as the legislative establishment of the term "mediation" and a uniform approach to the mediation procedure itself, including the requirements to the mediator's identity and responsibility, as well as the exclusion from the legislation of the possibility of conducting mediation on a non-professional basis. The author pays special attention to the role of the judicial community in the development of mediation in the settlement of disputes in court.

Keywords: Dispute resolution. Alternative dispute resolution. Mediation. Voluntariness. Neutrality. Mediator.

1 Introduction

In today's reality and in the age of digitalization, not only new opportunities but also new problems arise in connection with the resolution of business disputes. With the emergence of many disputes between business entities, the judicial burden and, therefore, the duration of their resolution and a sharp increase

in legal costs are also increasing. This is one of the reasons for the popularity of alternative methods of resolving business disputes.

The concept of "alternative dispute resolution" is borrowed from American legal doctrine. The term "alternative dispute resolution" (ADR) covers all methods of out-of-court conflict resolution. It should be noted that the American judiciary was confronted with the problems of the judicial system described above a century earlier. In 1906, Roscoe Pound, a lawyer, drew public attention to the inefficiency of the courts and dissatisfaction with the judicial system[1] in his report to the American Bar Association conference, which influenced further reform of the American judicial system and led to the introduction and effective use of alternative dispute resolution methods.

The literal translation of the term ADR from English is "alternative dispute resolution", however, for the Russian law such wording is not correct, as it can cover only dispute resolution procedures (for example, arbitration), but not settlement (conciliation). In this regard, there is a well-founded opinion in the academic literature that the use of the term "alternative dispute resolution and settlement" is more appropriate.[2]

Thus, it is possible to distinguish the legal categories of "settlement" and "resolution" of a dispute according to their nature and purpose. Dispute resolution has an authoritative nature, as it is carried out by authoritative action of the court, while dispute settlement is carried out based on a compromise voluntary agreement between the parties. Reconciliation aims at eliminating the conflict, eliminating the contradictions between the subjects, and dispute resolution aims at establishing the "right and wrong side" and making a judgement based on legal norms.[3]

Worldwide practice of ADR methods includes mediation, negotiation, binding recommendation, referral to an ombudsman, conciliation, pre-neutral evaluation, arbitration, fact-finding, dialogue forums and others. Of these, mediation is the most widely used.

Mediation is a universal tool for resolving a wide range of conflicts and in international practice is used for independent conflict resolution by its participants with the support of a third party. Undoubtedly, in some foreign countries (Austria, England, Wales, Germany) the use of mediators is associated with high costs and complexity of court proceedings.[4]

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1 POUND, R. Reasons for widespread dissatisfaction with the administration of justice, Mediation and Law, 1, 15-29, 2016.

2 ROZHKOVA, M.A., ELISEEV, N.G., SKVORTSOV, O.Y. Contract law: agreements on jurisdiction, international jurisdiction, conciliation procedure, arbitration (arbitration) and amicable agreement (Moscow: Statute, 2008).

3 Alternative ways of settlement and resolution of disputes in Russia (Samara: Samara University Publishing House, 2021). p. 104.

4 KONOVA, F.R. Mediableness of civil-law disputes: correlation with jurisdiction (Moscow, 2023).

Mediation in the context of increasing complexity and growth of international and domestic trade relations and increasing mobility leads to legal problems, but there are still unresolved issues related to the concept of mediation in different legal systems, the problem of applicable law, the wording of the mediation clause or agreement, gaps in legal regulation, differences in dispute resolution procedures in different countries, the procedure for enforcing a mediation agreement in a foreign country and others.

In addition, another important question arises: can mediation replace the judicial system and how effective and beneficial is it for the parties?

Globalization of trade and increased mobility make dispute resolution more complex and present companies and courts with additional challenges, such as issues of applicable law, gaps in the law, differences in national dispute resolution procedures, i.e. issues that may not arise in a domestic dispute. In addition, traditional judicial dispute resolution has its own procedural idiosyncrasies that can further complicate the resolution of a commercial dispute. Moreover, the strictly formalized structure of judicial dispute resolution can seriously damage the partnership relation between the parties.

However, unpleasant disputes and disagreements may arise; their total elimination is unfortunately an unattainable goal. After all, conflict is a reality of human interaction, and business relationships are no exception. After all, conflicts must be managed. Rather than trying to avoid them, we need to ask a question: how can we best manage conflicts arising from economic relations? In search of an answer to this question, economic actors are increasingly turning to alternative dispute resolution.

2 Mediation as an effective way to settle economic disputes

Historically, alternative methods of dispute resolution formed earlier than court proceedings. Mediation, negotiation, and mediation were already in use to resolve disputes in the early stages of social development. These procedures involve settling disputes outside the courtroom with the help of an impartial mediator who either resolves the dispute or assists the parties in resolving it. Different cultures have adopted different methods, but the dominant intention has always been to delegate dispute resolution to a respected member of society, the so-called mediator. Often, people have been using mediation to resolve inter-ethnic, multilateral, and international disputes.

Dispute resolution through mediation has a long tradition around the world.[5] The nature of the informal legal outcome in mediation is such that the resolution of the conflict is not in the hands of a third party but depends on the co-operation of the parties with the assistance of the mediator. The more parties use the process of alternative dispute resolution in resolving certain types of conflicts outside the formal court process, the more popular mediation becomes in various fields as one of the most effective methods.

Based on the general principles of alternative dispute resolution, mediation can provide greater flexibility, confidentiality, and participation of all parties in finding solutions different from those offered through the adversarial system in court. Mediation is more in demand where the usual conflict resolution mechanism may be ineffective.

Even though mediation is currently part of the legal systems of different countries, there is no clear definition of mediation in the legal literature.

Modern doctrine understands mediation as a method of dispute resolution alternative to litigation and there are different approaches to its definition:

- normative, as peaceful resolution of conflicts and disputes;
- communicative, as a mutual exchange of information within the framework of tripartite negotiations to reach a compromise;
- functional, as a combination of techniques used to reach a compromise between the parties;
- consultative, as a way of resolving disputes through the exchange of competent opinions;
- psychological, as a way of eliminating a conflict by rethinking it and eliminating its root causes.

Thus, according to T.A. Savelyeva, mediation is a way of resolving a conflict through negotiations with the participation of a neutral mediator. I.V. Reshetnikova gives a similar definition, seeing mediation as a form of reconciliation of the parties through negotiations by a neutral person chosen by the parties.[6] V.F. Yakovlev has his own view on the definition of this term – "mediation is the activity of a specialist in dispute resolution within the framework of negotiations between the disputing parties in order to conclude an amicable agreement between them".[7] D. Den defines mediation as the functional role of a third neutral party in a dispute, which helps to find mutual understanding between the parties and to resolve the conflict.[8] Although this definition is more widespread and clearer, it still does not

[5] GALINDO AYUDA, F. Algorithms, Sociology of Law and Justice. Journal of Digital Technologies and Law, 2 (1), 34, 2024.
[6] RESHETNIKOVA, I.V. And again, about mediation. What should it be like in Russia?, Law, 1, 51, 2014.
[7] YAKOVLEV, V.F. Law of free application, Mediation and Law. Mediation and reconciliation, 9, 34, 2016.
[8] DAN, D. Overcoming Disagreements (SPB., 1994). p. 437.

provide a clear distinction between mediation and conciliation due to the lack of distinguishing criteria.

The last, third definition of mediation as a special procedure is characteristic of those who seek to institutionalize and separate this alternative procedure from all others. Thus, mediation is recognized as being like other methods, but different in terms of the role and characteristics of the mediator, the techniques used and the criteria for decision-making. For example, A.D. Karpenko, Director of the Centre for Development of Negotiation Process and Peaceful Strategies in Conflict Resolution, mentions: "mediation, along with other forms of alternative dispute resolution, represents a special technology in which the parties themselves work on their conflict in negotiations with the participation of a third party".[9] One of the most successful definitions in terms of content is that of R. Baruch Bush, which includes important features of mediation: "Mediation is usually understood as an informal process in which an impartial third party, who does not have the authority to make a binding decision, helps the conflicting parties to reach a solution that is acceptable to both parties".[10] Based on this definition, we can identify the main features of mediation: informality, impartiality and neutrality of the mediator, lack of authority of the mediator to make a binding decision, reaching a compromise by the parties.

Thus, we can conclude that the absence of a legal definition of the term "mediation", a unified approach to the mediation process itself, as well as to the role, personality, and responsibility of the mediator, confirms the difficulty of developing a unified concept that distinguishes mediation from other procedures. This is due to the lack of universal rules and standards for the conduct of mediation, the diversity of its types and the variability of the techniques used by mediators. In addition, the definition of mediation suffers from the influence of the context in which it is used. For example, some countries legislate on the specifics of the process, giving it its own national characteristics. In Germany, for example, a mediator can be a person with public authority, although most countries require the mediator to be a person specialized in conflict and experienced in dispute resolution.

Despite the different approaches to the definition, there is a consensus on the purpose of mediation, which is to assist the parties in reaching a voluntary resolution of a dispute or conflict.

[9] KARPENKO, A.D. Mediation terms as an element of practice development in Russia, Court of Arbitration, 3, 164, 2016.

[10] BARUCH BUSH, R. The promise of mediation: responding to conflict through empowerment and recognition (CA: Jossey-Bass, 1994).

Thus, mediation should be understood as a dispute resolution process, defined by the rules of institutional mediation centers and the discretion of the parties, based on the principles of confidentiality, voluntariness and carried out by the parties to a conflict to resolve the dispute together with a neutral party (mediator) who does not have the authority to make a binding decision.

In the global context, cross-border recognition of judgments requires the cooperation of sovereign states. On the one hand, the states themselves must ensure that the individual agreements of the parties can be enforced; on the other hand, it is regional and global recognition that allows the development of sustainable practices in economic relations and strengthens mediation as an alternative to the judicial form.

The international community therefore needed a single instrument to recognize and enforce such agreements. At the time, the New York Convention of 1958[11] was the main international instrument establishing such an alternative dispute resolution mechanism as commercial arbitration on the international level. However, less formalized methods of dispute resolution, in particular mediation, have recently gained popularity. Thus, in 2018, the recognition and enforcement of mediation agreements became the subject of the first international convention in this field. To recognize mediation as a dispute resolution method on an equal footing with arbitration, the United Nations Commission on International Trade Law (UNCITRAL) drafted the Singapore Convention, which will enter into force on 12 September 2020.

The final draft of the Convention was formed at the 51st session of UNCITRAL on 25 June 2018, and the related Model Law was adopted. The first signatories were Singapore, Fiji, and Qatar. At present, its coverage has expanded significantly to 55 signatory countries and 11 ratifying countries. The Russian Federation and the EU countries have not yet acceded to the Convention. Regarding the EU, the Convention does not specify how such an integration association could accede to it: as a whole group of states or individually. The Russian Federation has not yet taken an official position on accession to the Convention.

The most important factor in the success of mediation is a society's long-standing cultural traditions and moral culture. In the Asian region, Confucianism promoted the spread of the alternative process; in Muslim countries, Sharia law served as a basis; and in Europe, the culture of the Greek polis.[12] However, Russia is only at the beginning of its journey. An analysis of the specifics of mediation in Russia shows that the current regulation of this procedure lacks not only systematic

[11] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

[12] DAVYDOV, A.P. The basis of development as a sociocultural problem (to the question of mediation theory of the evolution of Western society). Vestnik of the Institute of Sociology, 24, 27, 2018.

implementation, but also a cultural basis for it. Of note is the analytical report of the Supreme Court of the Russian Federation on this issue, which identifies four main reasons for the low popularity of mediation in Russia: organizational, economic, procedural, and psychological.[13] Although the first three reasons are important and can be overcome with the help of structural legal acts and financial support from the state in the initial stages, the last reason is the most difficult to solve. It has to do with a certain established psychology of people, which determines what fairness, justice and conflict resolution mean to them. The Supreme Court of the Russian Federation has identified the following causes: the growth of conflicts in society and business, a low level of legal culture, a lack of negotiation skills, and the belief that a court decision is more reliable.

As a result, the state's imposition of mediation without a prepared cultural base led to poor results. The textbook "Alternative Dispute Resolution", edited by E.A. Borisova, noted the wrong initial approach to the introduction of mediation: legal rather than social, so the law began to regulate relations that had not yet really developed in society.[14]

At the same time, the state has recently taken active steps to further promote this procedure. In October 2019 the Supreme Court of the Russian Federation adopted the Regulations on Judicial Mediation,[15] in 2020 the Plenum of the Supreme Court of the Russian Federation adopted a resolution with a list of mediators for all subjects of the Russian Federation,[16] and in the same year the Ministry of Justice prepared a draft Law on mediation,[17] thus initiating a policy of reforming this institution and strengthening the role of judicial mediation. Nevertheless, the introduction of mediation through the courts is unlikely to create a positive attitude towards it, as many people accuse the judicial system of being subjective and corrupt[18] (according to a sociological survey). In addition, there are many other problems that need to be solved, including those related to the

[13] Reference on the practice of application by the courts of the Federal Law of 27 July 2010 No 193-ФЗ "On alternative procedure of dispute resolution with the participation of a mediator (mediation procedure)" for the period from 2013 to 2014. (Approved by the Presidium of the Supreme Court of the Russian Federation on 1 April 2015), http://www.supcourt.ru/Show_pdf.php?Id=9939.

[14] BORISOVA, E.A. Alternative dispute resolution (Moscow: Gorodets, 2019). p. 416.

[15] Regulation of judicial reconciliation approved by Resolution of the Plenum of the Supreme Court of the Russian Federation of 03.10.2019 No. 41, https://vsrf.ru/about/info/primirenie/reglament_sud_pr/.

[16] Resolution of the Plenum of the Supreme Court of the Russian Federation of 28.01. 2020 N 1 "On Approval of the List of Judicial Conciliators".

[17] Federal Law "On the Settlement of Disputes with the Participation of a Mediator (Mediation) in the Russian Federation" (Draft of the Ministry of Justice of the Russian Federation. Out. No 12/108186-MB of 23.09.2020), https://www.advgazeta.ru/upload/medialibrary/3a9/Zakon_o_o_mediatsii_ot_minyusta.pdf.

[18] PROKHODA, V.A. Trust of Russians in the national judicial-legal system (on the materials of sociological research). Sociodynamika, 5, 86, 2019.

mediation community, as there is no organized professional community and no unified system of mediator training.

The problems of mediation in the Russian Federation and the strategy of application of the Singapore Convention also became a subject of discussion of the participants of the Third Asia-Pacific Conference, which will happen in Korea in 2019. N.G. Prisekina, Professor at the Faculty of Law of the Far Eastern Federal University, noted that mediation has not gained much popularity in the Russian Federation since it has become a widespread phenomenon abroad because of the serious shortcomings of the judicial system, namely its high cost, overload and slowness. In Russia, the situation is somewhat different; it is sometimes more profitable for companies to go to court than to a mediation center, as courts are easily accessible and inexpensive compared to Western countries.

At present, three main legal acts regulate the business mediation in the Russian Federation: the Federal Law "On Mediation Procedure",[19] the Law of the Russian Federation "On International Commercial Arbitration"[20] and the Arbitration Procedural Code of the Russian Federation.[21] The Federal Law "On Conciliation Procedure", the Law of the Russian Federation "On International Commercial Arbitration" and the Arbitration Procedural Code of the Russian Federation. These laws contain a provision on the enforcement of domestic mediation agreements, but the question of the enforcement of cross-border agreements remains open.

As for the Singapore Convention, it has the potential to make mediation one of the most popular forms of dispute resolution. Its adoption would help Russian participants in international trade to learn from the experience of their foreign counterparts and would contribute to the spread of this procedure for both cross-border and domestic disputes. In my opinion, it is the most active development of cross-border mediation that would help to make mediation, including domestic mediation, more popular. The participation of Russian business in an established procedure in major mediation centers abroad and a reliable international legal framework for the enforcement of mediation agreements would help to increase confidence in the procedure, its adoption by foreign partners and its adaptation to the conditions of domestic disputes. Moreover, the adoption of the Convention would not require significant changes in Russian legislation, as O.F. Zasemkova noted.[22] This would help to create a basis for the enforcement of mediation agreements

[19] Federal Law "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" dated 27.07.2010 No. 193-ФЗ. Rossiyskaya Gazeta. 2010. No. 168.

[20] Law of the Russian Federation "On International Commercial Arbitration" of 7 July 1993 No. 5338-I (ed. of 30.12.2021), Rossiyskaya Gazeta. 1993. No. 156.

[21] Arbitration Procedural Code of the Russian Federation of 24 July 2002 No. 95-ФЗ (ed. of 18.03.2023), Rossiyskaya Gazeta. 2002. No. 137.

[22] ZASEMKOVA, O. F. Singapore Convention on Enforcement of Settlement Agreements reached as a result of mediation: from dream to reality?. Lex Russica, 3 (148), 60, 2023.

in countries with different legal systems, economic and social conditions, while maintaining the flexibility of procedural aspects offered by mediation, reducing the burden on the courts, and contributing to the development of the Russian legal system.

3 Conclusion

The development of mediation in Russia requires a systematic approach and a combination of certain conditions. There is a public demand for this procedure, a high level of legal literacy among the population, organizational resources, state funding, effective regulation, and active central support from the judiciary.

It seems that for the successful development and popularization of mediation in Russia as an effective alternative method of dispute resolution it is necessary to improve the mediation legislation. It might happen by introducing amendments and additions related to specific economic incentives for the use of mediation in the form of full or partial exemption from payment, reimbursement of court costs and expenses in enforcement proceedings, preferential taxation of mediators, as well as the exclusion of the possibility of taxation of the mediator.

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Enforceability of agreements to mediate and mediated settlement agreements in Albania

Flutura Kola Tafaj

Ass. Prof. Flutura Kola Tafaj has twenty-nine years of experience as an academic and practitioner. She is a professor of Civil Procedure Law, ADR and International Arbitration Law at the University of Tirana, Faculty of Law. She is also a partner at "Kola & Associates" Law Firm in Tirana, Albania. She has participated in numerous national and international conferences. Ass. Prof. Kola Tafaj has completed several research stays at different universities and institutions in USA, France, Germany, Italy etc. She co-authored textbooks and commentaries on Civil Procedure Law, ADR and Private International Law and has published several research papers. She is also a part-time professor and training expert in civil procedure and arbitration at the School of Magistrates of Albania. She is engaged as a legal expert in many regional and international projects. E-mail: flutura.tafaj@fdut.edu.al. ORCID: https://orcid.org/0000-0002-2938-6299.

Silvana Çinari

Dr. Silvana Çinari is a lecturer of Civil Procedure Law, ADR and International Arbitration Law at the University of Tirana, Faculty of Law. She is also a senior associate at "Kola & Associates" Law Firm, in Tirana, Albania. She holds a PhD from the University of Tirana. She also graduated in Master of Laws in International Dispute Settlement (MIDS) at the University of Geneva and the Graduate Institute of International and Development Studies (IHEID). Dr. Çinari is the co-author of a textbook on Alternative Dispute Resolution and has authored several other publications focused mainly on domestic and international dispute resolution. She has completed several short-term qualifications and research stays mainly concerning international arbitration and private international law, at different universities and institutions across Europe, such as France, Netherlands, Germany etc. She is also engaged as a legal expert in several national, regional, and international projects related to her areas of expertise and research. E-mail: silvana.cinari@fdut.edu.al. ORCID: https://orcid.org/0000-0002-9174-4675.

Abstract: The article aims to examine the provision of the Albanian Mediation Law that provides mediation as a condition for the admissibility of the lawsuit in court when the parties have provided for it in the contract as a preliminary condition before addressing the court. This legal provision is addressed considering the right of access to court and aims to discuss how these agreements to mediate are enforced. In addition, since enforcement of mediated settlement agreements is also a guarantee for the effectiveness and success of mediation, this article also focuses on the analysis of the legal framework and the problems related to their enforcement, which differ depending on how the parties have resorted to mediation (voluntarily, due to the contract, or by referral from the court), and on the type of disputes, where mainly problems arise with conflicts of ownership over immovable property. Besides the analysis of the Albanian Mediation Law, following a comparative approach, the article also addresses the mediation laws of some foreign countries.

Keywords: Agreement to Mediate. Court-referred Mediation. Enforceability. Ex Contractu Mediation. Mediated Settlement Agreement. Self-initiated Mediation.

1 Introduction

The first law regulating mediation in Albania, after the change of the political and economic regime in the 90s, was the law no. 8465, dated 11.3.1999 "On mediation for the amicable settlement of disputes". This law was repealed by the law no. 9090, dated 26.6.2003 "On mediation in resolving disputes". The latter was abolished by the law no. 10385, dated 24.2.2011 "On mediation in resolving disputes", which is currently in force (*from now on referred to as the Mediation Law or ML*). The Mediation Law in force is amended twice, in 2013 and 2018.

The most significant changes were those of 2018, which aimed at increasing the use of mediation, of the professionalism and accountability of mediators, and of the capacities of the Chamber of Mediators, as well as harmonizing the law with the legal framework as a whole and with the Code of Civil Procedure (*hereinafter, the CPC*).[1] The guiding acts of these amendments were mainly the Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (*the Mediation Directive*) and the Recommendations of the Council of Europe "On certain aspects of mediation in civil, commercial and administrative matters between public administration bodies and private entities".[2] Also, other legal instruments, such as the European Code of Ethics for Mediators, the UNCITRAL Model Law on the Mediation of Commercial Disputes, the Recommendation Rec (1999)19 "On Mediation in Criminal Matters", the Recommendation Rec (2002)10 "On Mediation in Civil Matters", and the Recommendation Rec (98) 1 of the Committee of Ministers addressed to member states on family mediation of January 21, 1998, have been taken into account.[3]

The amendments aimed mainly the formalization, organization, and regulation of the mediators' licensing procedure, as well as expanding the scope of mediation. The extremely large workload of the courts of general jurisdiction[4] because of the reform in the judicial system in Albania seems that dictated the need to expand the

1 Report on the Draft Law "On some additions and changes to the law no. 10385, dated 24.02.2011 "On mediation in resolving disputes", p. 1, https://docplayer.net/77163555-Relation-for-the-project-law-for-some-additions-and-changes-to-the-law-nr-10385-date-per-mediation-in-the- dispute resolution.html.

2 *Idem,* p. 2.

3 *Idem,* p. 3.

4 For the High Court the year 2021 started with a total of 36,288 cases awaiting trial. Courts of appeal of general jurisdiction have experienced an increase in the backlog during 2021 by 24%, recording 22,702 cases in all appeals. Courts of first instance of general jurisdiction had a total backlog as of 2020 of 28,654 cases. *See:* High Judicial Council, Information Bulletin, July-September 2022, pp. 5-6.

scope of application of mediation. To address the issue of the backlog of cases, the Albanian legislator also introduced an unsuccessful proposal for mandatory mediation in 2017.[5] Resolving cases through mediation would not only ease the workload of the courts but would also guarantee a faster resolution considering that the average time to resolve a case in the three trial instances is currently 12 years.[6]

The scope of application of the Mediation Law exceeds that of Directive 2008/52 / EC "On some aspects of mediation in civil and commercial matters". It applies to the resolution of all disputes in civil, commercial, labor and family law, intellectual property, consumer rights, as well as conflicts between public administration bodies and private entities (*Art.2(2*)). Mediation of criminal cases is also allowed, but only for conflicts that are examined by the court at the request of the accusing victim or with the complaint of the injured party, according to articles 59 and 284 of the Code of Criminal Procedure, as well as for any other case allowed by special law. For mediation in criminal cases involving children, the provisions of the Code of Criminal Justice for Minors apply (*Art. 2(3)*).

From the totality of civil disputes for which mediation is applicable under Article 2 mentioned above, the Mediation Law places particular emphasis on certain types of disputes for which it expressly provides for the court's obligation to inform the parties of the possibility of their settlement through mediation. Thus, Article 4 of the Mediation Law provides that:

> The court, or the relevant state body, within the powers provided for in the law, mandatorily notifies, instructs, and as the case may be, informs the parties in a clear and understandable manner about the settlement of disputes through mediation, especially, but not limited to, disputes:
>
> a) in civil and family matters, when the interests of minors collide.
>
> b) in matters of reconciliation in cases of dissolution of marriage, provided for by Article 134 of the Family Code;
>
> c) of a property nature, related to the rights of ownership or co-ownership, the division of property, *rei vindicatio* claims, for action to deny (*actio negatoria*) and for lawsuits for the termination of infringement of possession, disputes arising from non-fulfillment of contractual obligations, as well as those that have as their object the compensation of non-contractual damages.

https://klgj.al/2022/11/buletini-informativ-periodik-korrik-shtator-2022/; *See also:* Judgment of the High Court No. 9, dated 11.04.2022, para. 22.

[5] The Italian legislator adopted compulsory mediation for the same purpose. See: D'ALESSANDRO, Giampiero. The alternative dispute resolution system in Italy: between harmonization with the requirements of European markets and de-juridicalization. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 1, n. 1, 2019, pp. 86, 88.

[6] AFortiori, Duration of judicial processes in Albania, May 2, 2023, available at: https://www.afortiori.al/2023/05/02/kohezgjatja-e-proceseve-gjyqesore-ne-shqiperi/.

Mediation laws of several countries,[7] including the Italian law, pay increased attention to mediating these types of disputes. In the Italian Legislative Decree No. 28/2010, in civil and commercial matters, mediation is provided as "voluntary" for all disputes. However, it is a condition for the admissibility of the lawsuit in court, and therefore "mandatory" for disputes related to co-ownership of land, property rights, division of assets, inheritance, family relations, leasing contracts, credit contracts, financial leases, medical and paramedical liability issues, defamation, insurance, banking and financial agreements, and from July 1, 2023, also for partnership, consortium, franchising, professional employment contract, network, supply contract, partnership and subcontracting.[8]

Unlike in Italy, mediation in Albania is as a condition for the admissibility of the lawsuit in court only when the parties have stipulated it in the contract as a precondition before going to court. The 2018 amendments to the Albanian mediation law introduced such a rule for the first time.

One of the purposes of this article is precisely the analysis of this new legal provision in the light of the right of access to court. It also aims to address how the Albanian legislation guarantees the enforcement of agreements to mediate. Also, since not only the enforcement of agreements to mediate but also the enforcement of mediated settlement agreements is a guarantee for the effectiveness and success of mediation, this article also focuses on the analysis of the legal framework and the problems related to the enforcement of mediated settlement agreements, which differ depending on how the parties have resorted to mediation, voluntarily, due to the contract, or by referral from the court, and the type of disputes, where problems arise mainly with conflicts of ownership over immovable property.

Given these goals, the first part of the article deals with how the parties can resort to mediation to resolve their disputes. The second part addresses the enforcement of agreements to mediate. The third part focuses on the enforcement of mediated settlement agreements.

The article follows an analytical and comparative approach. It addresses the provisions the Albanian Mediation Law concerning enforcement of agreements to mediate and mediated settlement agreements by pointing out several problems in their application and providing suggestions on how to overcome them. Following a comparative approach, the article also addresses the mediation laws of some foreign countries identifying several similarities and differences with the Albanian legislation.

[7] *See*: Kosovo Law No. 06/L-009 "On mediation", published in the Official Gazette of the Republic of Kosovo No. 14, dated August 20, 2018. Article 9, para. 2 provides mandatory mediation for almost the same issues.

[8] BRUNI, Alessandro. Mediation Italy, May 15, 2023, p. 11, available at: https://conflictresolution.weebly.com/uploads/9/8/2/8/98284/2022_mediation_-_italy__002_.pdf.

2 Methods of referral to mediation

Under the Albanian mediation law, "mediation is an extrajudicial activity in which the parties seek the resolution of a dispute through a neutral third party, the mediator, to reach an acceptable settlement of the dispute, which is not contrary to the law".[9] The Mediation Law provides for three ways in which the parties may resort to mediation: (i) on their initiative; (ii) due to a provision in the contract (*Ex Contractu*); or (iii) referred by the court or prosecutor.

Although not expressly referred to as such in the law, self-initiated mediation is "the procedure of extrajudicial conflict resolution, where two or more parties to a dispute, based on free will, attempt to resolve disputes with the support of a mediator."[10] Thus, in this case, mediation begins at the initiative of the parties themselves, without going to court firstly, when a dispute has arisen between them. In the foreign literature, this type of mediation is referred to as "Full Voluntary Mediation", which is based on the spontaneous agreement of the litigants to mediate disputes that have arisen between them and that they could not resolve on their own.[11] This type of mediation is freely chosen by the litigants and is possible in any dispute regarding rights that they can freely dispose of.[12]

Another way in which the parties resort to mediation is because they have provided in the contract for the obligation to attempt mediation before they can resolve the dispute through arbitration or in court,[13] which in the literature is referred to by the term *ex contractu*,[14] or "mutually agreed mediation".[15]

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9 Art. 1(1) of the Albanian Mediation Law.

10 Art. 1(2) (a) of the Albanian Mediation Law.

11 BRUNI, Alessandro. Mediation Italy, May 15, 2023, p. 6, available at: https://conflictresolution.weebly.com/uploads/9/8/2/8/98284/2022_mediation_-_italy__002_.pdf; DE PALO, Giuseppe; D'URSO, Leonardo. Achieving a Balanced Relationship between Mediation and Judicial Proceedings, 2016, p. 11, available at: https://www.mondoadr.it/wp-content/uploads/Achieving-a-balance-relationship-between-mediation-and-judicial-proceedings-De-Palo-G-DUrso-L.pdf. This type of mediation is also referred as optional mediation. See: D'ALESSANDRO, Giampiero. The alternative dispute resolution system in Italy: between harmonization with the requirements of European markets and de-juridicalization. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 1, n. 1, 2019, p. 86.

12 BRUNI, Alessandro. Mediation Italy, May 15, 2023, p. 6, available at: https://conflictresolution.weebly.com/uploads/9/8/2/8/98284/2022_mediation_-_italy__002_.pdf; DE PALO, Giuseppe; D'URSO, Leonardo. Achieving a Balanced Relationship between Mediation and Judicial Proceedings, 2016, p. 11, available at: https://www.mondoadr.it/wp-content/uploads/Achieving-a-balance-relationship-between-mediation-and-judicial-proceedings-De-Palo-G-DUrso-L.pdf.

13 Art. 2 (5) of the Albanian Mediation Law. "If the parties with a contract or written agreement have provided for the condition that mediation will be the first alternative to resolve the conflict, before the judicial one, the court does not consider the case without this condition is met."

14 BRUNI, Alessandro. Mediation Italy, May 15, 2023, p. 7, available at: https://conflictresolution.weebly.com/uploads/9/8/2/8/98284/2022_mediation_-_italy__002_.pdf.

15 D'ALESSANDRO, Giampiero. The alternative dispute resolution system in Italy: between harmonization with the requirements of European markets and de-juridicalization. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 1, n. 1, 2019, p. 87.

Also, the parties can resort to mediation even after they have initiated a court procedure, when they accept the court's invitation to mediate for the resolution of the dispute between them, known by Albanian law as "mediation referred by the court/prosecutor". According to the Albanian Mediation Law, this mediation begins after (i) the litigants are notified by the court of the possibility of resolving the dispute through mediation, (ii) they have agreed to settle the dispute through mediation, and (iii) the case has been transferred from the court for mediation, under this law, the CCP and the Juvenile Criminal Justice Code (*JCJC*).[16] It becomes evident that the court-referred mediation is not the same as the court-ordered mediation,[17] or as a Required Initial Mediation Session[18] where the court orders the parties to mediate against their will.[19] Albanian courts do not have such a competence. Their obligation under the Code of Civil Procedure is to make efforts to reconcile the parties to the dispute and, or to notify and instruct the parties of the possibility of resolving the dispute through mediation at any stage of the trial, and if the parties agree to refer the case for mediation.[20] Even under the Albanian Mediation Law, the court only should notify, guide and, as the case may be, inform the parties in a clear and understandable manner about the settlement of disputes through mediation.[21]

Unlike some foreign legislation,[22] the Albanian Mediation Law does not provide for mandatory mediation, which is "a preliminary and mandatory mediation effort provided by law as a precondition for filing a lawsuit in court."[23] It also does not provide for "implicit mandatory mediation" as recognized under the Rules of

16 Art. 1(2) (b) of the Albanian Mediation Law.

17 BRUNI, Alessandro. Mediation Italy, May 15, 2023, p. 6-7, available at: https://conflictresolution.weebly.com/uploads/9/8/2/8/98284/2022_mediation_-_italy__002_.pdf.

18 DE PALO, Giuseppe; D'URSO, Leonardo. Achieving a Balanced Relationship between Mediation and Judicial Proceedings, 2016, p. 13, available at: https://www.mondoadr.it/wp-content/uploads/Achieving-a-balance-relationship-between-mediation-and-judicial-proceedings-De-Palo-G-DUrso-L.pdf.

19 D'ALESSANDRO, Giampiero. The alternative dispute resolution system in Italy: between harmonization with the requirements of European markets and de-juridicalization. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 1, n. 1, 2019, 87.

20 Art. 25 and 158/ç of the Albanian Code of Civil Procedure.

21 Art. 2(4) and 2(5) of the Albanian Mediation Law. Similarly, the Chinese courts may recommend the parties to attempt mediation before proceeding with the trial. See: WEI, Sun. Mediation in China – Past, Present and Future. *Revista Brasileira de Alternative Dispute Resolution – RBADR,* v.5, n. 9, 2023, pp. 61-62. DOI: 10.52028/rbadr.v5i9.ART03.

22 Italian legislative decree no. 28/2010, updated on 2023, Article 5(1); Greek Mediation Law in Civil and Commercial Matters no. 4640/2019, Article 6; Décret nº 2023-357 du 11 May 2023 relatif à la tentative préalable obligatoire de mediation, de conciliation ou de procédure participative en matière civile, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047537847; In South Korea mediation is mandatory in certain family law disputes. See: KIM, Sae Youn; CHOI, Joonhak. Mediation in South Korea. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 5, n. 9, 2023, p. 147. DOI: 10.52028/rbadr.v5i9.ART08. In Singapore, as well, mediation is mandatory for certain family disputes and small claims. See: SIDDHARTH Jha; LIM, Carina. Evolution of Mediation in Singapore. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 5, n. 9, 2023, pp. 123-124. DOI:10.52028/rbadr.v5i9.ART07.

23 BRUNI, Alessandro. Mediation Italy, May 15, 2023, p. 7, available at: https://conflictresolution.weebly.com/uploads/9/8/2/8/98284/2022_mediation_-_italy__002_.pdf.

Court in Singapore, which impose on the parties an obligation to mediate before or during civil proceedings, otherwise the court may make adverse costs order against the party who did not make efforts to mediate.[24]

The enforcement of agreements to mediate and mediated settlement agreements also depend on how the parties approach mediation.

3 Agreements to mediate and their enforcement

The Albanian Mediation Law provides that mediation is voluntary, and the parties in dispute are free to: a) choose mediation, as an opportunity to resolve disputes provided for in this law; b) determine the conditions, the procedure and the deadlines as far as they are permissible; c) waive, at any time, the right to resolve the dispute through mediation.[25] The parties are free to agree to mediate after the dispute has arisen,[26] or before the dispute arose.[27]

Article 17, para. 2 of the Mediation Law provides for the elements of the mediation agreement's content after the dispute has arisen. Under this provision, the agreement to mediate must be in writing, signed jointly by the parties and the mediator and must determine a) the parties to this agreement and their representatives; b) a description of the object of the dispute; c) the acceptance of the mediation principles and the designated mediator; ç) the place of mediation; d) mediation expenses and mediator's remuneration. The Mediation Law also recognizes the possibility of the parties to verbally agree to resolve the dispute through mediation.

The agreement to mediate concluded before the dispute has arisen is usually part of a multi-tiered dispute resolution clause, under which the settlement of a dispute follows several stages, with the final stage being litigation or arbitration. The agreement to mediate can be a clause in the main contract or a separate written agreement.

The enforcement of the agreement to mediate depends, first, on the way the parties resorted to mediation: *on self-initiative, ex contractu or referred by the court/prosecutor*, and secondly, on the possibilities provided by the law for the enforcement of each type of agreement to mediate. In the case of self-initiated mediation, where the parties spontaneously agree to mediate a dispute that has arisen, the enforcement of the agreement to mediate does not raise any issue relevant of discussion, considering that the conclusion of the agreement to

[24] SIDDHARTH Jha; LIM, Carina. Evolution of Mediation in Singapore. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 5, n. 9, 2023, p. 123. DOI:10.52028/rbadr.v5i9.ART07.
[25] Article 3 (3) of the Albanian Mediation Law.
[26] Article 1(2)(a) of the Albanian Mediation Law.
[27] Article 2(6) of the Albanian Mediation Law.

mediate also marks the beginning of the mediation procedure. The enforcement of the agreement to mediate becomes an essential issue in *ex contractu* mediation and mediation referred by the court/prosecutor.

3.1 Enforcement of the agreement to mediate in ex contractu mediation

Article 2(6) of the Mediation Law provides that: "If the parties with a contract or written agreement have provided for the condition that mediation will be the first alternative to resolve the conflict, before the judicial one, the court shall not consider the case unless this contractual condition is met". Thus, under Albanian law, the enforcement of the contractual obligation to mediate is guaranteed by allowing the courts not to consider a dispute for which the parties have agreed to submit to mediation first. Several questions arise regarding this legal provision. First, what does it mean to "not consider the case?" In other words, from a procedural point of view, what kind of decision shall the court make in such a case? Second, when is the contractual obligation to mediate exhausted? Third, are there guarantees for the protection of access to justice?

Regarding the type of decision that procedurally the court can take, in the absence of an explicit legal provision, the discussion is whether the court:

(i) will suspend the trial for a period of up to 30 days when one of the parties requests it under Article 297(dh) of the Code of Civil Procedure and Article 13 (1) of the Mediation Law? or

(ii) will decline jurisdiction *ex officio* or at the request of at least one of the parties, because a preliminary phase provided for in the contract has not been exhausted? or

(iii) will return the lawsuit as defective because there is no proof of exhaustion of the mediation phase as a necessary precondition for initiating the process? or

(iv) will decide to dismiss the case as a lawsuit that cannot be filed?

In the absence of precise legal regulation (from a procedural point of view) regarding the specific decision of the court and the absence of Albanian judicial practice and legal doctrine regarding the application of this provision, in our assessment, in a purposive interpretation of the provision and compliance with the principle of access to the court and the economy of the process, the court must suspend the trial for a period of up to 30 days if at least one of the parties requests it under Article 297(dh) of the CPC. Then, if such a period expires and the parties did not make any effort to resolve the case through mediation, the court must decide to dismiss the case. Conversely, if the parties have attempted to resolve the dispute through mediation but have not resolved it, the court must proceed with

the trial. Hence, whether the parties have fulfilled the obligation to mediate during the suspension period will be decisive for the fate of the trial. Specifically, the trial will resume if the parties comply with the obligation to mediate but they cannot find a settlement within the period of suspension of the trial, or the court will dismiss the trial if the obligation to mediate is not fulfilled within the suspension period.

The issue is when are the parties released from the obligation to mediate? Will it be sufficient to present the invitation to mediate to the other party? Or a mediator should be at least appointed and hold at least one meeting? We believe that the contractual obligation to mediate is met even by only sending an invitation to mediate to the other party and the party either refuses it expressly or tacitly by not responding within the time limit set in the invitation. Such an interpretation would be in conformity with Article 12(1) of the Mediation Law, which provides that "the procedure for mediation begins after the date of presentation of the invitation to mediate by at least one of the parties to the conflict to the other party" and ensures access to justice, since the opposite interpretation, i.e., that the parties should appoint a mediator and they should hold at least one mediation session, would make the exhaustion of this contractual obligation, which prevents the continuation of the trial in court, dependent by the will of one party to the detriment of the other and risking the passing of the limitation periods.

The reason why we do not think that the court should decline jurisdiction is because, firstly, neither the Albanian procedural law nor the jurisprudence recognizes mediation as a separate jurisdiction, as the only recognized jurisdictions are the judicial, administrative and arbitration.[28] Jurisdiction is the right of a body to resolve issues that are included in their functions, applying the law in any case.[29] The mediators neither order nor force the parties to accept the settlement of the dispute (*Art. 1(3) ML*). Even the foreign doctrine and case law do not link the valid mediation clause with jurisdiction, but with the admissibility of the claim.[30] Secondly, regarding the limitation periods, the Civil Code, which is a qualified law and stands in the hierarchy of norms above simple laws,[31] (such as the ML), does

[28] Judgment of the High Court No. 140, dated 17.01.2008; Judgment of the High Court No. 806, dated 17.06.2008; KOLA TAFAJ, Flutura; VOKSHI, Asim. Civil Procedure. Tirana: Albas, 2018, pp. 322-330; KARANXHA, Anila. Civil judicial jurisdiction according to civil and administrative procedural law. *Albanian Journal of Legal Studies*, v. 8, 2015, pp. 44.

[29] LAMANI, Alqiviadh. Civil Procedure of The People's Republic of Albania, Tirana, 1962, p. 62.

[30] SALEHIJAM, Maryam. Mediation Clauses Enforceability and Impact, *Singapore Academy Law Journal,* v. 31, 2019, p. 614, available at: https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1473/Citation/JournalsOnlinePDF; CHAHINE, Josephine Hage; LUTRAN, David. The Breach of a Mediation Clause Can Go Unpunished Under French Law: What to do? Kluwer Arbitration Blog, July 3, 2023, available at: https://arbitrationblog.kluwerarbitration.com/2023/07/03/the-breach-of-a-mediation-clause-can-go-unpunished-under-french-law-what-to-do/.

[31] Judgment of the Albanian Constitutional Court No. 19/2007; Judgment of the Albanian Constitutional Court No. 29/2005.

not provide for mediation either as a reason for the suspension or interruption of the limitation periods (*Art. 129 and 131 CC*). Thus, since Albanian law does not regulate the issue of limitation periods in the case of mediation (as a suspensive or interruptive cause), the right of access to the court could be violated if the courts decline jurisdiction.

The Court of Justice of the European Union (CJEU) has also pointed out the importance of taking into consideration the passing of the limitation periods as a result of the enforcement of agreements to mediate. The CJEU, in several cases has held that prior implementation of an out-of-court settlement procedure is compatible with the right of access to court provided that:

> that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.[32]

National legislators, whether inside or outside the EU, are encouraged to take these criteria into account when providing for mandatory mediation in their respective national law.[33] Also, the Mediation Directive in Recital 24 provides that to encourage parties to use mediation, Member States should ensure that their rules on limitation periods do not prevent parties from going to court or arbitration if their mediation attempt fails.

In our opinion (*given that the law has not explicitly provided for the procedure*), the court should not immediately decide to dismiss the case as a lawsuit that cannot be filed (i.e., without prior suspension of the case), not only because of the issue of passing of the limitation periods, as mentioned above, but also in compliance with the principle of the economy of the judicial process. If the court dismisses the case because the party has not exhausted mediation, it is up to the party to exhaust mediation and file another lawsuit again. However, he must pay the filing fee again. Meanwhile, the court realizes this goal of the provision through suspension, which does not pose the party at the risk of losing the limitation

[32] C-317/08, Rosalba Alassini v Telecom Italia SpA; C-318/08, Filomena Califano v Wind SpA, C-319/08, Lucia Anna Giorgia Iacono v Telecom Italia SpA and C-320/08, Multiservice Srl v Telecom Italia SpA, 67 (March18, 2010) ECLI:EU:C:2010:146;C-75/16, Menini and Rampanelli v. Banco Popolare Società Cooperativa 61 (June 14, 2017) ECLI:EU:C:2017:457.

[33] European Commission for the Efficiency of Justice. European Handbook for Mediation Lawmaking, June 13-14, 2019, p. 57, available at: https://rm.coe.int/cepej-2019-9-en-handbook/1680951928

period and, on the other hand, economizes the processes by concentrating the resolution of the dispute in a single process.

Finally, we also do not think that the court should take a decision on the return of the lawsuit as defective either because the parties may have changed the terms of the agreement by another subsequent act (e.g., they may have revoked the mediation clause) for which the court you can only find out if it listens to both parties.

In an expanded interpretation of Article 12 of the Mediation Law, the analysis made above regarding the decision-making of the state court would also apply *mutadis mutandis* in arbitration, when an arbitral tribunal has jurisdiction to decide on the merits of the case.

Both the stay and dismissal of the case are procedural legal actions used to indirectly enforce an agreement to mediate and prevent the parties from breaching such agreements.[34] Most foreign laws explicitly provide that an attempt to mediate is a condition for the admissibility of the claim.[35] However, these foreign laws have expressly provided for the effect of the mediation process on the limitation periods, as well as for the procedure that the court must follow in such a case, which in some cases is preceded by the suspension of the process.[36]

For instance, Italian law[37] provides for *ex contractu* mediation in a very similar manner to Albanian law, determining that when the contract, statute or act of establishment of a public or private body provides for a mediation clause, the attempt to mediate is a condition for the admissibility of the lawsuit. Specifically, when the judge finds that mediation has not taken place or has already started but is not completed, he will schedule the next session after the expiration of the term mentioned in Article 6 (*as of July 1, 2023, three months, which can be extended with another three months if necessary*).[38] In this session, the judge ascertains whether the condition of admissibility is met and, in the absence thereof, declares the inadmissibility of the claim (Art. 5(2) and 5-sexies of the legislative decree no. 28/2010, updated on 2023). The Italian law also provides for mandatory

[34] SALEHIJAM, Maryam. Mediation Clauses Enforceability and Impact, *Singapore Academy Law Journal,* v. 31, 2019, p. 623, available at: https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1473/Citation/JournalsOnlinePDF.

[35] Croatian Mediation Law, Article 18, Italian Mediation Law (Legislative Decree No. 28/2010 updated in 2023 Article 5 para. 2 & 5-sexies); Article 6 of the Greek Mediation Law no. 464/2019; German Mediation Act, Article 283, para. 3.

[36] Article 6 & 7 of the Italian Legislative Decree on mediation no. 28/2010; Article 9(1) of the Greek Mediation Law no.464/2019; Article 13 of the Kosovo Mediation Law.

[37] Article 5 para. 5-sexies of the Italian legislative decree no. 28/2010, updated on 2023.

[38] MATTEUCCI, Giovanni. Italy "The country, where everything ends in court" New rules on mediation, *Revista Eletrônica de Direito Processual - REDP,* v. 24, n. 2, 2023, p. 79, available at: https://www.e-publicacoes.uerj.br/index.php/redp/article/view/76135/46024.

mediation.[39] In this case, mediation is also a condition for the admissibility of the claim. Inadmissibility must be raised by the respondent or *ex officio* by the court no later than the first hearing. When the judge finds that the mediation has not taken place or has already started but is not completed, the court follows the same procedure as in the e*x contractu* mediation discussed above. (*Art. 5(2) of the legislative decree no. 28/2010, updated in 2023*). The Italian law addressed the issue of the limitation period with the latest amendments of July 2023. This law provides that: "From the moment the other parties are served with the request for mediation, it produces the effects of the lawsuit for the purpose of the limitation period and prevents the expiration of the limitation period only once" (*Articles 6 & 7 of the Legislative Decree No. 28/2010*).

The Greek mediation law also provides for the *First Mandatory Session of Mediation* in the case of e*x contractu* mediation if the parties can dispose of rights relating to the object of the dispute. Based on the new mediation law (*No. 4640/2019*) this mandatory initial mediation session applies to limited cases. Among others, it applies to disputes arising from contracts that contain a valid written mediation clause.[40] In this case, the parties should provide proof of the first mandatory mediation session for the admissibility of the claim (*Art. 6 of the law 4640/2019).* The new Greek law has also dealt with the issue of the suspension of the limitation period, providing that "the mediator's written notification to the parties about the conduct of the mandatory initial session... suspends the limitation period... for as long as the mediation process lasts (*Art. 9(1) of the law 4640/2019*). The Greek law charges the party with damages if it does not comply with the agreement to mediate.[41]

In the Netherlands, the courts cannot decline jurisdiction in the case of e*x contractu* mediation because there is no legal basis for such a decision.[42] In Belgium[43] and England[44] the court may suspend the court proceedings and refer the parties to mediation if one of the parties requests the enforcement of the mediation clause in the case of *ex contractu* mediation. In Austria, the provision that

[39] Italian law (legislative decree no. 28/2010, updated in 2023, article 5 paragraph 1) provides for mandatory mediation in the following disputes: co-ownership of land, property rights, asset division, inheritance, family agreements, leasing, loan, commercial rent, medical and paramedical liability, slander, insurance, banking and financial contracts and (from 1 July 2023) partnership, consortium, franchise, professional employment contract, network, supply contract, partnership and subcontracting.

[40] Article 6 of the Greek Law on mediation no. 464/2019.

[41] Article 7(6) of the Greek Law on mediation no. 464/2019.

[42] PETERS, Nick. The enforcement of mediation agreements and settlement agreements resulting from mediation. *Corporate Mediation Journal,* v. 1-2, 2019, pp. 14-15, available at: https://research.rug.nl/en/publications/the-enforcement-of-mediation-agreements-and-settlement-agreements.

[43] *See* article 1725 and the following of the Belgian Judicial Code.

[44] PETSCHE, Marcus. The enforceability of mediation clauses: A critical analysis of English case law. *Journal of Strategic Contracting and Negotiation,* v. 5, n. 1-2, 2021, pp. 43-59, https://doi.org/10.1177/20555636211017415.

"a mediation clause constitutes a temporary waiver of the right to initiate a judicial process" provides the basis for the possibility of a stay of proceedings. Thus, a claim raised contrary to that clause has not yet become admissible (*mangelnde Klagbarkeit*).[45] In Germany, the claim is temporarily inadmissible.[46] While in France, a lawsuit in violation of an agreement to mediate is "inadmissible".[47]

3.2 Enforcement of the agreement to mediate in Court-Referred Mediation

Under the Albanian legal framework, the court cannot force the parties to resolve the disputes through mediation. Still, the court is obliged to notify and instruct the parties about the possibility of resolving the dispute through mediation. The parties are free to choose whether to settle the dispute through mediation. When the parties initiate a judicial process and later they agree to settle the case through mediation, regardless of the stage of the trial, the court decides to transfer the case to mediation (*Art. 158/ç(2) CCP*) and suspends the trial. Depending on the nature of the dispute the court sets a time limit, which is not longer than 30 days. Each of the parties has the right to request at any time the resumption of the trial (*Art. 13 ML*). If the parties resolve the dispute through a mediated settlement agreement, the court decides its approval unless it is not contrary to the law (*Art. 158/ç (4) CCP*). If the parties fail to resolve the dispute through mediation and, or the time limit set by the court has expired, then the court resumes the trial of the case (*Art. 298(5) CCP*).

Under Article 461(1) CCP, the court tries to resolve the case by agreement even in the appeal process. Even though the law does not expressly provide for the right to refer the case through mediation to the appellate court, in a logical interpretation of this provision, as well as in the application of Article 465(2) CCP, according to which, during the appeal process, the procedural rules applicable at the first instance court are also taken into account as far as they are applicable, in our opinion, the court of appeal has no legal obstacle to refer the case for

[45] See 8 ObA 2128/96s (OGH) (April 17, 1997); 1 Ob 300/00z (OGH) (17 August 2001); and 4 Ob 203/12z (OGH) (January 15, 2013) cited at: SALEHIJAM, Maryam. Mediation Clauses Enforceability and Impact, *Singapore Academy Law Journal,* v. 31, 2019, p. 626, available at: https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1473/Citation/JournalsOnlinePDF.

[46] Article 282(3) of the German Code of Civil Procedure (ZPO).

[47] Arrêt de la Cour de cassation 21-25.024, 1er février 2023. The French Supreme Court held that the breach of an arbitration clause is not a matter of jurisdiction and cannot lead to the nullity of a decision by which a court has retained its jurisdiction, even though the parties did not initiate mediation before the arbitration procedure. Available at: https://jusmundi.com/en/document/decision/fr-mcba-holding-hhdu-holding-thdu-holding-and-others-v-hd-holding-and-others-ii-arret-de-la-cour-de-cassation-21-25-024-wednesday-1st-february-2023#decision_44585.

mediation. When the parties reach an agreement through mediation and appear before the Court of Appeal within the set time limit, the latter decides to change the court of first instance judgment and approve the mediated settlement agreement unless it is contrary to the law. If the parties fail to resolve the dispute through mediation and, or the time limit set by the court has been met, then the court resumes the trial of the case.

In the case of court-referred mediation, another issue worth highlighting is the willingness of the parties to refer the case to mediation. Under the CCP, the court can suspend the trial if it deems it reasonable, even when only one of the parties submits a request for the settlement of the case through mediation. In this case, the trial resumes when a mediated settlement agreement is not reached and, or the time limit of 30 days has expired. (*Art. 297(dh) & Art. 298/5 CCP*) It is evident that there is a discrepancy between Article 158/ç (2) of the CCP, Article 1(2)(b) of the ML and Article 297(dh) of the CCP. Article 158/ç (2) of the CCP and Article 1(2)(b) of the ML require the consent of both parties for the court to transfer the case to mediation. In contrast, Article 297(dh) of the CCP provides only for the request of one party and the court's conviction on the reasonableness of such party's request, to refer the case to mediation.

This CCP provision exceeds the voluntary concept of mediation supported by the Mediation Law. The CCP stands higher in the hierarchy of legal acts as opposed to Mediation Law. Hence, under Article 297(dh) CCP, the court technically has no prohibition to refer the case to mediation even at the request of one party, when it deems it reasonable. However, in our opinion, despite this inconsistency of provisions, when assessing the fulfillment of the second condition (i.e., "when it deems it reasonable"), the court has the discretion decide to refer the case to mediation only when both parties accept the request to mediate.

4 Mediated settlement agreements and their enforcement

According to Article 22 of the Albanian Mediation Law, when the parties agree on an acceptable solution to the dispute with the mediator, they sign a mediated settlement agreement. This agreement includes: the parties, the description of the dispute, the obligations, and conditions that the parties impose on each other, the manner and the term of their fulfillment, the signature of the parties and the mediator. The parties also determine the time limit for fulfilling the obligations defined in the agreement. The agreement must contain clearly defined obligations.

The mediated settlement agreement should be in writing, except when the mediator and the parties assess that it can be oral given the nature of the dispute and unless is prohibited by law. The mediated settlement agreement is drawn up in three copies, one for each party and one copy for the mediator. The latter must

administer each mediated settlement agreement and the relevant documentation according to the rules established by the National Chamber of Mediators.

The written form of the mediated settlement agreement is necessary to prove its existence. In the case of mediated settlement agreements that contain monetary obligations, the written form is also a condition for its validity (*Article 24/1/c ML*).

The written form of the mediated settlement agreement aims to guarantee its enforcement. It is a requirement in international legal acts and the national laws of many countries. Specifically, the Mediation Directive, the Singapore Mediation Convention and the UNCITRAL Model Law (2018) require that the mediated settlement agreement be in writing to be enforceable. Most countries require this type of agreement to be signed by the parties (e.g., Italy, Germany, France, Greece, Kosovo, North Macedonia). In Greece, Italy, France and Germany, the mediated settlement agreement in certain kind of disputes must also be signed by lawyers as an additional guarantee of its compliance with the law.

The enforceability of the mediated settlement agreement is essential to ensure the effectiveness of mediation and to promote its use. The enforcement of a mediated settlement agreement varies depending on how the parties have resorted to mediation, voluntarily, due to the contract, or by referral from the court.

4.1 Enforcement of mediated settlement agreements in Court-Referred Mediation

The CCP expressly provides for the enforcement of the mediated settlement agreement in court-referred mediation. Under Article 158/ç (4), the court approves the mediated settlement unless it is contrary to the law. The term “contrary to the law” should be interpreted narrowly by the court because not every violation of rules should prevent the approval of the mediated settlement agreement. The mediated settlement agreement should not be contrary to a mandatory norm of the law or public policy. Courts should also take into consideration article 23(2) of the Mediation Law, which provides that “when the case is resolved through mediation, the judicial bodies decide, as the case may be, on the approval of the amicable settlement of the civil case... except in cases where there is invalidity”. Article 24 of the Mediation Law provides for the grounds of the invalidity of the mediated settlement agreement. Thus, the court should approve the mediated settlement agreement unless there are grounds of invalidity provided for in Article 24 of the Mediation Law.

Under Article 24 of the Mediation Law, the mediated settlement agreement is invalid when: a) it is carried out by persons who are not licensed and registered mediators according to this law; b) the dispute, according to the law, must be

resolved only in court; c) contains pecuniary obligations and is not drafted in writing; ç) contains obligations for entities that did not participate in the mediation; d) there is simulation and, for the actual conflict, there are causes of invalidity. Also, the court, besides the cases provided in the Civil Code for the invalidity of legal actions,[48] can find the mediated settlement agreement invalid even when it concludes that it does not respect the public order of the Republic of Albania.

The Code of Civil Procedure provides that special appeal is allowed against the court's decision to approve the settlement of the dispute by conciliation or mediation, or to disapprove its settlement by conciliation (*Art. 158/c CCP*). The wording of this provision puts the parties who have reached an agreement through mediation in an unequal position to those who have reached an agreement through conciliation. Practically, this provision makes it impossible for the party who disagrees with the court's decision to disapprove the mediated settlement agreement to exercise the right of special appeal. For this reason, in our opinion, the provision is incomplete, and it should be revised as follows: "Special appeal is allowed against the court's decision to approve the settlement of the dispute by conciliation or mediation, or to disapprove the settlement agreement reached through conciliation or mediation".

Referring to Article 510(a) of the CCP, the court decision approving the mediated settlement agreement constitutes an executive title. Its content must be in conformity with Article 310 of the CCP. It must include the descriptive part of the approved agreement. The dispositive part of the court decision should contain the litigation costs, the right to appeal and the execution order issued in accordance with Article 511(a) CCP. The execution order is executed by the judicial bailiff.

4.2 Enforcement of mediated settlement agreements in self-initiated and ex contractu mediation

The first paragraph of Article 22 of the Mediation Law provides that when the parties agree to resolve the dispute between them, together with the mediators, they sign the relevant agreement, which is binding and enforceable on the same level as arbitration awards. So, this provision equates the mediated settlement agreement in *self-initiated* and *ex contractu* mediation[49] with arbitration awards, which are executive titles under article 510/ç of the CCP.

[48] Articles 92-102 of the Albanian Civil Code.

[49] We think that in the case of mediated settlement agreement reached in court-referred mediation, it is unnecessary to provide for their enforcement the same as arbitration awards since the court's decisions on the approval of the mediated settlement agreement in application of Article 158/ç CCP and Article 23(1)(2) of the Mediation Law are themselves executive titles under Article 510/a of the CCP.

The fact that the agreement is considered enforceable by law on the same level as arbitration awards means that the execution procedure must be the same as that of arbitration awards. According to Article 46 (1) of Law no. 52/2023 "On Arbitration in the Republic of Albania", arbitration awards are enforced after the issuance of the execution order by the judicial district court. In analogy, mediated settlement agreements reached in *self-initiative* or *ex contractu* mediation are enforced through the issuance of the execution order by the judicial district court.

In addition to Article 22, Article 23 of the Mediation Law provides explicitly that mediated settlement agreements are executive titles when they meet the criteria set forth in Article 22 of this law and they are executed by the bailiffs. So, based on Article 23, the mediation agreement is an executive title in the sense of Article 510/e of the CCP, according to which "Executive titles are…other acts that according to special laws are called executive titles and they are executed by the enforcement office". According to Article 22, the mediated settlement agreement is equated with an arbitration award, which under Article 510/ç of the CPC also constitutes an executive title. Therefore, this double provision of the mediated settlement agreement as an executive title in both Article 22 and Article 23 of the Law on Mediation is unnecessary.

The provision of mediated settlement agreements as executive titles is a very positive legal regulation that facilitates their enforcement and encourages the use of mediation. However, enforcement of these legal provisions is not devoid of problems. There is a discussion regarding the enforcement mediated settlement agreements concerning the transfer of ownership or the division of property. The issue is whether these mediated settlement agreements related to the transfer of ownership of immovable property, legal actions for which the Albanian Civil Code[50] stipulates the notarial form as a condition for their validity, can be registered in the real estate register at the State Cadaster Agency (SCA) without being notarized by a notary or without an execution order issued by the court.

The authors' position is that the SCA should not register mediation agreements concerning the transfer of immovable property ownership without being notarized or without an execution order issued by the court for the following reasons. First, Article 24(2) of Law no. 111/2018 "On the State Cadaster Agency" does not provide that mediators' acts can be registered directly in the SCA. Secondly, Articles 22 and 23 of the Mediation Law provide that mediated settlement agreements are executive titles. Under Article 511 of the Code of Civil Procedure, mediated settlement agreements are not included in those executive titles that are enforceable without

[50] Article 83 of the Civil Code provides that: "The legal action for the transfer of ownership of immovable property and real rights over them must be in the form of a notarial deed and registered, otherwise it is not valid. A legal action is invalid if it does not meet the form requirement expressly imposed by law. …"

an execution order issued by the court. Thirdly, while the parties are free to agree on the transfer of ownership of an immovable property in a mediated settlement agreement, referring to the provisions of the Albanian Civil Code (Article 83), the legal action of the transfer of ownership in itself must be done with a notarial deed so that it can be valid and registered in the SCA.

We are also of the opinion that without having the form of a notarial deed, the court should also refuse to issue an execution order for a mediated settlement agreement related to the transfer of ownership of immovable property because that agreement would be invalid in the sense of Article 24(2) of the Mediation Law and Article 83 of the Civil Code. Although practically, if a mediated settlement agreement only relates to a legal action, which is in the form of a notarial deed, the issuing of an execution order by the court would be unnecessary because the notarial deed itself can be registered directly in the SCA.

As per above, referring to the legal framework in force, we think that mediated settlement agreements concerning the transfer of immovable property ownership should be enforced by signing a special notarial deed for the transfer of ownership, which the SCA can register directly. Whereas, when the mediation agreement is not related to a legal action for which the law requires the notarial form for its validity, for its enforcement it is sufficient to have an execution order from the court.

Mediation laws of several countries provide explicitly for similar solutions concerning the enforcement of mediated settlement agreements concerning the transfer of immovable property ownership. Specifically, the German mediation law[51] does not provide for formal requirements for the mediated settlement agreements. However, if the mediated settlement agreement relates to a legal action for which the law requires a particular form (e.g., the requirement for a notarial form of the contract for the transfer of ownership of a plot of land according to article 311bBGB), this form requirement must be complied with.[52] Also, the Greek Mediation Law provides that an agreement signed by the mediator, the parties and their lawyers is an executive title according to Article 904 of the Greek Procedural Code. It also determines that if the law requires a notarial form for the specific nature of the legal relationship resolved through mediation, then the legal action must be done by a notarial deed.[53] Kosovo Mediation Law[54] also provides that the mediated settlement agreement must be signed by the parties and the

[51] Mediation Act of July 21, 2012 (Federal Law Gazette I, p. 1577), last amended by Article 135 of the Statutory Instrument of August 31, 2015 (Federal Law Gazette I, p. 1474).

[52] WILKING. Felix. The enforcement and setting aside of mediation settlement agreements: A comparison between German and international commercial mediation, 2015, p. 13, available at: https://open.uct.ac.za/server/api/core/bitstreams/c99e6352-2e66-41ba-9942-5f9265045a7b/content.

[53] Greek Mediation Law No. 4640/2019 Article 8(2)(3)(4).

[54] Kosovo Mediation Law No. 06/L –009, published in the Official Gazette of the Republic of Kosovo/No. 14/20 August 2018, Article 14(2) and 14(5).

mediator and must comply with the Law on Obligatory Relations. Compliance with the Law on Obligatory Relations limits the form of the mediated settlement agreement concerning legal actions for which this law requires a particular form (*notarial deed*). Thus, in this last case, the mediation agreement must be made in the form mandated by the Law on Obligatory Relations. Even the Italian law on mediation, Legislative decree No. 28/2010, which applies to both cross-border and domestic mediation processes[55] and foresees compulsory mediation in many cases, including *in rem* rights (*diritti reali*), among other property cases, provides that if the mediated settlement agreement is signed by the parties, the lawyers and the mediator, it becomes an executive and enforceable title. If the agreement concerns the transfer of immovable property ownership, it must be defined in a document drawn up by a public official, usually a notary public (*Art. 2703 cc – civil code*) and be transcribed in real estate registers (*Art. 2643 and 2657 cc*).[56]

5 Conclusions

Over the years, the Albanian mediation law has changed to expand the scope of mediation, increase the professionalism of mediators and the efficiency of mediation procedures, as well as to encourage the use of mediation as a mechanism that will facilitate access to justice and reduce the workload of the courts. For these goals, the Albanian mediation law has defined, among other things, rules that ensure the enforcement of agreements to mediate and mediated settlement agreements. The focus of this article was precisely the analysis of these rules and the problems related to them. The enforcement of agreements to mediate and mediated settlement agreements depend mainly on the type of mediation, whether it is entirely voluntary, *ex contractu*, or court-referred mediation.

Regarding the enforcement of agreements to mediate, in the case of *ex contractu* mediation, from the analysis of Article 2(6) of the Mediation Law, which is considered positive because it guarantees their enforcement by providing that the court does not consider the case if the parties in a written agreement have provided for the condition that mediation will be the first alternative to resolve the conflict, before the judicial one, and this has not been exhausted, the problem related to the specific decision that the court would take in such a case was also highlighted. The recommendation related to this problem is that the law should explicitly foresee from a procedural point of view the decision the court should take

[55] LUPOI, Michele Angelo. Recent developments in Italian civil procedural law, p. 17, available at: https://www.judicium.it/wp-content/uploads/saggi/207/Lupoi%20III.pdf.

[56] Article 11(7) of the Italian Mediation Law (Legislative Decree no. 28/2010, updated on 2023).

in such a case (e.g., suspending the case) as well as foresee mediation (only once) as a reason for the suspension of the limitation periods.

Regarding the enforcement of agreements to mediate in court-referred mediations, the paper pointed out a discrepancy between the norms of the Mediation Law and the Civil Procedure Code. Specifically, under Article 158/c of the CCP and Article 1(2) of the Mediation Law, the court decides to transfer the case to mediation with the will of both parties. Under Article 297(dh) of the CCP, the court technically has no prohibition to refer the case to mediation even at the request of one of the parties, when it deems it reasonable. In the authors' opinion, when assessing the fulfillment of the second condition (i.e., "when it deems it reasonable"), the court should decide to refer the case to mediation only when both parties accept the request to mediate. Also, although the law does not expressly provide for the right of the court of appeals to refer the case to mediation, it is recommended that in a logical interpretation of Article 461(1) of the CPC, the appellate court can refer the case to mediation. If the parties reach a mediated settlement agreement and appear in court within the set time limit, the Court of Appeal must decide to change the decision of the court of first instance and approve the agreement reached through mediation unless it is contrary to the law.

Regarding the enforcement of mediated settlement agreements in the case of *self-initiated* and *ex contractu* mediation, it is very positive the provision in the law that mediated settlement agreements are executive titles and their enforcement is guaranteed through the issuance of the execution order by the court and by the enforcement service. Even in the case of *court-referred mediation,* the court's decision on the approval of the mediated settlement agreement is an executive title. Under Articles 310 and 511(a) of the CCP, it also contains the execution order.

Regarding the issue of the enforcement of mediated settlement agreements related to the transfer of property rights over immovable property, the authors conclude that based on the current Albanian legal framework, the mediated settlement agreement cannot be registered directly in the cadaster (without an execution order or notarial deed). Although the parties are free to agree on the transfer of ownership of an immovable property with a mediation agreement, the transfer of ownership itself must be done by a notarial deed to be valid and registered in the cadaster. In addition, even if the parties conclude a mediated settlement agreement for the transfer of ownership of an immovable property without a notarial deed and ask the court to issue an execution order, the latter must reject such a request because the mediated settlement agreement is invalid in application of Article 24(2) of the Mediation Law. As shown by the comparative analysis, mediation laws of several countries provide explicitly for the obligation to respect the notarial form in the case of agreements for the transfer of immovable property ownership. In response to this problem and to avoid different interpretations, the authors recommend that the

Albanian mediation law should provide for express legal regulation like the laws of the countries analyzed in this article.

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8 ObA 2128/96s (OGH) April 17, 1997.

1 Ob 300/00z (OGH) August 17, 2001.

4 Ob 203/12z (OGH) January 15, 2013.

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Legal liability of mediators

Guzel Valeeva

Candidate of Historical Sciences, Associate Professor, Associate Professor of the Department of Law Teaching Methods of Kazan (Volga Region) Federal University. E-mail: gavaleeva@kpfu.ru. ORCID: https://orcid.org/0000-0002-7895-8134.

Valery Golubtsov

Doctor of Law. Professor. Perm State National Research University. E-mail: vg2009@yandex.ru. ORCID ID: 0000-0003-3505-2348.

Abstract: The aim of the research is to identify possible gaps in the regulation of the legal liability of mediators and parties to the mediation process. The research methodology involved the use of dialectical, formal-legal, and comparative legal methods, as well as techniques of analysis and synthesis, deduction and induction, philosophical laws of unity and struggle of opposites, denial of negation, and others. In the main content, the legal liability of mediators is analyzed from the perspective of its positive and negative components, and the legal character of various manifestations of the legal liability of mediators and their place in the modern system of legal liability is identified. Significant attention is paid to the positive liability of mediators and its legal character is justified. In conclusion it is clarified that the institution of mediation as a whole and the legal liability of mediators in Russia are in the process of formation. It is proven that the legal liability of mediators has a public-law rather than a private-law character. Legal gaps in the regulation of the legal liability of mediators, as well as other parties to the mediation process, are identified, and ways to eliminate them are proposed.

Keywords: Mediator. Mediation. Positive liability. Negative liability. Legal offense. Legal anomie. Mediation institution.

1 Introduction

Recently, a new participant in procedural activities - a mediator - has emerged in the Russian legal system, to whom the current legislation grants rights to resolve conflicts. However, rights without obligations and responsibilities can lead to various abuses and, in the worst-case scenario, turn into arbitrariness of the parties involved in social relations. Moreover, with a small degree of conventionality, it can be argued that by introducing the institution of mediators, the state has delegated some of its powers to private entities for conflict resolution.[1]

[1] SOLHCHI, M.A., BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56, 2023; ALWAZNA R. Y. Culture and

This delegation is predetermined by at least several aspects. Firstly, by the desire to relieve the judicial system through expanding various methods of pre-trial conflict resolution. Secondly, by the necessity to develop various institutions of civil society, representing, among other things, public-private partnerships, which allows individuals who are not representatives of the government to participate in the public sphere of legal regulation. In this way, the state aims to increase citizens' trust in its own legal institutions by involving them in socially beneficial activities.

It should be noted that not all scientists agree with our point of view. Some authors take a purely formal approach, noting that a mediator is not endowed with the rights and duties characteristic of judicial power, but that "the character of his functions consists in mediating in the settlement of a dispute to assist the parties in developing a solution to the substance of the dispute, in assisting the mediator based on the voluntary consent of the parties in order to achieve a mutually acceptable solution".[2] They refer to Articles 1 and 2 of the Federal Law of the Russian Federation of July 27, 2010 No. 193-Ф3 "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)".[3] However, science begins where we can say "no" to the legislator. If we strictly follow the letter of the law, then a mediator is not a subject of justice, what directly comes from the constitutional provisions that "justice in the country is only carried out by the court" (Article 18 of the Constitution of the Russian Federation), but we do not claim that mediators exercise the powers of judges, we only point out the similarity of some aspects of their activities. In particular, judges also take all measures aimed at achieving a settlement agreement between the participants in

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2 POPOVA, Yu.P. Legal responsibility of mediators, Proceedings of the conference "Development of world justice in modern conditions: problems and prospects" (Tyumen, 2014).

3 Collection of Legislation of the Russian Federation. 2010. No. 31. Art. 4162.

a legal conflict, and as it is known, the essence of a mediator's activity is precisely in pre-trial resolution of disputes.

To determine the legal character of the responsibility of mediators, it is necessary to answer a number of important questions. Is it necessary to consider it from the perspective of a broad or narrow scale understanding, that is, solely as a consequence of a violation of law or include in the concept of responsibility lawful behavior? Questions also arise about the place of legal responsibility of mediators in the existing system of legal responsibility. In addition, it is necessary to correlate it with one of the blocks of legal responsibility at the macro level, that is, to establish whether it is material-legal or procedural, public-legal and private-legal.

2 The concept of legal responsibility of mediators

Without introducing the institution of mediators into the legal system, and most importantly, increasing trust in them from citizens, the judicial system will have a hard time coping with the increasing number of civil and other cases, as society, undergoing an information revolution, is in a state of turbulence and state bodies authorized to administer justice simply cannot react quickly and timely to the increase in their quantity. This is the one side of the "coin", the other side is that citizens and legal entities are increasingly trusting the law itself, believing that it can help resolve conflicts rather than resorting to so-called "shadow" law (or, in the terminology of other authors, "non-law"),[4] the role of which in modern legal life should only decrease over time. Moreover, as noted in literature, legal relationships are often inherently conflicting due to the mismatch of interests between parties, and the number of such legal relationships increases year by year. This is a manifestation of the law of unity and struggle of opposites.[5] On the one hand, the law is intended to regulate society's life, but on the other hand, due to various reasons both objective and subjective, it generates conflicts.[6] With the increase in both the quantity of legal norms and the strengthening role of law in society's life, the number of such conflicts will continue to increase in the nearest future. Therefore, the state needs to find various ways to resolve legal conflicts.

By introducing the institution of mediators into the legal life of modern Russia, the state should have foreseen their legal responsibility since it has a regulatory impact on the behavior of subjects, preventing possible violations of legal norms,

4 MALKO, A.V., TROFIMOV, V.V., ZATONSKY, V.A. Once again about right and wrong, or why legal life is called legal, State and Law, 11, 57, 2020.

5 MALKO, A.V., LIPINSKY, D.A., MARKUNIN, R.S. Positive and negative responsibility as a manifestation of dialectical logic in legal research, State and Law, 1, 17, 2021.

6 LIPINSKY, D., BOLGOVA, V., MUSATKINA, A., KHUDOYKINA, T. The notion of legal conflict, "Conflict-Free" Socio-Economic Systems (Bingley, West Yorkshire, 2019).

including procedural ones.[7] As correctly pointed out in scientific literature, there cannot be negative legal responsibility without sanctions established in legal norms, otherwise it becomes declarative.[8]

So, first of all, we need to define the concept of legal responsibility of mediators. However, approaching this issue requires certain methodological premises, namely from a general understanding of legal responsibility, following the logic from general to specific. In domestic[9] and foreign[10] science, a significant amount of work is devoted to the concept of "legal responsibility".[11] However, up to the present time, jurists have not been able to develop a universal concept of "legal responsibility". In existing studies, both domestic and foreign, there are two diametrically opposed approaches to the essence of legal responsibility.

The first approach can be conditionally called traditional, as it is based on understanding legal responsibility as a consequence of a legal violation and essentially comes to various legal restrictions that the violator must undergo. In this case, we are only indicating the general vector of understanding legal responsibility, as within this approach it is considered both as the duty of the violator and as the implementation of a sanction, which can be equated with a special type of legal relationship - the legal relationship of legal responsibility, and is understood as the condemnation of the violator or the negative reaction of society to the committed violation.

In the context of this research, we do not aim to extensively analyze each of the scientific approaches to understanding legal responsibility, but only point out that regarding legal responsibility for a violation, we adhere to the position according to which legal responsibility for a violation is a complex phenomenon that includes the obligation of the violator to undergo legal restrictions - the state's reaction to the violation - the implementation of the obligation.

Representatives of the second approach, based on the sociological school of jurisprudence, see legal responsibility primarily as responsibility for future actions, expressed in lawful behavior of subjects, which they call positive[12] or,

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7 MALKO, A.V., LIPINSKY, D.A., MARKUNIN, R.S., MUSATKINA, A.A. Legal responsibility in the legal system of Russia: some studies and prospects of the project, State and Law, 12, 24, 2021.

8 TOLSTIK, V.A. Legal responsibility and punishment: the problem of correlation, State and Law, 10, 63, 2010; MARKUNIN, R.S. The system of legal responsibility of public authorities: principles of formation, State and Law, 6, 35, 2020.

9 LIPINSKY, D.A. Social Bases of Positive Responsibility, Sententia. European of Humanities and Social Sciences, 3, 49, 2015.

10 HAYEK, F.A. Law, Legislation and Liberty: a New Statement of the Liberal Principles and Political Economy (New York: Routledge, 2003).

11 SPAAK, T. Legal positivism, law's normativity, and the normative force of legal justification, Ratio Juris, 16, 4, 469, 2003; STILLER, G. Rechtliche Sanktionen Probieme ihrer Ausgestaltung und Anwendung, Neue Justiz, 8, 219, 1975.

12 SCHMUTZER, R. Probleme der Verantwortung aus arbeisrechtlicher Sicht, Staat und Recht, 3, 29, 1973; SCHNEIDER, W. Zum Verhaltnis von Haftung und Verantwortlichkeit, Staat und Recht, 10–11, 37, 1972.

according to some scholars, prospective. In our view, a restricted understanding of legal responsibility impoverishes its social purpose, namely to be a regulator of subjects' behavior. Furthermore, when understanding legal responsibility only as a consequence of a violation, the integrative property of law as a whole is lost, its instrumental (formal) essence - to act as a regulator of social relations.

Legal responsibility is a complex phenomenon with internal unity, despite the presence of contradictions in it, which is determined by the corresponding philosophical law (the unity and struggle of opposites).[13] The positive and negative components of legal responsibility are precisely two opposites united in the integral phenomenon of legal responsibility. Which form of responsibility will ultimately develop depends on the behavior of the subject in social relations. Both positive and negative legal responsibilities are formally defined by legal norms, serve as a measure of subject behavior, are implemented in legal relationships, and are based on common principles while fulfilling several general functions.

The legal responsibility of mediators is a part of the general system of legal responsibility. Therefore, the most important characteristics that we have noted in the general concept of legal responsibility will necessarily find their manifestation in individual types of legal responsibility. In the case of legal responsibility of mediators, it can be both positive and negative.

It should be noted that numerous disputes about the concept of legal responsibility in general and its specific types particularly are also due to the fact that not a single normative legal act contains a legal definition of the concept of "legal responsibility." The Federal Law of the Russian Federation of July 27, 2010, No. 193-ФЗ "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" is not an exception.[14] By the way, the term "responsibility" is mentioned in Article 17 (responsibility of mediators and organizations conducting activities to ensure the conduct of the mediation procedure) and paragraph 6 of Article 18, which addresses requirements ensuring responsibility in the activities of mediators. Referring to Article 17 of the above-mentioned law, it is stated: "Mediators and organizations conducting activities to ensure the conduct of the mediation procedure are responsible to the parties for damage caused to the participants as a result of carrying out the specified activities, in accordance with civil law." An analysis of this article provides a clear example of a legal declaration. At first glance, it may seem that the legislator formulated a referral norm, but the point is that civil legislation does not contain specific provisions providing for the legal responsibility of mediators. To determine

[13] MALKO, A.V., LIPINSKY, D.A., MARKUNIN, R.S. Positive and negative responsibility as a manifestation of dialectical logic in legal research, State and Law, 12, 24, 2021.

[14] Collection of Legislation of the Russian Federation. 2010. No. 31. Art. 4162.

the legal responsibility of a mediator, we can only operate with general provisions on compensation for damages and compensation for moral injury, fixed in the Civil Code of the Russian Federation. As it faithfully noted in juristic scientific essays, "outside the law in this case remain, for example, the dishonest behavior of the mediator or abuse of the status. At the same time, a more general reference to responsibility in the text of the law is its undisputed drawback".[15]

The analysis of the Federal Law of the Russian Federation "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" shows that it operates with concepts inherent to the theory of positive legal responsibility, which once again emphasizes the formation of the activities of mediators under the influence of positive legal responsibility. In particular, in the above-mentioned Federal Law, terms such as "harmonization of social relations," "formation of business ethics," "equality," "impartiality," "voluntariness," and "good faith" are used. Furthermore, Article 18 specifies that "a self-regulatory organization of mediators, in addition to the rights defined by the Federal Law 'On Self-Regulatory Organizations', has the right to establish requirements for its members, additional to those provided for by the proper Federal Law, ensuring the responsibility of its members in carrying out mediator activities." Here, positive responsibility of subjects of mediation activity is primarily implied. However, legal literature has repeatedly pointed out that "positive responsibility without negative responsibility is defenseless, and negative responsibility without positive responsibility is meaningless".[16] As it has been mentioned earlier, there is no specialized legal responsibility for mediators based on general provisions of the Civil Code of the Russian Federation.

In scientific essays, it is always argued that civil legal responsibility is exclusively private-law by its character. However, as we have already indicated, a mediator, while performing its functions, becomes a subject of public activity and is vested with powers akin to authority. Therefore, even if we refer to the general provisions of the Civil Code of the Russian Federation, under which a mediator can be held legally responsible, it should be noted that it has a public, rather than private-law character.

If we analyze other fundamental normative legal acts that establish types of legal responsibility such as criminal and administrative ones, we will not find a specific subject of responsibility like a mediator. However, entitling mediators with public-law powers implies their increased legal responsibility, which stems from the general principle of establishing legal responsibility – the broader the

[15] SHURENKOVA, S.S. To the question of the responsibility of mediators: classical and online mediation, Law and Practice, 3, 207, 2022.

[16] KHACHATUROV, R.L., YAGUDYAN, R.G. Legal responsibility (Togliatti: MABiBD, 1995).

scope of authority, the stricter (according to some authors, "heightened") the legal responsibility should be.[17] Theoretically, mediators could be bribed, but they cannot be brought to justice for accepting a bribe because they are not representatives of authority, and also Article 204 of the Criminal Code of the Russian Federation (commercial bribery) excludes their responsibility. Thus, we are faced with a situation of normlessness (anomie)[18] or a state of legal irresponsibility in the field of mediation activity. In reality, there should be a reasonable balance between positive and negative responsibility since they are dialectically interconnected categories – positive responsibility should be supported by negative responsibility, and negative responsibility by positive responsibility.

It is necessary to remind that another question we are striving to explore in this article is determining the procedural or substantive juridical character of the legal responsibility of mediators. Scientists studying procedural responsibility proceed from its broad and narrow sense of understanding. In a narrow sense of understanding, procedural responsibility is always associated with its establishment in a specific regulatory legal act, the character of which is procedural. In a broad sense of understanding, procedural responsibility can be provided for by branches related to substantive law as well as procedural law. In this regard, scientists identify compositions of administrative or criminal offenses, the object of which is precisely procedural relations.[19] As we see it, the second approach to defining the legal character of procedural responsibility blurs its boundaries, turning it into a somewhat amorphous state weakly connected to each other. Therefore, we proceed from a narrow sense of understanding procedural responsibility.

An analysis of the Federal Law of the Russian Federation of July 27, 2010, No. 193-ФЗ "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" shows that there are no measures of procedural responsibility for violations of procedural norms of mediation by the mediator or the parties themselves. Thus, we are faced with a state of legal normlessness in this area and can only speculate theoretically about the procedural responsibility of participants in the mediation process. Moreover, it is quite problematic to talk about the procedural responsibility of the parties to the dispute themselves rather than the mediator, given that the mediator is not endowed with any authoritative powers to apply measures of state coercion. Also, we do not consider it expedient

[17] KHUZHIN, A.M., ODINOKOVA, A.V. Prospects for the study of increased legal responsibility, Legal Science and Practice. Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of the Russian Federation, 3, 69, 2020.

[18] LIPINSKY, D.A. IVANOV, A.A. Review of the concepts of legal anomie in foreign and domestic sociological and legal thought, State and Law, 11, 49, 2023.

[19] MAKAREIKO, N.V., LIPINSKY, D.A. Problems of establishing the limits of procedural responsibility, Herald of Civil Procedure, 1, 107, 2011.

to grant such powers for several reasons. Firstly, by introducing the institution of mediation, the state primarily relied on the voluntariness and conscientiousness of its participants. Secondly, it assumed that the participants in the mediation process are mediators of positive legal responsibility and will not violate the prescriptions of norms fixed in the above-mentioned law. The analysis of the norms contained in it shows that they are not accompanied by corresponding sanctions.

However, any right is designed for a certain level of development of both public and individual legal consciousness. In other words, before the right to mediation can be fully realized, further development is necessary, as noted in juristic literature, various deformations are often observed in the modern legal consciousness of Russian citizens.[20] After all, a certain right may be used not for good but with the aim of causing harm, for example, through its abuse.

3 Conclusion

The current research allows us to draw several conclusions and generalizations. Firstly, the institution of mediation within the Russian law system is still in its formative stages, and consequently, it lacks a well-developed system of norms that establish legal responsibility for participants in the mediation process.

Secondly, the legal responsibility of participants in the mediation process, by its legal character, is public and positive. This is due to the fact that the relevant normative legal act regulating it does not establish negative sanctions and operates with concepts inherent to positive legal responsibility. Procedural and substantive negative legal responsibility remain legally unpinned, and a lack of regulation is observed in this sphere of legal regulation of social relations.

Thirdly, general civil law norms that establish liability for causing harm are not adapted to the legal responsibility of such a subject as a mediator. Furthermore, there are no criminal or civil law norms that provide for the legal responsibility of mediators. Accordingly, to eliminate the existing gaps, the current legislation should be adjusted to protect the parties to the dispute from possible abuses by mediators. The legislator's reliance solely on positive responsibility is not always justified, and positive responsibility without negative becomes unenforceable.

[20] MALKO, A.V., LIPINSKY, D.A., ZRYACHKIN, A.N, MUSATKINA, A.A. Psychological aspects of deformation of legal consciousness and legal responsibility, Psychology and Law, 4, 140, 2022.

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The development of the ideas of “electronic court” and “electronic mediation” in Russian and foreign law

Irina Vorontsova

Doctor of Legal Sciences, Professor of the Department of Civil Procedure Law of the Kazan Branch of the Russian State University of Justice, Professor of the Department of Civil Procedure of the Saratov State Law Academy, Professor of the Department of Civil and Business Law of the V.G. Timiryasov Kazan Innovation University. ORCID: https://orcid.org/0000-0001-7248-0419

Roza Sitdikova

Doctor of Law. Professor. Department of Business and Energy Law. Kazan Federal University. E-mail: ms.rs575@gmail.com. ORCID ID: 0000-0003-1715-2863.

Abstract: This article focuses on the development and implementation of information technologies in courts of general jurisdiction. It compares the concept of “electronic court” in Russia and abroad and concludes with their different contents. Further, the article also focuses on using the “E-Court” system in Russia and “E-SUD” in Uzbekistan. This article analyzes the main problems hindering the development of mediation in Russia. In the future, mediation may become a key alternative to litigation because it saves time and money, maintains relations between the parties to a dispute, and makes a fair decision based on their sake. The development of mediation directly depends on the improvement of the legislative framework. Based on the identified issues, recommendations that will help to realize the potential of mediation have been proposed. The article aims to analyze the possibilities of developing electronic mediation and offers recommendations on the confidentiality of online mediation.

Keywords: E-court. E-justice. Digital technology. Information technology. Agency. Mediation. Electronic (online) mediation. Offline mediation.

1 Introduction

Digitalization of the Russian judicial system as an indivisible information space and the development of information technologies in the Russian civil process was carried out in several stages:

1) Federal Target Program “Development of the Judicial System of Russia” for 2002-2006;

2) the Federal Target Program "Development of the Judicial System of Russia" for 2007-20011; and, finally,
3) the currently being implemented Federal Target Program "Development of the Judicial System of Russia for 2013-2024".[1]

It is worth pointing out that at each stage, the aims and objectives of the programs were defined and, accordingly, achieved impressive results. The implementation of the last program in the courts of general jurisdiction involves, among other things, the development of information technologies through the implementation of measures to further increase the openness, accessibility, and transparency of court activities through the use of video and audio recording systems of court proceedings, software, and hardware tools for digitization of documents and equipment, informatization of the judicial system as a whole and the introduction of modern information technologies in the activities of the judiciary. It should be noted that the above objectives have been achieved in many respects; however, modern justice, without waiting for the final results of the implemented program in its development, runs far ahead and before contemporary society and, first, before the lawyers pose new questions that meet the spirit of information progress.

Over the last few years, research scientists have been sharing their findings on the development of "e-justice" and "artificial intelligence" in the Russian Federation more and more often. The need for more understanding of the terminology has been noted for a long time.[2]

The elaboration of the concept of "e-justice" was a positive static in the concretization of the meaning of this concept. The definition of this term was first formulated for the first time in the Order of the Judicial Department under the Supreme Court of the Russian Federation dated 26.11.2015 No. 362. According to this order, electronic justice should be understood as a way and form of implementing procedural actions stipulated by law, based on the use of information technologies in the activities of courts, including the interaction of courts, individuals, and legal entities in electronic (digital) form. This order establishes a list of basic concepts and terms used in the regulatory legal acts of the Judicial Department governing the use of information and telecommunication technologies in the activities of courts, Judicial Department offices in the constituent entities of the Russian Federation and Judicial Department institutions, and discloses their content.

[1] Resolution of the Government of 27.12.2012 No. 1406, which approved Resolution of the Government of the Russian Federation of 27.12.2012 No. 1406 (ed. 25.12.2014) "On the federal target program "Development of the judicial system of Russia for 2013 - 2020 years".

[2] FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law 36, 2261, 2023; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56-76, 2023; FERREIRA, D.B., GROMOVA, E. & TITOVA, E.V. The Principle of a Trial Within a Reasonable Time and JustTech: Benefits and Risks. Hum Rights Rev, 25, 47, 2024.

Science also does not leave this issue unattended. Back in 2018, S.V. Vasilkova prepared and defended her dissertation on the topic "Electronic justice in the civilistic process", where the author proposes that electronic justice should be understood as procedural activity established by law to administer justice in cases under its jurisdiction, in which remote (tele-) communication with the participants of the civilistic process and document less form of data transmission (information, documents, etc.) are carried out using information technologies (Internet, other telecommunication tools, etc.).[3] A certain scientific interest is also represented by the authors' abstract for the degree of Candidate of Legal Sciences, Yu.A. Kondyurina on the topic "Principles of civilistic process in the system of electronic justice", where the author offered her definition of electronic justice, under which she understands the application and use of information communication technologies in the civilistic process, allowing to perform procedural actions in electronic form and electronic support of judicial activity.[4] Further, the science of procedural law was offered a study that continues to develop the ideas of digitalization and which also cannot be left without attention. This is a study by Lukonina Yu.A. on the topic "Digital civilistic procedural form: theoretical and applied aspects", in which the author goes further and makes a proposal on the need to allocate the digital form along with oral and written.[5]

The article aimed at analysis of the possibilities of developing electronic mediation, and offers recommendations on confidentiality of online mediation. To achieve mentioned goal the methods of comparative legal analysis, systemic approach as well as formal-juridical method were used to show the current developments of online mediation in the Russian Federation.

2 The concept of e-court: definition and practice

Generally, already since the beginning of the 21st century, the legal sphere of Russian and foreign states has been marked by the active penetration of such concepts as "digital technologies"; "electronic justice"; "electronic court"; "intellectual court", "intellectual judicial system"; "digital judge"; "private online court"; "electronic mediation" and others.

According to the first, but rather bold assumptions, the "electronic court" is a court of the not-too-distant future. Currently, the electronic court with the official title "E-court" as a prerequisite for technological progress and revolution in law is developed by a group of professional lawyers and programmers (a joint project

[3] VASILKOVA, S.V. Electronic justice in civilistic process, 10, 2018.
[4] KONDYURINA, E.A. The principles of civilistic process in the system of electronic justice, 12, 2020.
[5] LUKONINA, YU.A. Digital civilistic procedural form: theoretical and applied aspects, 10, 2023.

of ELL Partnership and OmniCode). As stated on the official website,[6] E-Court is an intelligent system that, based on Russian law and court practice, asks you questions necessary to solve a court case and, based on your answers, considers the case and creates a professional, objective judicial act. Note that this software product should be perceived as a kind of experiment for a very limited range of cases (family disputes).

However, it is impossible to underestimate this system. Thus, successful active implementation and use of the E-SUD system has been recorded in Uzbekistan. As stated on the official website, in 2013 the Supreme Court of the Republic of Uzbekistan and the United Nations Development Program in Uzbekistan developed and launched the National Information System of Electronic Justice "E-SUD".[7] The effectiveness of this electronic system can be judged by the following figures: in 2017, 442435 applications to the courts in civil cases were recorded through the mentioned e-justice system, which is estimated at 40% of all cases considered.

However, E-SUD in Uzbekistan is an information system that allows applicants to send their claims to civil courts electronically as well. This follows primarily from the objectives of the E-SUD information system, which are presented on the official website of the national information system of electronic court proceedings "E-SUD" in Uzbekistan. These aims include: improving the efficiency of the functioning of civil courts through the introduction of modern information technologies; obtaining information on the activities of the courts; collecting, processing and storing information on the activities of the courts; providing interactive services in the judicial system; creating conditions for the realization of the constitutional right of citizens to appeal to the courts; ensuring openness and transparency in the activities of the courts; creating conditions for the widespread introduction of fair justice; eradicating bureaucracy; and providing information on the activities of the courts.

Registered users through this system, in addition to the possibility to apply to the courts in civil cases by filing an application or statement of claim, as well as the attached documents in electronic form, can receive information about the date and time of the court hearing; receive court summonses and documents in electronic form; familiarize themselves with the case materials.

Thus, the E-Court in Russia, which is labeled as an electronic court by its developers, and the E-SUD in Uzbekistan have completely different bases for use. There are also known examples of the use of e-court in other states.

[6] Official website of Electronic court of Uzbekistan, www.e-sud.ru.
[7] Official website of Electronic court of Uzbekistan, www.v3.esud.uz.

3 The concept of online mediation and its implementation in Russia

However, as the time flows, new tasks appear and new questions arise. For example, recently in Russia, serious attention has been paid to the problems of development of the mediation institute. The Federal Target Program of Economic Development of Russia until 2024 has fixed the idea of introducing mediation as one of the priority directions of modernization of the regional economy.[8]

Mediation is a process in which parties meet with a jointly elected, impartial, neutral mediator who helps them negotiate in order to reach a mutually acceptable viable solution in the face of different interests between them.[9] Mediation issues are being researched both in Russia and abroad.[10]

At the present time, the problem of finding ways of effective civilized prevention and settlement of disputes arising between participants in civil law turnover is becoming more and more relevant.

The emergence and spread of a new institution in Russia is designed to fulfill a number of functions with the assistance of independent persons - mediators. They determine the conditions, causes, and subject of the dispute, analyze the strong and weak positions of the disputing parties. They also help to find a balance of interests and work on the basis of the voluntary consent of the parties involved to reach a mutually acceptable solution. In addition, mediators stimulate a change in the behavior of the parties in a conflict situation.[11]

Moreover, scientists nowadays see mediation as having a broader purpose. Mediation can be an integral part of a complex of consulting services to business, aimed at solving actual problems of the enterprise. Also, it seems that the mediator can offer the best course of action, help to develop and implement anti-crisis measures, find alternative and non-standard ways out of the situation.[12]

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8 Decree of the President of the Russian Federation of 07.05.2018 No. 204 (ed. of 19.07.2018) "On national aims and strategic objectives of the development of the Russian Federation for the period up to 2024" // Collection of Legislation of the Russian Federation, 14.05.2018, No. 20, Art. 2817.

9 Federal Law of July 27, 2010, No. 193-ФЗ "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)" // Collection of Legislation of the Russian Federation. - 2010. - No. 31.- Art. 20.

10 GALANTER, M., CAHILL, M. «Most cases settle»: Judicial promotion and regulation of settlement, Stanford law review. Stanford, 6, 1353, 1994; ZAITSEVA, L., RACHEVA, S. Mediation and Legal Assistance, Russian Law Journal, 2, 2. P. 145, 2014; GALIAKBAROVA, G., SAIMOVA Sh. Mediation of labour disputes in Kazakhstan in comparative context. Russian Law Journal, 4, 2, 96, 2020.

11 SUDORGINA, E.V. Mediation in civil and arbitration proceedings, Issues of Russian and international law, 8, 10A, 40, 2024.

12 PAVLOVSKIY, A. Mediation in Russia. Why do disputing parties so rarely resort to mediation before they go to court? https://zakon.ru/blog/2020/11/09/mediaciya_v_rossii_pochemu_do_obrascheniya_sporyaschih_storon_v_sud_oni_tak_redko_pribegayut_k_proce?ysclid=ludpkn3lwl606055137.

The advantage of the procedure under consideration is its fast speed of conflict resolution, which is due to the absence of the need to collect evidence, call witnesses, conduct an expert examination, etc. In the mediation process, there are no third parties who may or may not make independent claims. All parties to a disputable legal relationship have the opportunity to participate in dispute resolution through mediation as full and equal participants in the negotiation process. In this case, the mediator is not a party to the conflict, but acts as a conciliator helping the parties to make a decision independently and by agreement.

In the context of the COVID-19 global pandemic, almost all spheres were experiencing digital transformation: there was a transition to the online space. The effectiveness of the use of mediation, negotiation, judicial reconciliation procedures should also be achieved through the use of modern information and communication technologies. The need to use digital technologies in mediation is primarily due to the necessity to organize interaction between mediators and consumers of this procedure.

The adoption of Federal Law No. 193-ФЗ dated July 27, 2010 "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)" opened wide opportunities for the use of mediation settlement in pre-trial proceedings. However, the realization of these opportunities is far from satisfactory and is not so implemented in Russian society as envisaged by the Federal Law and the potential of mediation practices themselves.

One of the priority objectives of the information policy of the judicial system in 2020-2030 is the creation of a unified information space as a set of information interaction between courts at all levels, judicial community bodies and the Judicial Department system. Increasing the level of knowledge about justice should be achieved through: dissemination of information and educational materials ("Electronic Justice", "Civil rights in court", "I am a jury", etc.).

4 Online mediation in Russia: areas of use and benefits

Developing these directions, it is impossible not to touch upon conciliation procedures, namely the need to create departments of informatization on mediation, negotiations and judicial conciliation, which would contribute to the formation of legal awareness of citizens about these procedures, which in turn can lead to the relief of judges and the court apparatus.[13] That is why it seems appropriate to involve in the information and education program to ensure the appearance of educational material "Conciliation Procedures".

[13] Mediation and Law Center, https://mediacia.com/.

The emergence of these electronic services will make it possible to improve the functions of online services again, for example, by introducing programs for notification of mediation participants, which will significantly reduce the costs of notifying the parties.

Mediation can be applied to disputes arising from civil, family and labor relations, as well as to most categories of cases arising from administrative and other public legal relations. This is also an important novelty of expanding the scope of application of conciliation procedures. The conciliation procedure may be conducted at any stage of the process at the request of a party or at the suggestion of the court with the consent of the parties.

It should be noted that it is possible to settle a dispute by conducting mediation by indicating this in a written commitment with reference to the agreement on its conduct to be concluded subsequently, as well as if the parties have undertaken not to go to court within a specified period of time.

According to Paragraph 1 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of June 22, 2021, No. 18 "On some issues of pre-trial settlement of disputes considered in civil and arbitration proceedings"[14] in such cases, mediation becomes a mandatory pre-trial settlement of the dispute (Paragraph 1 of Article 4 of the Law on Mediation).

The observation of the pre-trial procedure can be achieved by sending the party's appeal to the e-mail address, as well as on social networks (Paragraph 13 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of June 22, 2021, No. 18).

Currently, the advantages of online mediation are:

1) there is no need to postpone the attempt to resolve the dispute, as the mediation procedure can be realized despite the current restrictions and social distancing;
2) during the dispute resolution, the parties can be in any place, thus reducing tension by being in a familiar environment;
3) there is no need to travel to the mediator's office, or to the court, or to rent a room for negotiations, thus providing economic benefits to the disputants.

The new rules of conciliation procedures are aimed at creating an effective procedural and legal regulation of conciliation, popularization of conciliation procedures, their more effective use in practice and, as a result, reducing the judicial burden on judges.

[14] Resolution of the Plenum of the Supreme Court of the Russian Federation of June 22, 2021, No. 18, Moscow "On some issues of pre-trial settlement of disputes considered in the order of civil and arbitration court proceedings", Russian Newspaper. 2021. No. 144.

Online services on conciliation procedures can also become an effective platform for the implementation of the legislative initiative to improve access to mediation in electronic form, including in terms of conducting mediation with remote participants, which is why it is necessary to create a service "Conciliation procedures".

Based on the above, it should be noted that the advantages of online mediation become obvious:

1) time;
2) absence of attendance problems (distance);
3) reduction of the parties' expenses for participation in mediation;
4) lowering the level of emotional background.

Moreover, some researchers have already proposed recommendations for maintaining the confidentiality of online mediation. For example, they suggest: limiting access to meetings by using passwords and mandatory authentication; limiting the possibility of displaying the screen; being vigilant when clicking on links or opening sent documents; not showing anything unnecessary in the frame; making sure that there is nothing unnecessary on the screen before showing it to the participants; checking the settings; trying to follow the updates of the application.[15]

The demand for the institution of mediation in practice will increase. In order for mediation to be actively used, it is necessary to introduce not only voluntary procedures but also mandatory ones.[16]

5 Countries experience on the use of online mediation

Mediation is used by different states.[17] As the example, in Turkey, the Law on Labor Courts came into force on January 1, 2018, according to which the use of mediation became mandatory before filing a claim on labor disputes with the court.[18]

[15] ZHDAN-PUSHKINA, D. Online mediation: benefits, preparing for the hearing and ensuring confidentiality, https://zakon.ru/blog/2022/09/27/onlajnmediaciya_preimuschestva_podgotovka_k_slushaniyu_i_obespechenie_konfidencialnosti.

[16] PRADO CALDERON, E.B., CAMPAÑA MUÑOZ, L.C., CHUICO PARDO J.P. Mediation in coercive jurisdiction processes, Russian Law Journal, Vol. 11. N 13s, 132, 2023.

[17] KUMAR, V. Supply chain dispute resolution through Alternative Dispute Resolution (ADR) mechanism (viz, arbitration, mediation, conciliation, and negotiation) in India, Russian Law Journal, 11. N 5s, 367, 2023; HALTALI, A. Mediation and reconciliation under the law, Russian Law Journal, Vol. 12. N 1, 235, 2024; AGRAWAL K. Justice dispensation through the Alternative Dispute Resolution System in India, Russian Law Journal, Vol. 2. N 2, 63, 2014; MEHNAZ, B., MMUHAMMAD Z., ATAUR, R. Alternative Dispute Resolution: a catalyst for rule of law, democracy, and socio-economic development in developing countries - a case study of Pakistan, Russian Law Journal, 11. N 3, 2062, 2023. (4) HAFIZ, U.G., BALQEES, A. An analytical study of intellectual property (IP)-related Alternative Disputes Resolution (ADR) laws and their implications, implementation in United States of America (USA) and Pakistan, Russian Law Journal, Vol. 12. N 1, 518, 2024.

[18] ALEKSEEVA, S.A. The voluntary and compulsory mediation: The Turkish experience, Notary, 7, 46, 2022.

In the United States, mediation is widely used in civil and commercial disputes. Mediators and arbitrators help the parties to agree on a resolution of the dispute, and decisions made as a result of conciliation can be binding.

In Germany, conciliation is also popular, especially in commercial disputes. Specialized arbitration courts exist there, where disputes are resolved in a more flexible and faster manner than in traditional courts. In addition, conciliation procedures must necessarily precede an application to the court for protection of one's violated right. When filing a lawsuit, the plaintiff must indicate the extrajudicial measures taken to settle the dispute and the reasons that did not lead the parties to a positive result. The judge may, depending on the conciliation procedures previously used, recommend that the conflict be resolved through another conciliation procedure and, if the parties agree to the proposal, suspend the proceedings.

Japan has introduced a system of alternative dispute resolution in consumer protection. An important part of this system is the "consumer dispute resolution commission", which helps resolve disputes between consumers and businesses.

In Belarus and Russia, conciliation procedures are also developing and are commonly used in civil and administrative cases. It is important to note that the practice of mediation can vary greatly even within one country, depending on the region and specific situation.

However, for all the advantages of the institution of mediation (online mediation), as well as taking into account the positive experience of other states, there are a number of problems in the Russian Federation that hinder its development. These include:

Firstly, citizens of our country are somewhat wary of such a method of conflict resolution as mediation, as they do not know or have not heard about such a procedure.

Insufficient awareness of citizens about the existence and essence of this procedure, the lack of advertising of the services of professional specialists, as well as the fact that in the Russian Federation there is no practice of mandatory mediation as a preliminary conflict resolution, as is the case, for example, in the United States, is an organizational obstacle to the popularization of mediation.[19]

The reduced level of legal and conflict resolution culture of citizens of the Russian Federation is a subjective factor that hampers the mediation process. For example, a low level of conflict culture in society leads to high tension and

[19] PETRENKO, E.G., KLETS, A.O. The institute of modern mediation in foreign countries, Humanities, socio-economic and social sciences, 4, 150, 2022.

conflict in social relations. Also, the low level of conflict culture creates distrust in the mediator as a specialist who can help in conflict resolution and settlement.[20]

The solution to this problem is seen in the active educational work of public authorities at all levels, including local self-government bodies, the media, and mediators themselves.

Secondly, there are economic issues, which, in turn, also lead to the low popularity of the institution in question. These include the cost of professional mediators' services and the unwillingness of the parties to incur additional expenses.

Researchers attribute the high cost of mediation services to economic obstacles, the unwillingness of opponents to pay for conflict resolution, what the authors call "procedural and legal absenteeism of the parties," and the disinterest of judges in using mediation because it jeopardizes their income. However, on the other hand, the state is considering the idea of setting up negotiation rooms in court in order to facilitate the work of the courts and thus reduce their workload.

Thirdly, the problem of mediation development in the Russian Federation is also the lack of enforcement of a mediation agreement, which actually makes it a transaction and reduces the attractiveness of mediation for the parties to a conflict. In order to solve this problem, the best way is to legislate the instrument of enforcing the mediation agreement. This will increase the effectiveness of mediation and improve the situation.

Fourthly, one of the problems is the uncertainty of the scope of application of the law, in particular the question of which disputes can be dealt with through mediation.

Mediation procedures represent an important tool to reduce the burden on courts, speed up dispute resolution and improve access to justice. In the future, further development and dissemination of these procedures, both in Belarus and Russia, as well as in foreign countries, may contribute to a more efficient and fairer resolution of disputes worldwide.

6 Conclusion

Despite the existing problems in the development of conciliation procedures, it should nevertheless be noted that they are an effective way to resolve a civil-law dispute simultaneously with the methods realized in the form of judicial protection of violated rights. Their main advantage is that the parties are given the opportunity to independently settle disagreements between themselves, avoiding the assistance of a state body or a third party.

[20] SHILOVSKAYA, A.L. The legal aspects of mediation in civil and criminal proceedings, Bulletin of the S.Yu. Witte Moscow University, 2, 49, 2023.

Moreover, based on the above, it should be concluded that electronic (online) mediation has a number of advantages over offline mediation.

Summarizing the above, it should be noted that there is a need to develop the following areas in mediation: modernization of the legal framework, clear explanation of the mediation procedure and adjustment of the Federal Law "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)"; organization and improvement of training and professional development programs for mediators; the need to comply with the procedure for settling pre-trial disputes through a mediation agreement, development of "electronic" mediation;[21] supplementing the mediation procedure with the use of electronic mediation; development of the "electronic" mediation procedure.

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Authentication and verification in arbitration proceedings

Nikita Makolkin

Candidate of Legal Sciences, Senior Lecturer of the Department of Environmental, Labor Law and Civil Procedure of the Faculty of Law of Kazan (Volga Region) Federal University. E-mail: nikita.makolkin@gmail.com. ORCID: https://orcid.org/0000-0002-0528-8862.

Damir Valeev

Doctor of Legal Sciences, Professor of the Department of Environmental, Labor Law and Civil Procedure, Deputy Dean for Scientific Activities of the Faculty of Law of Kazan (Volga Region) Federal University. E-mail: valeev55@gmail.com. ORCID: https://orcid.org/0000-0002-3233-2400.

Abstract: The extensive and intensive development of digital technologies is a constant process that co-occurs with the same steady increase in the level of social significance of the justice process. One of the cornerstones in integrating individual technological solutions into the justice administration ecosystem is the development of technologies that can carry out many procedures remotely. These problems indicate a real need to develop a comprehensive scientific understanding of verification and authentication. This study aims to analyze the concepts of verification and authentication in the context of modern arbitration proceedings in Russia and define issues arising from the digitalization of procedural relations. The authors concluded on the possibility of convergence of arbitration institutions and state courts, the creation of a unified information system aimed at increasing the accessibility of arbitration proceedings, which correlates with the reduction of judicial workload in state courts, as well as the prospects of integration of authentication and verification mechanisms in arbitration proceedings.

Keywords: Authentication. Verification. Arbitration proceedings. Arbitration. Civil procedure. Dispute.

1 Introduction

The extensive and intensive development of digital technologies is a constant process that occurs simultaneously with the same steady increase in the level of social significance of the justice process. At the same time, the introduction of these technologies also predetermines an increase in the level of social responsibility of the entities using them, which corresponds to the constitutional right to judicial protection in the event of both a violation of rights and legitimate interests by these technologies, and an application for judicial protection through the use of

the achievements of modern science and technology.[1] It is also important to note that in all types of legal proceedings established by the Constitution of the Russian Federation, there are actually some modern technological solutions that contribute to the implementation of the above mentioned right.

One of the cornerstones in the context of the integration of individual technological solutions into the justice administration ecosystem is the development of technologies that provide the ability to carry out many procedures remotely. With regard to civil procedural relations in their broad sense, the key in the context of this study is the ability to seek protection of potentially violated rights in a remote format, which creates the need for remote participation in a court hearing and remote submission of various kinds of documents and information.

Integration into the legal field and law enforcement practice of technological solutions related to remote access to processes of administration of justice in the framework of civil, arbitration and administrative proceedings, as well as out-of-court protection of rights, is designed to increase their accessibility, openness and transparency, as well as reduce costs, which can also be perceived as a manifestation of the social orientation of policy in this area, since the totality of the above mentioned determines the beneficiary of all ongoing transfigurations and reorganizations of citizens of the Russian Federation and other individuals, as well as organizations, which in its essence is intended to create comfortable conditions for the protection of potentially violated rights and legitimate interests.

Also, within the framework of this research, emphasis is placed on the need to study the level of information technologies integration in the notarial activities' boundaries and as a part of consideration of cases in arbitration proceedings. In this context, it is necessary to note the large-scale modernization of notarial activities and the need for scientific comprehension of these transformations, as well as the need to improve arbitration proceedings, which can increase its attractiveness.

[1] SOLHCHI, M.A., BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2 (2), 56, 2023; ERMAKOVA, E.P. Features of Online Settlement of Consumer Disputes by e-commerce Platforms in the People's Republic of China. Journal of Digital Technologies and Law, 1(3), 691, 2023; FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings, Technology in Society, 68, 101872, 2022; FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5-26, 2021; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law, 36, 2261–2281, 2023; FILIPCZYK, H. ADR in Tax Disputes in Poland – The State of Play and Perspectives. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, pp. 205, 2023; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, p. 153, jul./dez. 2023; HALOUSH, H.A. The Liberty of Participation in Online Alternative Dispute Resolution Schemes. International Journal of Legal Information, 36(1), 102, 2008.

The significance of the issues raised acquires additional impetus in the light of the modernization of civil procedural, arbitration procedural and administrative procedural legislation that is actively underway these days. The presence of these problems indicates a real need to develop a comprehensive scientific understanding of verification and authentication.

2 Concepts of authentication and verification

Questions regarding the interpretation of the above-mentioned concepts of "authentication" and "verification" have their roots in the times of Ancient Greece and Rome.[2] Thus, the word "authentication" has one common root with the Greek word "*αύθεντικός*" [*authentikos*], which means "real, genuine",[3] as well as with the word "*αύτός*" [*autos*], related to the Greek language, which in translation into modern Russian language means "oneself; it is".[4] The second term – "verification" – is genetically formed by merging two words of the Latin language: *verum* – "true"[5] and *facere* – "to do".[6] Such a linguistic analysis allows both to determine the very general lexical meaning of these two terms and, at this stage of consideration, to conduct a comparative analysis of them.

The interpretation of the term "authentication" has not been properly reflected in existing Russian-language dictionaries, so the starting point here seems to be possible to take the approach outlined above, since, despite the versatility of this term, its main meaning will be associated precisely with identifying an individual and confirming that the personality participating in the trial is the one who should take part in it or has the right to do so.

If you turn to explanatory legal dictionaries, you can find the following approaches to the interpretation of the term "verification".

Verification is the act of testing something (proving or testing something to determine that it exists or is true or correct).[7]

Verification is the process of testing or finding out whether something is true, real, accurate.[8]

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2 See: MAKOLKIN, N.N. Some approaches to the legal interpretation of the terms verification and authentication, Laplage Em Revista, 6, 185, 2020.

3 NEWMAN, M. Greek-Russian Dictionary of the New Testament, Russian Bible Society, 2012. P. 18.

4 *Ibid*. P. 41.

5 DVORETSKY, I.H. Latin-Russian Dictionary. About 50 000 words. 2nd ed., rev. and ext. M.: Russian Language, 1976. P. 1070.

6 Ibid. P. 412.

7 MCINTOSH, C. Cambridge Advanced Learner's Dictionary. Cambridge University Press. 2013.

8 Cambridge Academic Content Dictionary. Cambridge University Press. 2008.

A confirmation is a statement under oath or under penalty of perjury that a statement or petition is true.[9]

A systematic analysis of the views of foreign linguistic and legal thought shows that verification is an action, a process that allows to establish the accuracy and reliability of something.

The above-mentioned sources did not ignore the concept of "authentication", the lexical meaning of which was also revealed in a number of works.

Authentication is a confirmation provided by a court official that a certified copy of a judgment is an exact copy of the original adjudication. In evidence law it is an act, statute, record, or other document, or a notarized copy of such a document, confirming that it can be used in litigation as evidence when resolving a dispute. Self-authentication of certain categories of documents is ensured by federal and state rules of evidence. A document or other information that has been notarized by its signers, a certified copy of a public record, or an official government publication are examples of self-certifying documents.[10]

Authentication is the act of proving that something is real, or that someone claims it to be true.[11]

Authentication is the process or act of proving or demonstrating that something is true, genuine or valid.[12]

Analysis of these approaches allows us to identify a number of overlapping characteristics between verification and authentication. This is due to the fact that authentication is also a process, an action, and at the same time, like verification, it is aimed at establishing the truth of something.

At the same time, the technical approach to this term deserves attention, which comes down to the following: "Authentication is the process of verifying the identity of a person or device".[13]

The technical approach, of course, more accurately describes the main element of authentication associated with identifying an individual, but it is the presence of the interpretations demonstrated above that further confirms the thesis about the versatility of this issue.

Thus, as a result of the analysis of legislation, as well as foreign legal thought and individual linguistic Russian and foreign research suggests the conclusion that the terms "authentication" and "verification" are universal for various legal families, various government systems, and also have certain unique features.

9 BOUVIER, J. A Law Dictionary, Adapted to the Constitution and Laws of the United States. 1856.
10 West's Encyclopedia of American Law, (New York, 2005). 524 p.
11 Cambridge Advanced Learner's Dictionary (Cambridge University Press. 2013).
12 Oxford English and Spanish Dictionary.
13 Authentication, https://techterms.com/definition/authentication (03.04.2021).

Based on the above mentioned, we can formulate the author's approach to understanding the terms discussed.

Thus, verification, as it seems, can be understood as follows: "the process of confirming the truth of evidence and information presented to judicial and non-judicial jurisdictional bodies in a remote format, regardless of their type, using procedural and material tools".

Authentication, in its turn, despite the existing opinion about its similarity with verification and the presence of functionality to confirm the truth of documents, can be considered as "the process of verifying a person's identity in a remote format", while, for justice, it should be noted that in the law of evidence there is a special place for resolving the issue of subjects of proof.

3 Authentication and verification in arbitration proceedings

In the context of this study arbitration proceedings are perceived as one of the components of the civilistic process. It is important to note that in the doctrine of procedural law there is a certain pluralism on this issue, which is beyond the scope of this dissertation research. So, D.H. Valeev, A.I. Zaitsev, M.V. Fetyukhin perceive arbitration proceedings as part of the civilistic process and it seems possible to agree with this point of view.[14] At the same time, we note that the civilistic process is understood as a term that was first introduced into scientific circulation and accompanied by massive scientific justification by T.V. Sakhnova, who states that the civilistic process can be characterized as a system of procedural actions performed by courts and other participants in legal proceedings when considering non-criminal disputes.[15]

If we revise the essence of the arbitration proceedings itself, it is important to note that the institution of arbitration proceedings or arbitration is not a new matter for our legal reality, but was already known in the times of Ancient Greece,[16] as evidenced by the statement of Aristotle: "An arbitrator gravitates towards justice, a judge towards law; arbitration is created so that justice can be realized".[17] Additionally, this thesis is confirmed by the fact that in Ancient Rome, general

[14] See more about this: VALEEV, D.H., ZAITSEV, A.I., FETYUKHIN, M.V. Commentary to the Federal Law "On Arbitration Courts in the Russian Federation", The Herald of Civil Procedure, 1, 104, 2016.

[15] SAKHNOVA, T.V. Reform of civilistic process: problems and prospects, State and Law, 9, 12, 1997; ABOVA, T.E. Arbitration court in the judicial system of Russia, State and Law, 9, 40, 2000; ZHILIN, G.A. Justice in civil cases: actual issues: a monograph (M., 2010); Yarkov V.V. Arbitration process (M., 2012).

[16] CALAP DELPHI, C. War and the question of arbitration (500–400 BCE), Social Sciences & Humanities Open, 1, 23, 2023; SHOEMAKER, G. Ancient Greek arbitration: practices, failures, and the decline of the Greek world // International Law and Politics, 55, 24, 2023; PIEGDOŃ, M. Roman Arbitration in the Greek Oikumene in the Third–Second Century BCE: Some Observations,[in:] Diplomacy and Inter-State Relations in the Hellenistic World, ELECTRUM vol. XXV, ed. E. Dąbrowa, Kraków, 27, 2018.

[17] ARISTOTLE. Ethics. Politics. Rhetoric. Poetics. Categories (Minsk: Literature, 1998).

provisions on arbitration were reflected in the Code of Justinian (the eighth title of the fourth book of the Digest).[18]

If we refer to the domestic history of arbitration proceedings, we can reveal the following: "During its activity, as of January 1, 1982, the Foreign Trade Arbitration Commission[19] considered 2890 cases. The first decision of the Foreign Trade Arbitration Commission was dated November 15, 1933. It was made on the claim of the All-Union Association "Zagotsherst", Moscow, against the Liquidation Committee of the Mongolian Central People's Cooperative, Ulaanbaatar; the dispute was considered by a sole arbitrator M.O. Reichel. Before the beginning of the Great Patriotic War, the Commission considered 87 cases".[20]

Also, within the framework of this study, it is interesting that the Foreign Trade Arbitration Commission is not the first arbitration body in the history of Russia. Previously, there was the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation, which is the oldest and one of the most famous Russian arbitration institutions and is one of the oldest maritime arbitrations existing in the world.[21]

If we talk about times closer to today, it is worth noting that the liberalization of foreign economic activity in Russia has led to a significant expansion of the circle of Russian participants in international commercial turnover[22] and considerable experience in their activities has already been accumulated, which is reflected in the practice of the International Commercial Arbitration Court at the Trade and Commercial Court within Industrial Chamber of the Russian Federation.[23]

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18 The Digests of Justinian: Digests of Justinian (Moscow: "Statut", 2002).

19 Resolution of the Central Executive Committee and the Council of National Commissars of the USSR of June 17, 1932. The Collection of Legislation of the USSR. 1932. No. 48. Art. 281) to resolve by arbitration disputes arising out of foreign trade transactions, in particular disputes between foreign firms and Soviet economic organizations.

20 ZHILTSOV, A.N., MURANOV, A.I. Some statistical data on the activities and decisions of the ICAC. 1933-2011 // International Commercial Arbitration: Experience of Domestic Regulation/Self-Regulation. 80 Years of the ICAC at the Chamber of Commerce and Industry of the Russian Federation: 1932-2012: a collection of selected scientific, normative, archival, analytical and other materials. Vol. I (Moscow: Statut, 2012).

21 International Commercial Arbitration: Experience of Domestic Regulation. 80 Years of IAC at the USSR Chamber of Commerce and (Moscow: Infotropic Media, 2011).

22 ROSENBERG, M.G. International sale of goods: commentary on legal regulation and dispute resolution practice (M.: Statut, 2010).

23 ROSENBERG, M.G. From the practice of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation for 2008, Economics and Law, 8, 101, 2008; ROSENBERG, M.G. From the practice of the ICAC at the Chamber of Commerce and Industry of the Russian Federation, Economics and Law. 2009. No. 5. Pp. 109-118, 2009; ROSENBERG, M.G. International contract and foreign law in the practice of the International Commercial Arbitration Court. 2nd ed., revision and addendum (M: Statut, 2000); ROSENBERG, M.G. Limitation in international commercial turnover: practice of application (Moscow: Statut, 1999); ZYKIN, I.S. Basic procedural aspects of consideration of disputes by international commercial arbitration in the Russian Federation // International Commercial Arbitration, 4, 33, 2004; KABATOV, V.A. Applicable law in dispute resolution in the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Economics and Law, 6, 105, 1998.

At the same time, it is necessary to make one more reservation, indicating the essence of modern arbitration proceedings. So, in accordance with Part 4 of Art. 44 Federal Law of December 29, 2015 No. 382-ФЗ"On Arbitration (Arbitration Proceedings) in the Russian Federation" (hereinafter also referred to as the Federal Law "On Arbitration"), the right to exercise the functions of a permanent arbitration institution is granted by an act of the authorized federal executive body, adopted in the manner established by it, on the basis of the recommendation of the Council for the Improvement of Arbitration proceedings on granting the right to exercise the functions of a permanent arbitration institution. That is, today the procedure for creating arbitration courts[24] has undergone significant changes, and if previously they were created spontaneously, which could serve as a basis for abuse, today this activity is sanctioned by the state, which in its turn not only predetermines the creation of additional barriers, but also contributes to increasing the authority, as well as the trust level in arbitration courts.

The long path of development of the institution of arbitration has allowed it to become largely original, but at the same time it is subject to general trends that are characteristic of the entire civilistic process today, and one of these trends is digitalization.[25]

This state of affairs also indicates that the institution of authentication and verification is not alien to arbitration proceedings due to its intersectoral character.

Honed procedures for remote identification and presentation of evidence have their impact and importance on arbitration proceedings. For example, noting the positive aspects of remote participation in a court hearing, a partner at "Pepeliaev Group" Yu. Vorobyov points out that "if at present the parties are actually free to provide evidence, submit motions at any time during the consideration of the process (despite the requirement of the current Arbitration Procedure Code of the Russian Federation for the advance disclosure of evidence), then within the framework of this process it will be much more difficult to do this "Industry legislation relating to arbitration (arbitration proceedings) operates with the

[24] GERASIMENKO, Yu.V., TEREKHOVA, L.A. On the new procedure for creating an arbitration institution (introductory article to the review), Law Enforcement, 2, 207, 2017; PAVLOV, R.V. On the limits of state influence on the procedure for creating permanent arbitration institutions in Russia, Vestnik VSU. Ser. Law, 3 (38), 126, 2019.

[25] WAINCYMER, J. Procedure and Evidence in International Arbitration (Hague, Wolters Kluwer, 2012); GREBELSKY, A.V. Electronic evidence in international commercial arbitration, Law, 10., 59, 2015. (3) COHEN S., MORRIL, M. Fordham International Arbitration & Mediation Conference Issue: a Call to Cyberarms: the International Arbitrator's Duty to Avoid Digital Intrusion, Fordham International Law Journal, 40, 981, 2016; POPOV, E.V. Challenges of the digital and information age and arbitration reform in Russia, The Act, 9, 91, 2017; SEVASTYANOV, G.V. The soul of Russian arbitration, Arbitration Court, 2 (126), 10, 2021; MOLCHANOV, V.V. Prejudice in arbitration (arbitration proceedings), Legislation, 6, 51, 2022; GABOV, A.V. GAIDAENKO-SHER, N.I., GANICHEVA, E.S., ZHUIKOV, V.M. Violation of public policy as a ground for refusal to recognize and enforce an international commercial arbitration award, The Herald of Civil Procedure, 7, 5, 45, 2018.

concept of "electronic document transmitted via communication channels". So, according to paragraph 21 of Art. 2 of the Federal Law of December 29, 2015 No. 382-ФЗ "On Arbitration (Arbitration Proceedings) in the Russian Federation" such a document is "information prepared, sent, received or stored by electronic, magnetic, optical or similar means, including electronic data interchange and e-mail".[26] And in accordance with Part 6 of Art. 45 of the same Law, such documents can be accepted by the court as evidence. However, the procedure for their remote submission, as well as the remote identification of participants in arbitration proceedings, is established by the Rules of the permanent arbitration institution. More specific and detailed instructions, such as those developed and adopted for state courts, are not contained, therefore, in practice, the order may depend on the discretion of the court.

Despite these and other requirements for the procedures for remotely identifying participants in legal proceedings and presenting evidence to the court, the advantages of remote dispute resolution are recognized by both participants in proceedings in courts of general jurisdiction, arbitration courts, and participants in arbitration proceedings.

Remote identification and presentation of evidence in arbitration proceedings meets the same goals as in arbitration courts or courts of general jurisdiction. However, having a fundamentally unified focus on expanding guarantees for the implementation of the right to judicial protection, participants in the process may face various approaches to identifying their personality. In this context, we can add that arbitration proceedings, although not regulated by mandatory rules of civil procedural law, nevertheless, like state courts, resolve the dispute on the merits, therefore, in our opinion, the general trends in the use of existing and proven ICTs with clearly defined methods of personal identification can also be adopted by arbitration courts, which in one way or another have developed a serious practice of conducting court hearings via video conferencing, web conferencing, and online hearings. This is confirmed by the regulations of individual arbitration courts. For example, in the pre-reform period in the Rules of the First Arbitration Institution as amended on February 1, 2016 in Art. 115 was clearly defined "participation in court hearings through the use of videoconferencing systems".[27] At the same time, according to the same provisions, the court establishes the identity of those present at the court hearing "using the original documents presented at the hearing." This feature became the subject of attention of the state court. So, for instance,

[26] Federal Law of December 29, 2015, No. 382-ФЗ "On Arbitration (arbitration proceedings) in the Russian Federation".

[27] The Regulations of the First Arbitration Institution in the version of February 1, 2016, effective February 1, 2016 (approved by the First Arbitration Institution at the autonomous non-profit organization for the settlement of entrepreneurial disputes "Independent Arbitrator").

in the reasoning part of the Resolution of the Arbitration Court of the Moscow District of August 4, 2016 No. Ф05-10328/16 in case No. A40-82002/2016, the court states the following: "Having established the factual circumstances of the case correctly, the court of first instance came to erroneous conclusions, because identification and verification of the powers of persons participating in the court hearing; the arbitration court's examination of evidence in the case was carried out in real time directly during the arbitration proceedings using technical means while its participants and the judge were in different places". Thus, the presence of the arbitrator and the parties to the dispute in different places at the time of the videoconference not only does not prevent the remote identification of those participating in the case in the ways determined by the arbitrator, but also, if there is no doubt about the identification of the relevant persons, cannot be unconditional evidence of a violation of the fundamental principles of Russian law.[28]

As a rule, the arbitrator does not have such systems and methods that arbitration courts and courts of general jurisdiction have access to, so often remote identification and presentation of documents in arbitration proceedings is based either on the presentation of original documents, or on their presentation on camera in during the trial itself.

One of the ways to unify the procedure for authentication and verification in arbitration proceedings, in our opinion, could be the use of the state automated system "Justice",[29] where users have access to information on cases filed in court electronically. In this case the same multi-factor identification and authentication of the identity of participants in a court session cannot be ruled out, which exists now for citizens, their representatives and representatives of legal entities whose disputes are considered by arbitration courts and courts of general jurisdiction.

But there is another option. On the Gosuslugi portal, the "Online Justice" super service has been added to the development and implementation, which, according to the plan, will allow the user to undergo biometric authentication, and during the trial, send documents and notifications digitally to the courts, as well as to persons participating in the case to familiarize yourself with the case materials online. At the present stage, participants in arbitration proceedings, like all subjects of this professional community, should, in our opinion, take advantage of the already existing level of identification of the portal user based on a personal account confirmed in the prescribed manner.

As a potential additional trajectory for the development of authentication in the context of arbitration proceedings, it is possible to use two extra mechanisms,

[28] Resolution of the Arbitration Court of the Moscow District from August 4, 2016, No. Ф05-10328/16 in case No. A40-82002/2016.

[29] State Automated System "Justice", https://ej.sudrf.ru/ (01.04.2022).

similar in essence to the organization of videoconferencing in state courts, when the issue of identification is left to the court where the litigant participates. In the context of arbitration proceedings, the role of the court can be assigned either to an arbitration institution at the location of one of the parties, if there is one, or to a notary who would provide services for organizing videoconferencing with arbitration institutions. This development track is possible, but at the same time it seems unpromising due to the fact that it is associated with many difficulties, and this in its turn makes it possible to refuse further analysis and consideration.

4 Conclusion

Summarizing the analysis, we come to the following conclusion. The provisions of the codes and the Rules establish a fairly effective, efficient and fully operational mechanism for remote identification and submission of evidence to arbitration courts and courts of general jurisdiction, which inherently and for the purposes of this study are referred to as verification and authentication. However, the practice of arbitration courts often bypasses the mechanisms tested by state courts, and such mechanisms are often simply not available to them. Authentication and verification, which are potential for implementation and reviewed in this study, were developed by practice itself and do not conflict with the existing norms of legislation on arbitration proceedings. Therefore, there are no obstacles to the use of a similar system for identifying an interested party and for direct remote participation in arbitration proceedings, provided that the parties agree to take advantage of the achievements of existing ICTs and legal provisions governing the identification and authentication of their users, as well as the remote submission of documents and evidence to the court. We especially emphasize that it is not enough not to raise objections to the consideration of a case by an arbitrator using the *Skype* system; one should strive to ensure that arbitration justice, which is flexible in character, can fully become electronic, remote, cyber or online justice.

In development of this idea, it can be noted that arbitration courts should consider the possibility of joining existing platforms both in terms of authentication of participants in the process and in terms of document verification, which will improve existing mechanisms that to some extent copy what is implemented in the system of state courts. So, for example, one of the first steps could be the integration of a videoconferencing system, which would allow full remote participation in a court hearing, and at the same time, the organization of work would fall on both the arbitration court and the state court. The second development track is the already mentioned joining the «Justice Online» super service. Moreover, these two ways of developing the system of administering justice through arbitration courts do not compete, but can be combined symbiotically.

In the context of this study, it also seems possible to somewhat shift the focus of the issue of integrating authentication and verification into the system of arbitration courts towards the general issue of digitalization of this system and formulate several more possible development trajectories.

So, an example of what arbitration courts potentially need to adopt is a system similar to that implemented in the system of arbitration courts. "My Arbitrator" has extremely broad functionality and openness, and here we have to take into account that some aspects of this openness are unnecessary in arbitration proceedings, which is precisely an alternative to this excessive openness. But at the same time, it is important to mention that in some way closed system of arbitration courts[30] seems unnecessary and even infringes on the rights of third parties. In this context, this should be perceived as the difficulty of obtaining information about whether a particular person is a participant in any legal process. This information for the counterparty can be of significant importance when entering into a contractual relationship, and its confidentiality predetermines the emergence of a situation where the counterparty is a kind of "pig in a poke", and it is equally difficult to fully assess its solvency and diligence. In this sense, the formation of a unified database and a slight expansion of the list of open data could both increase confidence in arbitration courts and create an additional source of information that would allow assessing the counterparty, which has a significant impact on participants in civil transactions. This expansion of the level of openness can potentially be perceived as the formation of a new guarantee of law, but material one, which is not of interest for this study, but seems significant from the point of view of compliance theory.[31]

Another potential development path relates to the ideas already mentioned in this study about interdepartmental cooperation and increased procedural guarantees. Thus, existing law enforcement practice indicates that the norm of the procedural law on the issuance of a writ of execution on the basis of an arbitration court decision does not work properly. Examples of this are the following cases:

[30] SKVORTSOV, O.Yu. The principle of confidentiality of arbitration proceedings and its correlation with related institutions of public law, Bulletin of St. Petersburg State University. Ser. 14. Law, 4, 181, 2014; BEVZENKO, R.S., et al. Scientific and practical commentary to the Federal Law of the Russian Federation "On Arbitration Courts in the Russian Federation" (Moscow: Delovoy dvor, 2011); SKVORTSOV, O.Yu. System of principles of arbitration proceedings // The Bulletin of St. Petersburg State University. Ser. 14. Law, 3,100, 2013; KUROCHKIN, S.A. The concept and system of principles of arbitration proceedings, Arbitration and Civil Procedure, 11, 7, 2005; KAZACHENOK, S.Y., Antipova E.A. Unification of arbitration agreement terminology in the process of international integration, Legal Concept, 2, 150, 2014.

[31] ASHFA, D.M. Compliance in competition law: problems of theory and practice, The Bulletin of O.E. Kutafin University, 7 (95), 50, 2022; GARMAEV, Y.P., IVANOV, E.A., MARKUNTSOV, S.A. On the formation of an interdisciplinary concept of anti-corruption compliance in the Russian Federation, Law. Journal of the Higher School of Economics, 4, 106, 2022; ERSHOVA, I.V., YENKOVA, E.E. Sanction Compliance, or Intrafirm Risk Management from Restrictions, Actual Issues of Russian Law, 8 (141), 93, 2023.

A65-16167/2022, A65-11220/2022, A65-3407/2022, A07-18094/2022, A10-4850/2022, A38-3604/2022, A40-73146/2022. This list can be continued, but there is no need for this, since a certain pattern can be formulated based on the analysis of these cases, which are also related to a close completion date. What these cases have in common is that from the moment the subject applied to the arbitration court to the issuance of a performance list for the execution of the arbitration court decision, much more than one month passed, which contradicts the provisions of Art. 240 Arbitration Procedure Code of the Russian Federation. Such a contradiction seems unacceptable, since it actually predetermines the fact that state courts neutralize all the advantages that are provided by arbitration courts in terms of the timing of receiving a writ of execution. In this context, it seems possible to automate the process of issuing writs of execution in the sense that the arbitration court itself can send an application for the issuance of a writ of execution for its decision either automatically, or at the request of a participant in the process, which would reduce time costs, and would also be a manifestation of the necessary interdepartmental interaction. At the same time, the question of the very timing of consideration of cases on the issuance of a writ of execution against the decision of arbitration courts seems inappropriate for consideration within the framework of this study, since this problem to some extent goes beyond its scope, but at the same time one of the mechanisms for solving it, at least partially, seems appropriate for implementation in law enforcement practice.

In addition, it is important to note that the above-mentioned procedure for creating arbitration courts has changed significantly, which also necessitates the need to rethink the level of trust to this method of resolving disputed legal relations. This idea correlates with another trajectory of development of the arbitration court system from the point of view of giving them the right to independently issue writs of execution, which would be equal in strength and significance to writs of execution issued by state courts. This proposal is also intended to reduce the burden on the judicial system and fully contributes to the implementation of the principle of procedural economy. Let us note that such a model for organizing the activities of arbitration courts in terms of expanding their powers seems to be a logical step from the point of view that persons applying to an arbitration court deliberately minimize state intervention in these legal relations, which can subsequently be leveled out in the process of obtaining a writ of execution. Yes, to be fair it is worth noting that the very character of the activities of arbitration courts implies that their decisions will be executed voluntarily, but existing practice dictates other conditions and predetermines the need to involve persons with authority like bailiffs, what doesn't violate private law basis and allows you to respect the rights and legitimate interests of participants in civil transactions.

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Social protection strategies in relations between Ukraine and the European Union

Oleg M. Yaroshenko

Department of Labor Law. Yaroslav Mudryi National Law University. 61024, 77 Pushkinska Str., Kharkiv, Ukraine. E-mail: oleg-yaroshenko@edu-knu.com. ORCID: https://orcid.org/0000-0002-7884-5834.

Olga I. Demenko

Department of Pedagogy, Foreign Philology and Translation. Simon Kuznets Kharkiv National University of Economics. 61166, 9-A Nauky Av., Kharkiv, Ukraine. E-mail: olga.d1962@gmail.com. ORCID: https://orcid.org/ 0000-0003-0244-921.

Olena V. Moskalenko

Faculty of Management, Administration and Law. State biotechnological University. 61002, 44. Alchevskykh Str., Kharkiv, Ukraine. E-mail: alena.mko9@gmail.com. ORCID: https://orcid.org/0000-0002-0807-0519.

Andrey M. Sliusar

Department of Labor Law. Yaroslav Mudryi National Law University. 61024, 77 Pushkinska Str., Kharkiv, Ukraine. E-mail: adv.sliusar@gmail.com. ORCID: https://orcid.org/0000-0003-4550-7086.

Natalya M. Vapnyarchuk

Department of Legal Research Coordination. National Academy of Legal Sciences of Ukraine. 61024, 70 Pushkinska Str., Kharkiv, Ukraine. E-mail: 130398@ukr.net. ORCID: https://orcid.org/0000-0003-1335-2542.

Abstract: In today's world, social protection is becoming an increasingly important topic that combines economic, political, and social aspects. Regardless of the level of development of a country, people are constantly looking for ways to ensure their well-being and protect themselves from negative influences. Social protection strategies are of particular importance in relations between Ukraine and the European Union. Ukraine, as a sovereign state, monitors the needs of its population and tries to adapt its social system to European standards. Therefore, the purpose of the study is to analyze the current state and prospects for the development of social protection strategies in Ukraine in the context of cooperation with the European Union to identify possible areas for improving the social sphere and ensuring a high level of social protection for the Ukrainian population. The study uses a variety of methods, including analysis, synthesis, induction, deduction, comparative legal, dialectical, and others. Considering cooperation with the European Union helps to solve socioeconomic problems and ensure a high level of social protection.

Keywords: Social protection strategies. Ukraine. European Union. Cooperation. Social programs. Social reforms. Social justice.

1 Introduction

In today's world, social protection is becoming one of the most important and relevant topics at the intersection of economic, political, and social challenges. Ukraine, as a sovereign state, recreates and develops its social system taking into account the needs of its population. However, in the context of the European integration process, the Ukrainian authorities seek to ensure a high level of social protection, adapt the national system to European standards and solve several socio-economic problems. In this process, the European Union is an important partner for Ukraine.

By deepening cooperation with the European Union, Ukraine has the opportunity not only to get closer to European standards but also to improve its social protection system. As part of this cooperation, strategies are being developed and implemented to protect the rights and interests of Ukrainian citizens, improve access to quality social services and ensure a decent life for all segments of the population.

Joint initiatives and programs implemented by Ukraine and the European Union cover various aspects of social protection. The main areas of cooperation include pension reform, ensuring equal opportunities for women and men in the labor market, development of social services, ensuring access to quality education and healthcare, support for people with disabilities, and much more. For example, in the area of pension reform, Ukraine is actively implementing changes aimed at improving the pension security of citizens and creating a sustainable pension system. This includes revising pension benefits, establishing fairer criteria for pension provision, and introducing transparent mechanisms for managing pension funds.

In the labor market, it is important to ensure equal working conditions for women and men and to combat discrimination and inequality. In this context, cooperation with the European Union allows Ukraine to use best practices and experience to create gender-equal working conditions, develop family and labor policies, and social protection for mothers.

Special attention is paid to the development of social services and support for people with disabilities. Ukraine, in cooperation with the European Union, is working to improve the system of rehabilitation and social integration of persons

with disabilities, creating favorable conditions for their self-determination and realization of their potential. In addition, joint projects and programs in education, youth policy, and social entrepreneurship contribute to the development of society and support young people in their professional development and building a sustainable future.

The application of social protection strategies in relations between Ukraine and the European Union has a significant positive impact on the lives of Ukrainian citizens. It helps to reduce inequalities, ensure social justice and improve the quality of life. Through these strategies, the Ukrainian authorities are trying to ensure a guaranteed minimum of social services for all segments of the population, as well as to develop socio-economic inclusion.

However, the implementation of social reforms sometimes faces certain challenges and obstacles. For example, it is necessary to ensure the financial sustainability of social programs and the efficient use of resources. It is also necessary to ensure effective cooperation between all stakeholders, including the government, civil society organizations, and international institutions. Many scientific works, including such scholars as M. Bondar,[1] M. Danilina,[2] V. V. Kryzhna,[3] T. Kostyshyna,[4] B. Umayev[5] are devoted to this topic. The purpose of the study is to analyze the current state and prospects of social protection strategies in Ukraine in the context of cooperation with the European Union to identify possible areas for improving the social sphere and ensuring a high level of social protection for the Ukrainian population.

2 Materials and methods

The methodology used in the study of social protection strategies in relations between Ukraine and the European Union is based on a combination of general scientific and special scientific methods. It allows analyzing, summarizing, and drawing conclusions about the effectiveness and potential for implementing various social protection strategies.

1 BONDAR, M. (2021). Social security and social protection in Ukraine. *Economy and society*, (34), 1-10

2 DANILINA, M. (2020). The Constitution of Ukraine and social protection of the population. In *Social rights and their protection by the administrative court: materials III International. science and practice conference* (Kyiv, September 4, 2020). Kyiv, pp. 25-29

3 KRYZHNA, V. V. (2020). Social rights of citizens: social protection and social security. It is printed by the decision of the organizing committee in accordance with the mandate of the Kharkiv National University of Internal Affairs dated September 23. 2020 No. 119, 218.

4 KOSTYSHYNA, T. (2021). Social protection in the context of the development of the digital economy. *Economic Analysis*, 31(1), 279-288

5 UMAYEV, B. (2022). Features of social protection of servicemen and employees of the Security Service of Ukraine. *Scientific Bulletin of the Uzhhorod National University. Series: Law*, (70), 248-252.

One of the key methods used in the study is analysis. It provides a detailed examination of social problems and identifies factors that affect social protection in Ukraine and the European Union. The analysis allows us to identify the needs of the population, assess the status of existing social programs, and identify the strengths and weaknesses of the strategies under consideration. The synthesis method is used to summarize and systematize the data obtained. It allows the combining of various aspects of social protection and information on different strategies to form a general idea of their potential and impact. Synthesis makes it possible to identify dependencies, establish relationships between different aspects of social protection, and develop a comprehensive approach to solving social problems.

The deductive method is also used in the study. It allows us to start from general principles and legal norms governing social protection and apply them to specific cases. This method allows for establishing cause-and-effect relationships and developing recommendations for improving the social protection system based on existing legislation and international standards.

One of the important methods used in the study is the comparative legal method. It allows comparing legal acts, strategies, and practices of social protection applied in Ukraine and the European Union. This allows us to highlight similarities and differences in the regulation of social protection, identify good practices and best practices and use them in the context of Ukrainian reforms.

The dialectical method helps to identify contradictions and interrelationships in social protection and to highlight their impact on the effectiveness of the strategies under consideration. This method allows us to consider social protection as a system where different elements interact with each other and influence their development.

Summarizing, the use of a combination of general scientific and special scientific methods, such as analysis, synthesis, deduction, comparative legal, and dialectical, allows for a thorough study and evaluation of social protection strategies in relations between Ukraine and the European Union. This contributes to the development of recommendations and improvement of social protection for citizens of both sides.

3 Results

3.1 Legal basis of social protection strategies and relations between Ukraine and the European Union in this area

Article 1 of the Constitution of Ukraine proclaims Ukraine to be a democratic, legal, and social state, and the strict implementation of these provisions is the most urgent strategic task at all times, especially at the present stage of Ukraine's

development.[6] Ukraine's aspirations to join the European Community cannot be realized without implementing a social policy towards any category of its citizens, without providing them with social protection, since only this will ensure social stability in society, increase the welfare of the population, and ensure an adequate standard of living and quality of life for every Ukrainian.

Social protection of the population of Ukraine is a multifaceted system of interconnected economic, legal, and social guarantees of the most important social rights of every member of our society, regardless of their place of residence, ability to work, or gender, which are interrelated with all legislative and executive decisions at various levels. In the broadest sense, social protection is a system of organizational, legal, and economic measures to ensure the basic social rights of citizens in Ukraine.

The ultimate goal of social protection is to provide every member of society, regardless of social origin, nationality, or race, with the opportunity to develop freely and realize their abilities. Another goal is to maintain stability in society, i.e., to prevent tensions arising from property, racial, cultural, and social inequality.[7]

Social protection strategies in relations between Ukraine and the European Union (EU) are an important component of cooperation between the two parties. These strategies are aimed at ensuring stability, developing the social sphere, and improving the quality of life in both countries. Ukraine, as a country seeking to get closer to European standards and values, is actively cooperating with the EU in this area.

One of the key aspects of social protection strategies is the social security system. The European Union has a wide range of social programs that provide citizens with pensions, health insurance, unemployment benefits, and other types of social support. Ukraine is striving to adapt its social security system to European standards by reforming its pension system, improving health insurance, and developing a social assistance system.[8]

Another important aspect of European social protection strategies is the development of the education and training system. Ukraine is actively cooperating with the European Union in the field of education, youth, and culture. This allows Ukrainian citizens to have access to quality education, exchange of experience, and professional development. Cooperation with the EU helps to improve the Ukrainian

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6 Verkhovna Rada of Ukraine. (1996). Constitution of Ukraine. URL: https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.

7 PALACIO LUDENA, M. G. (2021). Falling through the Cracks: Digital Infrastructures of Social Protection in Ecuador. *Development and Change*, 52(4), 805-828.

8 SMIRNOVA, I. I., LYKHOSHVA, O. Yu., RAK, N. V., & GORIEVA, L. A. (2021). Social protection of the population at the current stage: state and problems in Ukraine. *Economic Bulletin of Donbass*, (2 (64)), 201-208.

education system, including the development of modern programs, improving the quality of education, and developing international relations in the field of education.

In addition, social protection strategies include issues of social integration and human rights protection. To approach European standards, Ukraine focuses on ensuring equal opportunities for all citizens, regardless of their origin, gender, age, or physical characteristics. This includes protecting the rights of women, children, people with disabilities, and other vulnerable groups. Ukraine is actively implementing European standards in the area of combating discrimination, support, and social integration of these groups.

In addition, social protection strategies include support for economic development and entrepreneurship. Ukraine cooperates with the EU in the area of economic development, market opening, and investment attractiveness. This contributes to the creation of new jobs, raising living standards, and reducing poverty. Cooperation with the EU also promotes entrepreneurship, supports small and medium-sized enterprises, and stimulates innovation.

The European Union also provides financial and technical support to Ukraine in implementing social projects and programs. This support is aimed at developing infrastructure, improving access to education and healthcare, developing social services, and much more. This allows Ukraine to implement important social projects that contribute to the quality of life of its citizens.[9]

In addition, social protection strategies in relations between Ukraine and the European Union contribute to the joint fight against complex challenges and threats, including reducing the impact of the COVID-19 pandemic. The European Union has provided emergency assistance to Ukraine by sending medical equipment, vaccines, and other resources to combat the coronavirus outbreak. Such cooperation strengthens Ukraine's reserves to counter global health and social challenges.

It is also important to note that social protection strategies in relations between Ukraine and the European Union have a profound impact on the development of human rights and democratic values. Ukraine is actively working to implement European standards in the field of human rights, protection of minority rights, freedom of speech, and other democratic values. Cooperation with the EU helps Ukrainian society to develop more progressive and open values, ensuring the rights and freedoms of citizens.

[9] CHORNA, M. (2019). The essence of the right of citizens to social protection. *Entrepreneurship, economy and law*, (4), 151-156.

One of the most important areas of cooperation in the field of social protection is the fight against poverty and social inclusion. The European Union provides financial support and technical assistance to Ukraine for the development of social programs and projects aimed at reducing poverty and improving the living standards of the most vulnerable segments of the population. This may include the provision of social services, support for low-income families, increased access to education and healthcare, and stimulating economic development in rural and remote areas.

In addition, an important aspect of social protection strategies is the development of the health care system and medical services. Ukraine is cooperating with the European Union to improve access to quality health care, develop primary health care, and prevent diseases. This includes support for the implementation of electronic medical records, professional development of medical personnel, development of healthcare infrastructure, and access to medicines and medical services.[10]

Ukraine and the European Union also actively cooperate in the field of labor protection and social insurance. This includes the development and implementation of regulations aimed at improving working conditions, social insurance, and pensions. Ukraine is trying to harmonize its legal framework with European labor standards, taking into account the rights and interests of employees and employers.

In addition, social protection strategies include initiatives aimed at supporting the development of social entrepreneurship and expanding social services for youth, women, the disabled, and other vulnerable groups. In particular, this includes providing financial support and training for the development of social enterprises and creating a network of social centers and organizations that assist those in need.[11]

Cooperation between Ukraine and the European Union in the area of social protection strategies is an important element of the partnership. It allows Ukraine to implement modern social standards and practices, improve the quality of life of its citizens, ensure social justice, and strengthen democratic values. Together with the EU, Ukraine has the opportunity to develop as a society that guarantees the rights and well-being of its citizens.[12]

[10] BONDAR, M. (2021). Social security and social protection in Ukraine. *Economy and society*, (34), 1-10.

[11] KHORUZHIY, M. E., & GBUR, Z. V. (2021). Social protection of civil servants. *Investments: practice and experience,* (13-14), 103-109.

[12] YAROSHENKO, O. M., Kutomanov, D. Y, MARYNIV, N. A., & DUDENKO, T. V. (2020). Features of Corporate Liability for Violation of Competition Law. *International Journal of Criminology and Sociology*, 9, 1517–1525. https://doi.org/10.6000/1929-4409.2020.09.172.

3.2 Social protection strategies and programmes on the example of selected European countries

Using the example of specific EU countries, let's look at a few countries that are implementing successful social protection strategies and programs to ensure the well-being of their citizens. Denmark is known for its high-quality social protection. It has a wide network of social programs that ensure a high level of well-being for its citizens. One of the most important aspects of the social protection system in Denmark is the universal social security system, which includes access to free healthcare and education, as well as guarantees a sufficient minimum wage and a high level of pension provision. In addition, Denmark has family support programs that assist in raising children and fighting poverty.[13]

Sweden is another country with significant success in social protection. It is known for its general social insurance system that ensures equal opportunities and social justice. The Swedish system includes a wide range of services, such as free health care, education, childcare, social housing, unemployment support, etc. In addition, Sweden invests significant efforts in the development of equality and gender equality policies, providing appropriate social measures and support for women in the labor market and family life.[14]

Germany is also known for its effective social protection system. It has a wide range of programs aimed at ensuring the social support and well-being of its citizens. For example, the social insurance system in Germany provides access to health care and sickness insurance, as well as pension coverage for the population. The country also has family support programs that provide financial assistance and services for parents and children, including summer and preschool facilities.[15]

Finland is known for its high quality of life and social support. It has a progressive social protection system that guarantees all citizens access to quality health care, education, and social services. Finland is also defined by its child support system, including a large number of kindergartens and free education for children.[16]

These are just a few examples of countries in the European Union that are implementing successful social protection strategies. Each of these countries has

[13] SUTIYO, S. (2022). On the Discourses of Social Protection Distribution: Insights from *Indonesia. J. Soc. & Soc. Welfare*, 49, 4.

[14] SLAVICH, G. M. (2020). Social safety theory: a biologically based evolutionary perspective on life stress, health, and behavior.

[15] DANILINA, M. (2020). The Constitution of Ukraine and social protection of the population. In Social rights and their protection by the administrative court: materials III International. science and practice conference (Kyiv, September 4, 2020). Kyiv, pp. 25-29.

[16] HASAN, A. M., ANUGRAH, B., & PRATIWI, A. M. (2019). Gender-Responsive Budget Analysis on Social Protection Programs in Indonesia: A Case Study in Two Districts and A City. *Jurnal Perempuan,* 24(1), 25-38.

its unique model of social protection, but the general idea is to ensure well-being and social justice for its citizens. Ukraine can learn from and implement the best practices of these countries to improve its social protection system and ensure a better future for its citizens.[17]

3.3 Current state of development of social protection systems in Ukraine

On February 28, 2022, Ukraine submitted an official application for membership in the European Union. From that moment on, the process of official accession to the EU was launched. In the shortest possible time, the painstaking work of completing the two parts of the questionnaire for obtaining the status of a candidate for EU membership, which took thousands of pages, was completed. As a result of the coordinated work of all branches of government, the great demand of Ukrainian society for further democratic reforms, and the EU's political readiness to make historically important decisions, Ukraine was granted candidate status on June 23, 2022. Ukraine is currently finalizing the implementation of seven recommendations of the European Commission necessary for further progress toward EU membership.[18]

In line with the results of the implementation of the EU-Ukraine Association Agreement in 2022, work continued to strengthen social protection for the most vulnerable groups of the population. Despite the difficulties of wartime, about UAH 800 billion was allocated for all social expenditures in 2022. The continuity of social payments (various types of benefits, housing subsidies, and privileges) was ensured, in particular, through a specially created system of centralized accrual for the period of martial law. This mechanism made it possible to accrue payments to people living in the territory of hostilities and under occupation. More than 5 million families received payments, including 300,000 through the centralized mechanism.

With the introduction of martial law, the payment of previously granted benefits has been extended automatically without the need for citizens to apply: benefits for children under guardianship or custody; children with serious illnesses; children whose parents evade child support; persons with disabilities since childhood and children with disabilities; persons caring for persons with disabilities of groups I and II due to mental disorders; persons not entitled to a pension; and persons

[17] SAMBORSKA, O. (2020). Efficiency of social protection of the rural population in the united territorial community. *European Journal of Sustainable Development*, 9(3), 333.

[18] NASIBOVA, O. V. (2019). Theoretical aspects of financial provision of social protection of the population. *Economy and the state*, (8), 35-40.

with disabilities. These benefits will be paid for the duration of martial law and one month after its termination or cancellation.[19]

Under martial law, the system of compulsory state social insurance ensured continuous financing of pensions for almost 11 million pensioners and insurance payments for about 10 million insured persons. All increases planned for 2022, including indexation, have been fully implemented, including the first indexation of military pensions. The implementation of the support program for pensioners aged 80+ continued. In October 2022, those pensioners who turned 70 began to receive additional assistance. A total of UAH 575.2 billion was paid in pensions. The conditions for the payment and delivery of pensions for the period of martial law are defined by the Resolution of the Cabinet of Ministers of Ukraine No. 162 of 26.02.2022 "On the Peculiarities of Payment and Delivery of Pensions and Financial Assistance for the Period of Martial Law".[20]

Funding for pensions in the temporarily occupied territories has not been suspended. Currently, more than 6 million citizens are covered by some type of social assistance. Most regions continue to provide social services to people in need (except for the temporarily occupied territories and the area of active hostilities).

The Register of Social Service Providers contains information on more than 3,000 entities, of which about 1,500 are municipally owned, including almost 1,000 providers working directly in territorial communities (social service centers, social service centers, territorial centers of social services (social service provision). There are also 501 mobile teams of social and psychological assistance to victims of domestic violence or gender-based violence. The system of social service centers employs about 300 psychologists and more than 3,600 social work specialists.

The Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Provision of Social Services in the Event of the Introduction of a State of Emergency or Martial Law in Ukraine" (No. 2193-IX of 14.04.2022), which establishes the mechanism for the provision of social services during martial law, including emergency (crisis) services.[21]

In pursuance of the above Law, the Cabinet of Ministers of Ukraine adopted 11 regulatory acts that simplified the criteria for the activities of social service

[19] KRYZHNA, V. V. (2020). Social rights of citizens: social protection and social security. It is printed by the decision of the organizing committee in accordance with the mandate of the Kharkiv National University of Internal Affairs dated September 23. 2020 No. 119, 218.

[20] Cabinet of Ministers of Ukraine. (2022a). About the peculiarities of the payment and delivery of pensions, cash benefits for the period of the introduction of martial law. URL: https://zakon.rada.gov.ua/laws/show/162-2022-п#Text.

[21] Verkhovna Rada of Ukraine. (2022). On making changes to some laws of Ukraine regarding the provision of social services in the event of a state of emergency or martial law being introduced on the territory of Ukraine. URL: https://zakon.rada.gov.ua/laws/show/2193-20#Text.

providers; regulated the procedures for providing social services on an emergency (crisis) basis, and drew up an act on their provision; simplified the procedures for making decisions on the provision of social services upon a single application during a state of emergency or martial law.[22]

Modernization of the system of social services for the population is ensured, which is especially important in the context of decentralization. As part of the construction of a unified social information system (USIS), the formation of a unified system for the administration of all social benefits through the Pension Fund of Ukraine as a payment agency has begun. The first stage has already centralized the payment of housing subsidies and benefits, which has allowed for the digitalization and acceleration of the processing of applications; people can apply throughout Ukraine, not just to the social security authorities at their place of residence. All data is securely stored on cloud servers.[23]

To ensure social protection of the population of internally displaced persons, the Procedure for Providing Accommodation Assistance to Internally Displaced Persons (Resolution of the Cabinet of Ministers of Ukraine No. 332 of 20.03.2022) was approved.[24] Almost 4.9 million internally displaced persons have been registered, of whom more than 3.5 million have moved since February 24, 2022. About 2 million internally displaced persons have received assistance.

As a result of the armed aggression of the Russian Federation and hostilities in Ukraine, the number of people with disabilities (including severe forms) is rapidly increasing and will continue to increase among civilians, including children, and among the defenders of Ukraine. The possibility of rehabilitation and obtaining auxiliary rehabilitation equipment (prostheses, wheelchairs, etc.) for all citizens affected by the war without the need to obtain disability status was ensured (Resolution of the Cabinet of Ministers of Ukraine No. 454 of 12.04.2022).

A systemic draft Law of Ukraine "On Amendments to Certain Laws of Ukraine on Ensuring the Rights of Persons with Disabilities to Work" was prepared (Reg. No. 5344-D of 18.11.2022). The draft law provides for a change in the mechanism for promoting the employment of persons with disabilities by expanding the range

[22] MALYUGA, L. Yu. (2019). European social standards in the context of the right to social protection in Ukraine. *Almanac of International Law*, (22), 109-114.

[23] YAROSHENKO, O. M., MELNYCHUK, N. O., PROKOPIEV, R. Y., ANISIMOVA, H. V., & KAPLINA, H. A. (2022). Violation of Labour Rights in the Context of Compulsory Vaccination Against Covid-19. *Comparative Law Review*, 28, 485–502. https://doi.org/10.12775/CLR.2022.017.

[24] Cabinet of Ministers of Ukraine. (2022b). Some issues of payment of housing allowance to internally displaced persons. URL: https://zakon.rada.gov.ua/laws/show/332-2022-п#Text.

of support and assistance during employment and introducing incentives for employers rather than sanctions.[25] [26]

In addition, to preserve jobs for people with disabilities, the Government decided to allow socially important enterprises with protected employment to enjoy a preferential tax regime under martial law[27] (Resolution of the Cabinet of Ministers of Ukraine No. 323 of 19.03.2022). A unified mechanism for administering aid from international donors through the eDopomoga platform was established. Applications were submitted by 10 million citizens, 3 million of whom received payments totaling almost UAH 6 billion.

The Cabinet of Ministers adopted Resolution No. 447 of April 15, 2022. No. 447 was adopted, which expanded the grounds for granting the status of an orphan or a child deprived of parental care in times of war, making it possible to place such children in family-based care. The Memorandum of Cooperation on Social Protection of Children Affected by War and Armed Conflict with UNICEF was signed (09.04.2022) and the Agreement between the Ministry of Social Policy of Ukraine and the Ministry of Social Protection and Labor of the Republic of Lithuania on Cooperation in the Protection of Children Affected by the War in Ukraine as a result of the Armed Aggression of the Russian Federation was signed (11.04.2022).

A Political Declaration was signed between the Ministry of Social Policy of Ukraine and the Ministry of Family and Social Policy of the Republic of Poland on the social protection of children affected by war and armed conflict (30.06.2022). The Adoption in Action service was introduced, which allowed people to conveniently obtain all information about child adoption online and submit the necessary package of documents to obtain the status of an adoptive parent. 780 such applications have already been submitted.

On August 12, 2022, the Government approved the State Strategy for Ensuring Equal Rights and Opportunities for Women and Men until 2030 and approved an operational plan for its implementation for 2022-2024 (Order of the Cabinet of Ministers of Ukraine No. 752 of August 12, 2022). The Strategy is focused on achieving the Sustainable Development Goals of Ukraine by 2030.[28]

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[25] KOSTYSHYNA, T. (2021). Social protection in the context of the development of the digital economy. *Economic Analysis*, 31(1), 279-288.

[26] YAROSHENKO, O.M., MELNYCHUK, N.O., MOROZ, S.V., HAVRYLOVA, O.O., & YARYHINA, Y.P. (2021). Features of Remote Work in Ukraine and the European Union: Comparative Legal Aspect. *Hasanuddin Law Review,* 7(3), 136-149. 10.20956/halrev.v7i3.3218.

[27] Verkhovna Rada of Ukraine. (2022). On making changes to some laws of Ukraine regarding the provision of social services in the event of a state of emergency or martial law being introduced on the territory of Ukraine. URL: https://zakon.rada.gov.ua/laws/show/2193-20#Text.

[28] UMAYEV, B. (2022). Features of social protection of servicemen and employees of the Security Service of Ukraine. Scientific Bulletin of the *Uzhhorod National University. Series: Law,* (70), 248-252.

3.4 Alternative dispute resolution and the system of "multi-level courts" as a social protection strategy

Since alternative dispute resolution (ADR) offers affordable and effective methods of resolving conflicts without resorting to court, it is an important tool for social protection. These methods of problem-solving include ADR procedures such as mediation, arbitration, consultation and negotiation.

The accessibility of alternative dispute resolution methods makes them important. Without the need to incur the significant time and financial costs usually associated with litigation, citizens can get the right solution. ADR procedures are also usually faster and more efficient, allowing parties to settle a dispute more quickly and focus on their personal affairs.[29]

Another important component of ADR is confidentiality. Numerous alternative dispute resolution procedures, including mediation and arbitration, guarantee the confidentiality of the process, which can be crucial for the parties involved, especially in situations involving sensitive data. Another important component of ADR is flexibility. Finding mutually beneficial solutions is facilitated by the ability of the parties to choose the processes and terms of conflict resolution that best suit their unique requirements and objectives.

In addition, the use of alternative dispute resolution encourages cooperation and positive communication between the parties involved, which can ultimately lead to the maintenance of goodwill and a mutually acceptable resolution.

Finally, the use of ADR reduces the burden on the judicial system, allowing it to focus more effectively on the most complex and important cases. In general, the creation and promotion of alternative conflict resolution methods is an important tactic for ensuring effective social protection of citizens and raising standards of justice.

The ability to guarantee the prospect of an effective and fair resolution of legal disputes at multiple judicial levels makes the system of "multi-level courts" an important social protection tactic. Depending on the complexity and nature of the problem, citizens can apply to different levels of courts within the tiered court system. As small cases can be dealt with in lower courts instead of going to higher courts, this increases access to justice.

To ensure that justice is done and rights are protected, cases can be reviewed by higher courts on appeal and cassation against decisions made by lower courts. Supervision of the activities of courts at different levels is another advantage of

[29] KOGUT, D. (2020). Prospects for further reform of the judicial system of Ukraine. *Journal of the Kyiv University of Law,* 2, 186-191.

a multi-level judicial system. This helps to ensure that court decisions protect the rights of citizens and the law.

The case law that emerges from the decisions of the courts at different levels develops the legal system and contributes to the expansion and standardisation of case law. Higher courts have less work due to the multi-level system, which allows cases to be heard at several levels. This can contribute to faster and more efficient case resolution, especially when lower courts can resolve some types of cases without the involvement of higher courts. In sum, a multi-tiered judicial system is an important social protection tactic as it guarantees access, fairness and control in the legal system by providing individuals with the opportunity to defend their rights and interests at multiple judicial levels.

The state should take certain proactive measures to ensure the effective implementation of alternative dispute resolution and the system of "multi-level courts" as a social protection policy. The use of alternative dispute resolution procedures, including mediation, arbitration and counselling, should be regulated by law. The establishment and use of ADR should be legally supported by these regulations. The state must establish appropriate regulatory legislation and guidelines to ensure the effective functioning of the "multi-level courts" system. Standardising the processes used by the appellate and cassation courts is part of this process.[30]

Conducting information campaigns and training for judges, lawyers, mediators and other litigants on the benefits and practices of alternative dispute resolution. The successful implementation of alternative dispute resolution and the system of "multi-level courts" critically depends on ensuring the professionalism and competence of those involved in the judicial process. It is recommended that the state allocate funds to create and maintain the necessary infrastructure for alternative dispute resolution and the system of "multi-level courts". This includes creating conditions for mediation, encouraging the use of alternative courts and guaranteeing access to the legal system for all social groups.

By offering favourable conditions to parties who choose alternative dispute resolution over litigation, the state can encourage parties to use ADR. The state should conduct methodical supervision and evaluation of the ADR institution and "multi-level courts" to ensure their development and effectiveness. This will help identify problems and implement necessary changes to improve the standards and accessibility of justice. By assisting the state in establishing "multi-level courts"

[30] KARMAZA, O. (2020). Mediation and negotiation as alternative methods of dispute resolution. *Entrepreneurship, economy and law, 5*, 13-18.

and alternative conflict resolution procedures, these steps will ensure that all residents receive adequate social protection.

4 Discussion

Social protection is an important component of social development and ensuring the well-being of citizens. Ukraine, like many other countries, faces shortcomings in its social protection system that need to be addressed and resolved. Improving the social protection system in Ukraine is one of the key tasks to ensure the country's stable development and improve the living standards of its citizens. Despite certain positive developments in this area, certain shortcomings in Ukraine affect the effectiveness and accessibility of social protection.

One of the main shortcomings of the social protection system in Ukraine is the insufficient level of social benefits. Minimum pensions and social benefits are often insufficient to meet the basic needs of citizens, especially in the context of rising inflation and economic difficulties. Many people live below the poverty line and cannot afford a decent standard of living.

Another problem is the low level of access to quality medical services. Many people have limited access to medical care due to the low quality and insufficient number of medical facilities, as well as financial constraints. This is especially true for people with low incomes and vulnerable groups. Lack of proper medical care undermines the health and well-being of citizens. There is also a problem of insufficient support for families and children in Ukraine. Large families, low-income families, and single parents do not receive sufficient financial support and social services, which affects their ability to raise children and provide them with normal living conditions.

One of the most serious shortcomings of social protection in Ukraine is the lack of financial stability in the system. The lack of sufficient financial resources leads to restrictions in the provision of social services and a decline in the quality of life of citizens. To solve this problem, it is necessary to ensure stable financing of social programs, improve the tax collection system and ensure transparent use of these funds.

Another important drawback is bureaucratic obstacles and difficulties in accessing social services. The procedures for obtaining social benefits are often complex and time-consuming. Citizens face long waiting times and requirements to submit a large number of documents. To overcome these shortcomings, it is necessary to simplify the procedures for the provision of social services, reduce bureaucracy, and use modern technologies to ensure quick and convenient access to social protection.

There is also a problem of inequality in the distribution of social services in Ukraine. Certain groups of the population, including the elderly, low-income families, the disabled, and children, may be excluded from necessary social services due to limited access to them. To address this problem, it is necessary to ensure equal access to social protection for all citizens regardless of their social status, to support and protect vulnerable groups, and to promote their social inclusion.[31]

In addition, the lack of a comprehensive approach to unemployment and insufficient support for workers are among the shortcomings of social protection in Ukraine. A large number of people have limited opportunities for decent work and sufficient income. To solve these problems, it is necessary to promote the creation of new jobs, support the development of entrepreneurship and self-employment, and provide active support and professional training for unemployed people.

Other shortcomings of social protection in Ukraine include corruption and lack of transparency in social services. Cases of bribery and unlawful denial of social assistance are quite common. This leads to a loss of public trust in the social protection system and negatively affects their well-being. To overcome these shortcomings, it is necessary to effectively combat corruption, introduce transparency in the provision of social services, and ensure mechanisms to monitor their quality and accessibility.

The existing social protection system in our country is not effective enough and leads to the bankruptcy of the state, whose financial capabilities do not correspond to its financial obligations. It is safe to say that the state is not fully implementing the Constitution of Ukraine, i.e., there is no recognition of Ukraine as a social state, as there is a significant decline in the living standards of the majority of the population. In addition, an acute problem of social protection today is the survival of socially vulnerable groups of the population and the priority protection of certain categories of citizens, such as military personnel, internally displaced persons, victims of various kinds of disasters, etc.

Over the past few years, Ukraine has been carrying out a radical reform of its social protection system. Recognizing that market transformations are leading to a significant drop in the living standards of most families and given the limited financial resources of the state, the Ukrainian government has created new programs of targeted social assistance. The distinctive feature of this approach is that social assistance is provided only to those most in need.

Today's agenda includes finding the best ways to provide social assistance and services at the local level. The introduction of new social programs and the

[31] KONDRATIEVA, I. I. (2021). Separate areas of improvement of social protection of private and senior members of the civil protection service and their family members. *Social law*, 1, 104-112.

improvement of existing ones make it possible to optimize the management of the social protection system at the level of each region, to ensure high quality and efficiency of services to the most vulnerable individuals and families.[32]

The issue of social protection of citizens is above all the prerogative of state policy. The state takes measures to address the economic situation and social protection guarantees. However, it must be said frankly that today the state is not ready to ensure the implementation of socially oriented programs due to economic circumstances. Therefore, local governments are forced to address the issues of social protection of the population and seek funds to finance municipal social assistance programs.

On Ukraine's way to European standards of living, it is necessary to ensure a sufficient level of social protection. Today, this is the policy chosen by Ukraine to implement European standards in Ukrainian legislation, which will make it possible to stabilize the economy, create conditions for the regulatory framework and change the social protection of citizens. From a long-term perspective, the goal of social protection in this regard should be considered by international acts ratified by our country, according to which every member of Ukrainian society has the right to a standard of living adequate to maintain the health and well-being of himself and his family in normal circumstances and special cases, such as loss of livelihood for reasons beyond his control.

Reforming social protection is defined in the Sustainable Development Strategy "Ukraine - 2000", in which one of the next priorities is the provision of guarantees to every citizen, regardless of race, skin color, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language or other characteristics, access to high-quality education, the health care system, and other services in the public and private sectors.[33]

The system of social protection of the population formed in Ukraine requires change, because at the moment most of its measures are passive, which reduces the motivation of the population to independently ensure their material well-being. The existing system of social protection has a paternalistic character and creates dependent attitudes in people. Therefore, the improvement of the social protection system should take place in two directions. On the one hand, the social state that Ukraine aspires to should show concern for its citizens, and on the other hand, create mechanisms that encourage people to actively seek and strive to take care of their well-being.

[32] KOSTYSHYNA, T. (2021). Social protection in the context of the development of the digital economy. *Economic Analysis*, 31(1), 279-288.

[33] BONDAR, M. (2021). Social security and social protection in Ukraine. *Economy and society*, (34), 1-10.

The strategy and tactics of social protection presuppose regulatory and legal regulation in the form of a law on social protection, which would fix the main theses of the concept, as well as the directions, ways, forms, and technology of providing this sphere. We believe that one of the options for such regulation in the system of social protection of the low-income category of the population should be the creation of a specialized base for them, provided that systematic monitoring of compliance with the requirements for issuing targeted assistance is carried out. The improvement of the program of such assistance should be adjusted through the coordination of the bodies of the Ministry of Social Policy of Ukraine and local self-government bodies.[34]

Improvement of the social protection system can be ensured by: determining the strategy of social protection of individuals and families in Ukraine;[35] recognition of the family as the main link in the implementation of state social policy; codification of legislation on social law and, in particular, social protection; improving the system of social interbudgetary transfers and increasing the role of local communities in determining priority areas and financing social protection measures; increasing the targeting of state social assistance (cash and in the form of services) taking into account the level of income and real needs of individuals and families; reforming the system of social services, increasing their availability and approaching the needs of consumers; implementation of an active strategy of social protection in order to use the potential of self-defense of the individual; moving away from the categorical principle of granting benefits and targeting benefits to a specific person, finding out the income level of a person who applies for a benefit, and granting a benefit if his income is lower than the average; a ban on the introduction of new benefits, the legislative establishment of a specific source of funding for each type of benefits, the introduction of the restriction «One person - one benefit».

5 Conclusions

Social protection of the population of Ukraine is an integral part of the system of guarantees for the realization of the social rights of citizens. Ukraine is actively cooperating with the European Union (EU) in this area to ensure stability,

[34] DEREVYANKO, B., LOHVYNENKO, M., NEZHEVELO, V., NIKOLENKO, L., & ZAHRISHEVA, N. (2023). Legal Foundations for Resolving Land Disputes Through Mediation as an Alternative Dispute Resolution Method. *European Energy and Environmental Law Review*, 32(5), 248-256. URL: https://kluwerlawonline.com/journalarticle/European+Energy+and+Environmental+Law+Review/32.5%20[pre-publication]/EELR2023014;

[35] SERHII, KRAVTSOV; ALINA, SERHEIEVA. Right to be heard as a part of due process of law in arbitration proceedings: current challenges and lessons for Ukraine. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, p. 221– 239, jul./dez. 2023. DOI: 10.52028/rbadr.v5i10.ART10.LU.

develop the social sphere, and improve the quality of life of the population. Social protection strategies cover such aspects as the social security system, education and training development, social integration and human rights protection, support for economic development, and joint efforts to combat complex challenges.

Cooperation with the EU contributes to the adaptation of Ukraine's social security system to European standards, the development of education, and the professional development of citizens. It also contributes to the protection of human rights, the development of entrepreneurship, and the improvement of living standards. The EU's financial and technical support helps Ukraine implement important social projects and programs.

One of the most important areas of cooperation is the fight against poverty and social inclusion. With the help of the EU, Ukraine develops and implements social programs aimed at reducing poverty and improving the living standards of the most vulnerable segments of the population. Ukraine continues to work on the implementation of European standards in the field of social protection, human rights, and democratic values.

Ukraine cooperates with the European Union in the areas of social protection, healthcare, labor protection, and social entrepreneurship. This cooperation contributes to improving access to quality healthcare, improving working conditions, developing social services, and protecting human rights. It helps Ukraine to adapt to European standards, strengthens democratic values, and improves the quality of life of its citizens. Cooperation with the EU plays an important role in the development of Ukraine as a society that cares about the welfare of its citizens.

Social protection in Ukraine faces numerous challenges and shortcomings. Insufficient social benefits, low access to health care, insufficient support for families and children, financial instability, bureaucratic obstacles, and inequalities in the distribution of social services are just a few of the problems that need to be addressed. To improve the social protection system, it is necessary to provide adequate resources, simplify procedures, ensure equal access and protection for all citizens, fight corruption, and ensure transparency in social services. This requires broad cooperation between the government, civil society organizations, and international partners to achieve equitable and effective social protection for all citizens.

To improve the social protection system in Ukraine, several measures need to be taken. Among them, it is important to define a social protection strategy, focus on the role of the family as the main pillar of social policy, and establish legislation on social law and social protection. It is also necessary to improve the system of social transfers, to involve local communities in financing and prioritizing social protection, and to improve the targeting of assistance based on the real

needs of individuals and families. It is important to reform the system of social services, ensuring their accessibility and adaptation to the needs of consumers. In addition, it is necessary to actively implement the social protection strategy, promote the self-defense of individuals, and move from the categorical principle to an individual approach to benefits. It is also important to establish clear funding for each type of benefit and limit their introduction, ensuring transparency and efficiency of the social protection system.

The "multi-level courts" system and alternative dispute resolution (ADR) have become important social protection tactics, offering easily accessible and effective means of dispute resolution. ADR increases people's trust in the legal system while saving them money and time. Legal conflicts at multiple judicial levels can be resolved fairly and efficiently through a system of "multi-level courts". For this tactic to be successful, the state must establish legislative norms, harmonise judicial processes and provide funding for the infrastructure of the ADR system and "multi-level courts".

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The notarial mediation as an alternative way of resolving legal disputes in the Russian Federation

Olga Kuznetsova

Doctor of Legal Sciences, Professor of the Perm State National Research University, Professor of the Perm Institute of the Federal Penitentiary Service of Russia. E-mail: kuznetsova_psu@mail.ru. ORCID: https://orcid.org/0000-0001-6880-5604.

Tatyana Andropova

Candidate of Legal Sciences, Assistant Notary of the Perm City Notarial District, Senior Lecturer of the Perm Branch of the Higher School of Economics. E-mail: andropovatv@yandex.ru. ORCID: https://orcid.org/0009-0002-6471-5251.

Lilia Bakulina

Doctor of Legal Sciences, Professor of the Russian Academy of Sciences, Dean of the Faculty of Law of the Kazan Federal University. E-mail: bltkfu@mail.ru. ORCID: 0000-0002-8891-6974

Abstract: Mediation technologies are one of the alternative ways to resolve judicial disputes, and extrajudicial methods to resolve legal conflicts are a priority and promising direction. The mediation institute affects many aspects of social relations and is relevant in foreign legal orders and the Russian Federation. This paper aims to analyze the concept of notarial mediation as an alternative way of resolving legal disputes in the Russian Federation, define the issues related to its implementation, and further perspectives on its development. A set of methods was used to achieve the aim of the paper. Thus, the authors applied a systemic approach to study the implementation of the concept of "notarial mediation" in the Russian Federation. Also, comparative legal analysis was used to address the development of the concept of notarial mediation in different countries from a comparative perspective. The authors concluded that notarial mediation in the Russian Federation, one of the methods of out-of-court reconciliation, is becoming increasingly popular and in demand as an institution of dispute resolution with the help of a notary and a mediator (conciliator). Participation of a notary in the certification of the mediation agreement on the results of the mediation procedure guarantees the legality of the agreements reached and gives the mediation agreement executive force.

Keywords: Mediation. Alternative methods of dispute resolution. Mediation agreement. Notary. Notarial mediation. Certification of mediation agreement.

1 Introduction

Modern Russian legislation provides for several types of conciliation procedures or alternative dispute resolution, which should include negotiations, mediation, conclusion of an amicable agreement, application to the intermediate court (arbitration) and other conciliation procedures that do not contradict the current legislation. These procedures aim at the resolution by the subjects of law of the dispute arising between them on terms mutually acceptable to them by finding an acceptable option for the conflicting parties to resolve the problem.

Extrajudicial conciliation as a form of resolution of legal conflict is the most preferable, civilized way of protection of violated rights in foreign legal orders.[1] Currently, in Russia the issues of extrajudicial conciliation are in the spotlight of scientists, legislators, and practitioners. The effectiveness of mediation procedures conducted by a mediator on the basis of established legal norms is ensured by the presence of a third party not interested in the conflict – a mediator, who helps the parties in dealing with the conflict situation by applying special skills in the field of communication, conflict analysis and management, organization and conduct of negotiations, conciliation procedures in conjunction with legal training.[2]

The mediator does not make a decision on the dispute, their role is to facilitate the discussion on its settlement, and the parties themselves take an agreed decision to sign an appropriate agreement on mutual terms. This is not an ordinary mediation procedure, because it involves interpersonal legal relations even being realized within the legal framework and entailing legal consequences. The mediator becomes a translator from the language of conflicts and emotions to the language of facts, rights and obligations, translates the thoughts of one party to the other and helps the parties to reach an agreement.[3] Mediation is one of the most effective dispute resolution procedures, as the parties overcome the conflict by their own will, come to an agreed solution and subsequently, as a rule, do not revise or challenge this decision.

Legislative regulation of the mentioned procedure occurred with the adoption of the Federal Law No. 193-ФЗ dated 27.07.2010 "On alternative dispute

1 PRESCOTT, J.J., SPIER, Kathryn E., YOON, A. Trial and Settlement: A Study of High-Low Agreements. The Journal of Law & Economics, vol. 57, n. 3, 699, 2014; JOSÉ, Pascal da Rocha. The Changing Nature of International Mediation. Global Policy, vol. 10, n. S2, 2019; FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", Technology in Society, 68, 101872, 2022; FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5-26, 2021.

2 GLAZOV, D.V. Mediation as an Alternative Way to Protect Inheritance Rights in Notary Practice. Notary Bulletin, n. 8, p. 10, 2023.

3 KARPUNINA, O.V. Notarial Certification of Mediation Agreements: Issues of Theory and Practice, n. 2, p. 30, 2022.

resolution procedure with the participation of a mediator (mediation procedure)" (hereinafter - the Mediation Law). As of October 25, 2019, the Russian legislation on the possibility of notary participation in the mediation procedure when certifying a mediation agreement came into force. The demand for notarization of mediation agreements is growing, as the notary ensures the guarantee of compliance with the terms of the parties' agreement, its legal purity, and such mediation agreement acquires additional legal weight and enforceability.

That is why the aim of this paper is to analyze the concept of notarial mediation as an alternative way of resolving legal disputes in the Russian Federation, define the issues related to its implementation, and further perspectives of its development.

To achieve mentioned aim of the paper the set of methods were used. Thus, authors applied systemic approach to study the implementation of the concept "notarial mediation" in the Russian Federation. Also, comparative legal analysis was used to address the development of the concept of notarial mediation in different countries in comparative perspective.

2 The modern approaches to mediation

One of the peculiarities of mediation as a procedure of alternative dispute resolution is the mobility of its procedural form and the lack of strict certainty in its content. If the judicial process carries out according to strict procedural rules established by law, the procedural structure of mediation is dynamic, often unwritten. The lack of universal rules and standards of mediation, the diversity of practices, approaches to understanding its content, as well as the marked difference in the styles of practicing mediators are just a few factors that make it impossible to develop a unified concept of mediation, containing clear criteria for its definition, and thus to distinguish it from other procedures similar in content and certain features.[4]

Mediation procedure is quite popular and in demand in foreign legal orders, where it is usually carried out only on a professional basis and affects a wide range of social relations.[5] To date, the study of Russian and foreign legislation, as well

[4] ABOLONIN, V.O. Judicial Mediation: Theory, Practice, Prospects. Moscow: Infotropik Media, 2015, 42; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law, 36, 2261, 2023; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, p. 153-175, 2023.

[5] JAYADI, H.; HASIBUAN, H.; KUNTADI, K.; SUSANTO, H. Analysis of the Efficiency of Mediation Methods in Handling Conflicts. Journal of Law and Sustainable Development, vol. 12, n. 1, pp. 1-16, 2024; SINIŠA, Vuković. International Multiparty Mediation: Prospects for a Coordinated Effort. Global Policy, vol. 10, 2, 2019.

as special doctrinal literature and available practice allows us to identify three main approaches to the understanding of mediation, which can be conditionally labeled as cumulative, framework, and exclusive.[6] Each of these approaches to the understanding of mediation has a number of peculiarities and consists mainly of the following.

Cumulative approach. In this approach, mediation is seen as the broadest possible "cumulative concept" (German Containerbegriff), which includes all possible variants of conciliation procedures with the participation of a mediator, from any form of indirect negotiations in political conflicts and wars to school, family, and domestic reconciliation.[7] This understanding of mediation bases on the notion of its ancient origin and genesis in diplomacy, with its subsequent adoption in business and everyday practice of conflict resolution. This approach does not allow defining the essence of mediation and includes unreasonably wide range of procedures and forms of conflict resolution, different in character.[8]

Framework approach. In this approach, mediation performs as a framework concept that combines certain types of procedures involving an independent third party who does not have the authority to resolve a dispute in most civil, family and commercial disputes, excluding conciliation procedures in political and a number of other conflicts.[9] This understanding of mediation is based on the classification of all alternative forms of dispute resolution into three groups, where the first group includes forms involving direct interaction between the conflicting parties (negotiation), the second group includes forms involving a mediator without authority to resolve the dispute (mediation), and the third group includes forms involving a mediator with authority to resolve the dispute (arbitration).

Special approach. This approach understands mediation as a special procedure similar to other types (such as moderation or conciliation), but with a number of specific features, mainly related to the understanding of the mediator's role, the techniques used in the procedure, and the implementation of the basic principles underlying mediation.[10] In this approach, the definition of mediation becomes more complex and includes, in addition to its general standard description as "a procedure involving a mediator who does not have the power

6 LOHVINENKO, M., STARYNSKYI, M., RUDENKO, L.; KORDUNIAN, I. Models of Mediation: Theoretical and Legal Analysis. Conflict Resolution Quarterly, vol. 39, n. 1, 51, 2021.

7 KREISSL, Stephan. Mediation – von der Alternative zum Recht zur Integration in das Staatliche Konfliktlosungssystem. SchiedsVZ, n. 5, 230, 2012.

8 GLASL, F. Mediation zwischen Anspruch und Wirklichkeit. Eine Bestandsaufnahme von 2009 in sieben Thesen. Gesprächspsychotherapie und Personzentrierte Beratung, n. 3, 129, 2009.

9 HIDALGO, L.R.; LEBOVITS, G. Alternative Dispute Resolution in Real Estate Matters: The New York Experience. Cardozo Journal of Conflict Resolution, vol. 11, p. 437, 2010.

10 CLAYTON, G.; DORUSSEN, H. The Effectiveness of Mediation and Peacekeeping for Ending Conflict. Journal of Peace Research, vol. 59, n. 2, pp. 107-301, 2022. DOI: https://doi.org/10.1177/0022343321990076.

to resolve a dispute and assists the parties in finding a solution", a number of additional criteria, which may include "mutual benefit of the solution reached", "the mediator has special education, knowledge, and skills in conflict resolution", "the development of a solution based on the interests of the parties" (i.e., the final solution should be reached within the framework of a special cooperative strategy, which in English-language literature is called "win-win", i.e., such a variant of the solution in which both parties win).[11]

According to Paragraph 2 of Article 1 of the Law on Mediation, the following categories of cases may be settled by mediation: civil, family, labor (except for collective labor disputes), corporate, administrative and other cases related to public legal relations, including in connection with business and other economic activities. At the same time, if such disputes concern or may affect the rights and legitimate interests of third parties not participating in the mediation procedure or affect public interests, it is impossible to conduct such procedure. Thus, the subjects of mediation legal relations may be both citizens and legal entities, public-law entities, public authorities. Mediation as a method of dispute resolution is most in demand for the following categories of cases: family disputes (disputes related to the upbringing of children, disputes on the division of jointly acquired property between spouses); labor disputes (on reinstatement at work, on wages, on compensation for damage caused in the performance of official duties, etc.); housing disputes; land disputes; consumer protection disputes; disputes related to inheritance of property; disputes in cases on protection of honor, dignity, and business reputation; disputes on recovery of amounts under the loan agreement, credit and in other cases. The expansion of the range of cases of application of mediation to resolve disputes in administrative legal relations seems to be positive.[12] In foreign legal orders, mediation is applied to a wide range of social and public relations, in particular, it is very relevant in the sphere of economics and environment.[13]

[11] GOLDWICH, D. Win-Win Negotiations: Developing the Mindset, Skills and Behaviours of Win-Win Negotiators. Singapore, p. 15, 2010.

[12] YUDINA, Yu.V. The Mediation Procedure as a Type of Reconciliation in the Modern Russian Civil Procedure. Arbitration and Civil Procedure Journal, n. 2, p. 47, 2021.

[13] FENG, Zhiyuan; LI, Yali. Natural Resource Curse and Fiscal Decentralization: Exploring the Mediating Role of Green Innovations and Market Regulations in G-20 Economies. Resources Policy, vol. 89, 2024; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56, 2023; DHIAULHAQ, A., DE BRUYN, T., GRITTEN, D. The Use and Effectiveness of Mediation in Forest and Land Conflict Transformation in Southeast Asia: Case Studies From Cambodia, Indonesia and Thailand. Environmental Science & Policy, vol. 45, 132, 2015.

3 The notarial mediation

Despite the wide range of the above-mentioned legal relations to which the mediation procedure may be applied, only certain legal relations are the subject of the notarized certified mediation agreement. Based on the systematic interpretation of Article 59.1 of the Fundamentals of Notarial Legislation of the Russian Federation, Paragraph 2 of Article 1 and Paragraphs 4 and 5 of Article 12 of the Law on Mediation, researchers make a reasonable conclusion that disputes arising only from civil and family legal relations (in terms of property relations) can be settled by concluding a notarized mediation agreement.[14] As a rule, these are various types of obligatory agreements between legal entities and individuals: on the fulfillment of monetary obligations, obligations to transfer property, on voluntary compensation for harm caused, agreements on contractual settlement of family law and inheritance disputes.[15] Mediation agreement may be complex and contain terms on settlement of disputes arising from both civil and other legal relations, which the legislation allows. Therefore, a notary may certify a mediation agreement on a dispute arising out of civil legal (in particular, corporate) or family (in terms of property relations) relations, while the agreed terms for the settlement of other categories of disputes will be contained in a mediation agreement concluded in a simple written form. At the same time, different terms of a dispute arising out of civil and/or family legal relations may be subject to a single mediation agreement certified by a notary.

Unlike court proceedings, mediation implies the parties' voluntariness, their cooperation and equality, an expedited informal procedure and confidentiality. Mediation also provides for the impartiality and independence of the mediator. Mediation provides an opportunity for the parties to the dispute to preserve partnership or friendly relations in the perspective of further cooperation, as well as to avoid financial expenses and loss of time spent on consideration of cases in courts.[16]

A mediator must be present during the mediation procedure. The mediator shall not pressure, manipulate, influence or resolve any conflicts for the parties. While conducting the mediation procedure, the mediator shall have the right to meet and communicate with each of the parties individually and with all parties together, and they shall not put any of the parties to the dispute in an advantageous position or diminish the rights and legitimate interests of the other. The mediator

[14] ZAGAJNOVA, S.K. Urgent Issues of Law Enforcement by a Notary When Certifying Mediation Agreements. Notary Bulletin, n. 9, p. 7, 2020.
[15] KORSIK, K.A. Mediation in the Practice of Notaries. Notary Bulletin, n. 9, p. 3, 2020.
[16] YAROSHENKO, T.V. Notary's Mediation Activities: Relevant Issues. Notary, n. 1, p. 18, 2023.

shall try to organize such conditions of negotiations under which the parties could reach a concrete mutually beneficial solution satisfying the interests of all parties. The mediator shall not have the right to represent the interests of any party to the dispute, to provide counseling, legal or other assistance to any party to the dispute, as well as to have any interest in the result of the mediation procedure conducted by them, in particular, to be a relative of one of the parties. The mediator may make a public statement on the merits of the dispute only with the consent of the parties. When drafting the mediation agreement, the mediator's task is to check its terms and conditions for feasibility and satisfaction of the parties' interests, which indirectly indicates the presumption that the mediation agreement is enforceable by the parties.[17]

Mediators in the Russian Federation may be both professional and non-professional participants. Mediator activity on a *non-professional* basis may be carried out by persons who have reached the age of 18, have full legal capacity and have no criminal record. More serious requirements are imposed *on professional* mediators: older than 25 years old, any higher education, additional professional qualifications (a special certificate for mediation procedures), full legal capacity, legal capability and no criminal record. A retired judge may act as a professional mediator. Professional mediators may unite in self-regulatory organizations, which shall be registered in accordance with the procedure established by law. Additional requirements for mediators, including those acting on a professional basis, establish by agreement of the parties or special rules for conducting mediation procedures, which shall be approved by the organization engaged in ensuring the conduct of such procedures. Only professional mediators may appear in court. *The notarization* of a mediation agreement shall also carry out with the participation of a mediator acting on a professional basis or a mediator-representative of an organization engaged in ensuring the conduct of mediation procedures, in accordance with Paragraph 2 of Article 59.1 of the "Fundamentals of Legislation of the Russian Federation on Notarial System".

Mediator's activity is not business activity; it may proceed either on a compensated or non-reimbursed basis. Mediators may engage in any activity not prohibited by the legislation of the Russian Federation, except for filling certain public positions.

At the same time, there are the following problems of the mediation procedure in the Russian Federation: related to difficulties in selecting a mediator; citizens' misunderstanding of the role of the mediator as a subject of legal

[17] ABOLONIN, V.O. Mediation Settlement Agreement: Content and Enforcement in Law of Russia and Germany. Notary Bulletin, n. 9, p. 24, 2020.

relations, contributing to the resolution of the dispute between them; claims to the competence and professional qualities of the mediator; lack of legal literacy and unwillingness of the parties to agree peacefully.[18]

In general, the mediation process in the Russian Federation appears in three agreements: an agreement on the application of the mediation procedure (mediation clause), an agreement on the conduct of the mediation procedure and a mediation agreement.

A mediation agreement (mediation clause) is a preliminary agreement concluded by the disputing parties in writing before or after a dispute arises on the settlement of a dispute over a specific disputed legal relationship through mediation. This agreement may exist either as a stand-alone agreement or as a separate document or a clause in a specific type of contract.

An agreement to mediate is an agreement between the parties in writing specifying the mediation procedure itself. It is from the conclusion of this agreement that the mediation procedure in respect of a particular dispute is considered to have been initiated. Such an agreement shall contain five main details: the subject of the dispute (one or more issues); the mediator, mediators, or an organization engaged in mediation; the procedure for conducting the mediation procedure; the terms of the parties' participation in the costs of the mediation procedure; and the timing of the mediation procedure.

A mediation procedure conducted in accordance with the law ends with the conclusion and signing of *a mediation agreement* or with the parties' refusal to reconcile further. At the same time, the dispute may or may not yet be submitted to the court. In a mediation agreement, the parties resolve disputes, conflicts, and issues of primarily legal nature.

The Conclusion of a mediation agreement in a simple written form is relevant if the parties will execute it voluntarily. In order for it to be enforced and have the force of an enforcement document, it is necessary to continue its execution by notarization or by applying to the court. In particular, if the parties have reached a mediation agreement as a result of a properly conducted mediation procedure *after the dispute has been referred to the court*, such an agreement may be approved by the court or arbitration court as a *settlement agreement* under Article 153.7 of the Civil Procedure Code of the Russian Federation.

If a mediation agreement arises out of a dispute within the framework of civil legal relations and is reached by the disputing parties as a result of the mediation procedure *without referring the dispute to the court*, it is a civil law

[18] KIVLENOK, T.V. The Role of Mediation in The Resolution of Legal Conflicts. Herald of Civil Procedure, vol. 10, n. 4, p. 170, 2020. DOI: 10.24031/2226-0781-2020-10-4-167-177.

contract. The agreement implies not only the resolution of the dispute, but also the achievement of certain aims, counter concessions and obligations. Therefore, the rules on obligations and contracts may also apply to mediation agreements. In particular, according to Article 12 of the Law on Mediation, the rules of civil legislation on novation, assignment, forgiveness of debt, set-off of counterclaims, and compensation for damage may be applied to them.

Notarization of the mediation agreement is not mandatory, however, only in case of notarization it will have the force of an enforcement document, as well as its notarized copy according to Article 12 of the Federal Law "On enforcement proceedings". A mediation agreement shall be certified by a notary according to the rules of certification of contracts, therefore the notary shall explain the meaning and significance of the transaction to the parties and verify the legality of the contract, including whether each of the parties has the right to execute it. This means establishment of the identity of the parties by the notary, verification of the legal capacity of citizens and legal capacity of legal entities, verification of conformity of will and declaration of will, mutuality of free will of the parties. A mediation agreement certified by a notary shall enter into force from the moment of its notarization. Until the moment of its execution, it may be terminated at any time by mutual consent of the parties.

A notary may not certify a mediation agreement in the presence of a dispute in court or a dispute already considered by court.[19] At the same time, according to a number of researchers, if a dispute between the parties is already in court, but in order to settle it the parties have decided to conclude a contract in notarial form, then the subject of notarial certification will not be a mediation agreement, but such a contract made in accordance with the provisions of Article 53 of the Fundamentals of Legislation of the Russian Federation on Notarial System.

Mediation agreement shall protect the interests of all parties and shall be enforceable based on the principles of good faith and voluntariness of the parties. A mediation agreement shall contain information on: the parties to such an agreement, the subject of the dispute, the mediation procedure conducted, the mediator, as well as the obligations, terms, and conditions of their fulfillment agreed upon by the parties. The parties to the mediation agreement shall independently and freely form its terms and conditions without typification of civil law contractual or obligatory mechanisms, in particular, they shall choose any method of securing the obligation, termination of the obligation, may choose and combine several contractual and legal constructions. The mediator is not a

[19] ZAGAJNOVA, S.K. Urgent Issues of Law Enforcement by a Notary When Certifying Mediation Agreements. Notary Bulletin, n. 9, p. 9, 2020.

party to the mediation agreement, but information about their participation shall be indicated when certifying such agreement, they shall sign the mediation agreement if it is notarized according to Article 59.1 of the Fundamentals of Legislation of the Russian Federation on Notarial System. The notary shall identify the mediator and verify their legal capacity. The parties to the mediation agreement must be the same persons as those specified in the mediation agreement. At the same time, when concluding a mediation agreement, the Law on Mediation allows the parties to be represented by a power of attorney, which should clearly state the possibility of the proxy to conclude such an agreement on appropriate terms. On the moment of the conclusion of the mediation agreement, the mediator no longer conducts the mediation procedure at the notary's office, since by the time of the certification of the agreement, the wills of the parties and its terms should have already been agreed upon.

As a general rule, the mediation procedure may be conducted for a maximum of *sixty days.* If the dispute is complex enough, if it is necessary to obtain additional information or provide additional documents, this period may be increased by agreement of the parties and with the consent of the mediator up to *one hundred and eighty* days. However, such prolongation of the term is possible *only in the extrajudicial order* of the mediation procedure.

In the Russian Federation, the notarial system does not belong to the bodies of state power, and the notary does not have the status of an official. At the same time, the notary realizes public-law powers, since all notarial acts are performed on behalf of the state. Notarial certification of a mediation agreement does not change the character of the transaction, but it significantly affects the procedure for its execution, since it is equated with enforcement documents. All other out-of-court conciliation agreements, as well as transactions that have undergone state registration, are deprived of this possibility.

According to the legislation of the Russian Federation, the role of a notary as a guarantor of the legality of contracts when certifying a mediation agreement is limited to the appropriate general verification actions, in particular, the verification of the capacity of the parties, the authority of the mediator, the existence of an agreement on the mediation procedure, the absence of a court dispute, the compliance of the contract with applicable law, the absence of violation of the rights and legitimate interests of third parties, as well as to the verification actions provided for a specific type of contract.[20] The notary participates in the process of execution of the agreement reached by the parties after the

[20] MIKHAILOVA, E.V. Notarized Mediation Agreement: Legal Nature, Procedure for Execution and Challenge. Notary Bulletin, n. 2, p. 20, 2022. DOI: 10.53578/1819-6624_2022_2_17.

mediation procedure, only fixates the final result of mediation – the conclusion of the mediation agreement, the notary does not conduct the procedure itself, as this is the competence of the mediator. When studying foreign experience, it becomes obvious that the development of the institute of mediation agreement in the Russian Federation is at the initial level, and the use of its capabilities and resources for the legal system should be developed. In many European countries, specifically in Austria, Germany, Belgium, France, the Netherlands, Switzerland, a notary can directly act as a mediator and participate in conciliation procedures.[21] In particular, the experience of such foreign countries as France and Germany shows that a notary can quite successfully combine the professional activity with the resolution of disputes and reconciliation of parties, while not pretending to the role of a judge, applying expert legal knowledge and neutral position in relation to the parties to assist in negotiations and reconciliation.[22] For example, in Germany, in accordance with the Civil Procedure Code of the Federal Republic of Germany Paragraph 1 of Article 5, notaries, being public functionaries, in addition to their main notarial activity, represent a kind of conciliation service, i.e., they are obliged to carry out conciliation procedures in relation to certain types of cases listed in the law, in particular in case of inheritance disputes or other issues related to the establishment of property rights. The rules of notarial mediation and the procedure for conducting this procedure in the Federal Republic of Germany are stipulated by law (§20 of the German Notarial Act). A notary has the right to be a mediator if this activity does not contradict the principles of impartiality, independence, and confidentiality. The effectiveness of notarial mediation in this sphere is very high, which is due to the elaboration of this mechanism, as well as the high authority of notaries in German society. The German legislation on notarial mediation also enshrines the principle of a notary's liability for concluding and certifying a knowingly legally unenforceable mediation agreement. The notarial mediation procedure in Germany may be conducted exclusively by notaries who have undergone special training based on the recommendations of the Federal Chamber of the Notarial System. By virtue of notarization, the agreement reached during mediation is enforceable and can be enforced out of court.[23]

The practice of interaction between notaries and conciliation technologies is also present in France, where a Mediation Center was organized in the activities

[21] VERSHININA, E.V.; KONOVALOV, D.V.; NOVIKOV, V.S.; KHOKHLACHEVA, S.V. Concept and Types of Mediation Set Forth in the Legislation and Expounded in the Legal Doctrine in Russia, France, Spain, and the USA. Herald of Civil Procedure, vol. 10, n. 6, p. 150, 2020. DOI: 10.24031/2226-0781-2020-10-6-137-176.

[22] KOKOVA, D.A. Prospects for Strengthening the Notary's Role in Mediation Procedure: Comparative Legal Aspect. Notary Bulletin, n. 8, p. 20, 2023.

[23] ROMANOVSKAYA, O.V. Notary in Russia and Germany: Comparative Legal Experience. Electronic scientific journal «Science. Society. State», vol. 8, no. 1, p. 82, 2020; GUSHCHINA, L.I.; RABOTA, E.O. Experience of Mediation in Notary Activities of Germany and Russia. Essays on the Latest Cameralistics, n. 2, 36, 2020.

of notaries in Paris. According to French notarial legal acts, a notary may perform the functions of mediator and arbitrator. The legislation also defines the spheres of action of notarial mediation in France, namely: family law, real estate contracts, commercial relations involving legal entities. There are also imperative restrictions on mediation activities conducted by a notary: he cannot conduct mediation procedures between individuals and merchants. In order to become a mediator, a French notary must undergo special training, after which he or she may directly start mediation procedures.

An important characteristic of the system of providing mediation procedures to the notary community abroad is the degree of unification achieved in the European region. The European policy is aimed at raising the importance of mediation, which is not only seen as a means to traditionally relieve the burden of the courts, but is presumed to be a special kind of justice, since European citizens often face difficulties in accessing the judicial system, and thus mediation is actually seen as a real opportunity to realize the principle of access to justice. A number of international instruments clearly define the main characteristic of mediation: the possibility of providing an effective and accessible out-of-court resolution of legal conflict in civil and commercial cases.[24]

At the same time, the notarization of meditative agreements in the Russian Federation has a number of indisputable advantages. First, notarization of contracts confirms the emergence of subjective rights and, accordingly, makes it easier for an interested party to prove its right, since the circumstances of a contract officially recorded by a notary are presumed to be legal, obvious, and reliable. Consequently, it becomes easier for each party, if necessary, to prove the fact of out-of-court settlement of the dispute on agreed terms.[25]

If the parties apply to a notary for certification of the mediation agreement, in case of its non-execution, it is possible to avoid filing a lawsuit in court: such a mediation agreement is an enforcement document that can be directly submitted to the bailiff service. Direct enforcement allows avoiding significant costs of enforcing the mediation agreement through a new application to the court, which in turn increases not only the attractiveness of the mediation procedure itself, but also the importance of the functions of the notarial system as an institution of preventive justice.

Thus, in case of a conflict, the parties may resort to the assistance of a mediator, who will help them to agree on all the terms of the dispute with the subsequent execution of the mediation agreement, including through its notarization, or, in

[24] 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 (Strasbourg, 21 May 2008.).

[25] ZYLEVICH, S.Yu. Notarization of Mediation Agreements. Notary Bulletin, n. 2, p. 15, 2022.

the case of independent settlement of the dispute, without the assistance of a mediator, seek the assistance of a notary, who assists participants of civil turnover in exercising their rights and protecting their legitimate interests in accordance with Article 16 of the Fundamentals of Legislation of the Russian Federation on Notarial System. In the latter case, the notary will certify the agreement of the parties as an ordinary transaction, explaining to the parties their rights and obligations, as well as the consequences of the notarial action being performed, with the possibility of including the right to make an executive inscription of the notary on this contract.[26] Since any conciliation procedure is based on the principles of voluntariness, impartiality, equality of the parties, and their cooperation, regardless of the subject who carries out such conciliation procedure, the main thing is to settle the dispute, resolve the conflict and draw up an agreement in a form acceptable to the parties.

4 Conclusion

The main and most significant difference between all alternative dispute resolution methods and the court is their voluntariness both in the aspect of resorting to such a method of dispute resolution and in the process of execution of the decision taken. It is alternative ways of dispute resolution that help to establish relations between the parties more quickly and effectively, as the parties to a dispute, first, take responsibility for their dispute, voluntarily with the help of a mediator find a solution that will satisfy their interests, while remaining within the law. But in Russia, unfortunately, the formation of the system of extrajudicial settlement of civil legal relations is still in its infancy.

Mediation procedure as a type of conciliation procedure, including with the participation of a notary, is relevant and in demand in civil turnover. It serves to settle conflicts out of court, thereby reducing the burden of the courts and preserving good relations between the disputing parties, as the parties resolve the dispute by signing an agreement on mutually acceptable terms. Mediation activities of a notary in the Russian Federation include the following elements: the notary verifies the legality of the agreement reached earlier with the help of a mediator before certifying the mediation agreement; the notary performs explanatory work; the notary certifies the mediation agreement, which reflects the results of the parties' negotiations and contains the mediator's signature. Among the positive characteristics of a notarized mediation agreement are the following: low costs as compared to court proceedings; confidentiality; extraterritoriality (application to a notary allows the agreement to be executed remotely, when the parties to the contract are located in

[26] YARKOV, V.V. Mediation in Notarial Activities: New Opportunities and Their Limits. Notary, n. 1, 5, 2020.

different cities of the Russian Federation and do not have the opportunity to meet in person in one place); enforceability of the decision, since such an agreement has the force of a writ of execution; optimization of the judicial burden; the process of mediation; and the use of notarized mediation agreements. Today, the request of the state, business, and society for more active use of mediation, primarily with the participation of notaries, is becoming increasingly relevant.

Notarial mediation is relevant, and the role of a notary in mediation agreements is obvious. Today, many authors point to the possibility of developing the participation of notaries in mediation. It is noted that the use of any mediation procedures in notary offices can reduce the number of subsequent appeals to the courts, increase the efficiency and speed up the production of notarial actions themselves. One of the promising directions of mediation development is the integration of this procedure and technologies into the activities of notaries. Actualization of notarial mediation primarily aims at increasing the efficiency of protection of rights and legitimate interests of persons.

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The development of arbitration proceedings in Russia

Ramil Khasanshin

Candidate of Legal Sciences, Associate Professor of the Department of Environmental, Labor Law and Civil Procedure of Kazan (Volga Region) Federal University. E-mail: khasanshin.ramil@mail.ru. ORCID: https://orcid.org/0000-0002-0053-5908.

Andrei Yudin

Doctor of Law. Professor. Head of the Department of Civil Procedural and Business Law. Director of the Department of Research Management. Samara National Research University named after Academician S.P. Korolev. E-mail: udin77@mail.ru. ORCID ID: 0000-0002-1840-6223.

Abstract: The article reviews the general development of arbitration proceedings in the Russian Federation. The paper's main aim is to review the general development of arbitration proceedings in the Russian Federation. Using the legal comparative method allowed us to study national and foreign legislation to formulate conclusions about developing the arbitration procedure in Russian legislation. The application of the formal legal analysis made it possible to understand the concept of the arbitration court from a Russian perspective. A brief historical excursion of the development of arbitration proceedings, starting from the twelfth century, was made to achieve the paper's aim. Following that, the author delves into the 2016 arbitration reform, its significance and the current state of arbitration in Russia. The author briefly describes and analyzes permanent arbitration institutions operating in the Russian Federation. At the end of the article, the author discusses the current trends in the development of arbitration and the challenges facing arbitration proceedings in Russia.

Keywords: Arbitral proceedings. Development. Arbitration. Alternative dispute resolution. Regulation disputes.

1 Introduction

Arbitration proceeding, also known as arbitration, is a dispute resolution process in which the parties agree to submit the resolution of a dispute to an independent third party or arbitral tribunal.[1] This third party, or arbitrator, makes a decision, called an arbitral award or arbitral decision, which is binding to the parties.

[1] FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings",

It should be recognized that for quite a long-time arbitration in Russia was associated primarily with international commercial arbitration and was familiar from the practical side only to a small group of specialists. It is obvious that a specialist is accustomed and comfortable with what is familiar and understandable, at least from a theoretical point of view. Therefore, arbitration often seems to lawyers who do not have enough specialized knowledge in this area, more complex than the process in a state court, despite its greater dispositive and flexible procedure.

The main aim of the paper is to review the general development of arbitration proceedings in the Russian Federation. The use of legal comparative method allowed to study national and foreign legislation to formulate some conclusions related to the development of the arbitration procedure in the Russian legislation. The application of the formal legal analysis made it possible to formulate the understanding of the concept of the arbitration court from Russian perspective.

For readers' convenience at the beginning of the article, the author makes a brief historical excursion of the development of arbitration proceedings, starting from the twelfth century. Then, the author then examines the 2016 arbitration reform, its significance and the current state of arbitration in Russia. The author also provides a brief description and analysis of permanent arbitration institutions operating in the Russian Federation. At the end of the article, the author examines the current trends in the development of arbitration, as well as the challenges facing arbitration proceedings in Russia.

2 Arbitration Proceedings in the Russian Federation: The Genesis

The history of arbitration proceedings in Russia has ancient roots. Arbitration courts were first mentioned back in Old Russian times.

The history of specialized courts for commercial cases finds its origin in the Charter of the Novgorod Church of St. John the Baptist on Opoki in 1135,

Technology in Society, 68, 101872, 2022; FILIPCZYK, H. ADR in Tax Disputes in Poland – The State of Play and Perspectives. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, 205, 2023; FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5, 2021; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law, 36, 2261, 2023; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, 153, jul./dez. 2023; GROMOVA E., IVANC T. Regulatory Sandboxes (Experimental Legal Regimes) for Digital Innovations in BRICS. BRICS Law Journal, 7(2), 10-36, 2020; HALOUSH, H.A. The Liberty of Participation in Online Alternative Dispute Resolution Schemes. International Journal of Legal Information, 36(1), 102, 2008; MAIA, A., FLÓRIO, R.A. Online Dispute Resolution (ODR) / Mediação de Conflitos On-line Rumo à Singularidade Tecnológica? Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, 39, 2023; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56, 2023.

granted by Novgorod Feudal Lord Vsevolod Mstislavovich. In the 12th century, in Veliky Novgorod, parallel to the princely court, there was a trade court, which was divided into two parts: one to resolve conflicts between Russian merchants, and the other – a "mixed" court to settle disputes between Novgorod merchants and German "alderman". This merchant court was created with the participation of the Ttysiatskii and five elected headmen. Nevertheless, the above-mentioned document does not consider the trade court as an innovation, but as an application of well-known rules to Ivanovo merchants.

It is interesting that both in Russia and in European countries the idea of specialized courts to resolve commercial disputes originated from where trade was particularly developed and where there were close ties with foreign merchants.

In the judicial practice of the First Russian state for commercial cases, exclusively court-ordered litigation was used. In rural areas, the most common way of dispute resolution was arbitration proceedings with the participation of elders and mediators. Another way was village assemblies, where they judged according to customs.

According to the essay of Vitsyn A.I., back in the 14th century there is documented evidence of the existence of an arbitration court in Russia, according to an excerpt from the treaty letter of 1362 of Great Prince Dmitry Ivanovich Donskoy with Prince Vladimir Andreyevich Khrabry: "And what I will seek against your boyars, or what you will seek against my boyars, we will send from each of us a boyar, they will judge, and if their votes are divided, then the third person, whom they choose, will judge them".[2]

By 1911, a draft of the General Statement on Chambers of Commerce and Industry in Russia was prepared. In the section "Subjects of jurisdiction of the Chamber" Paragraph 12 of this draft provided that "the chambers, if there is an agreement between the parties, resolve disputes arising in the field of trade and industry, as an arbitration court, in compliance with the relevant legislative norms". Unfortunately, this document was not adopted.

During the Soviet period, the functions of the arbitration court were delegated to stock exchange arbitration commissions, established in 1922 for commodity and stock exchanges. However, the most striking example of the embodiment of the idea of an arbitration court was the creation of the Foreign Trade Arbitration Commission (FTAC) in 1932 at the All-Union Chamber of Commerce. The decision on its creation was made on June 17, 1932, by the Central Executive Committee and the Council of National Commissars of the Union of Soviet Socialist Republics.

[2] VITSYN, A.I. Arbitration court on Russian law, historical and dogmatic reasoning (M., 1856).

Before the establishment of the Foreign Trade Arbitration Commission, there was no legislation regulating arbitration of foreign trade disputes in permanent arbitration bodies having a non-state character, neither in the legislation of the USSR nor in the legislation of the Union republics.

In the period of 1950-1960s, after the Second World War, economic activity in our country revitalized, the ideas of self-support and self-financing became popular. At the same time, public forms of government, including public forms of justice such as comradeship and arbitration courts, were also gaining importance. These trends partly drew the attention of the legislator to arbitration methods of dispute resolution in the economic sphere. The increasing role of arbitration courts was attributed to the desire to involve the public in tasks normally performed by government agencies. Arbitration proceedings were seen as another step in the transition from socialist statehood to public self-government.

On July 23, 1959, the Council of Ministers of the USSR adopted a resolution "On improving the work of state arbitration" which allowed arbitration of disputes between legal entities. This decision was considered by M.I. Kleandrov as the initial legal basis for the establishment of arbitration courts for the resolution of economic disputes at the current stage of development of legal regulation. It was aimed at using new forms of public involvement in resolving complex economic disputes between enterprises, organizations and institutions.

The modern understanding and development of arbitration proceedings began in the early 20th century. A special impetus to the development of arbitration proceedings was given during the period of perestroika and economic reforms of the 1990s.

3 Arbitration proceedings in the modern Russian Federation

The development of arbitration proceedings in modern Russia began in the early 1990s with the adoption of the Federal Law "On Arbitration Courts in the Russian Federation" in 1993. This law established the legal basis for arbitration procedures in Russia and provided an opportunity for more flexible and efficient resolution of commercial disputes.

Since the 1990s, arbitration proceedings in Russia have been actively developing, implementing modern international standards.

On September 1, 2016, the Federal Law dated December 29, 2015, No. 382-ФЗ "On Arbitration (Arbitration Proceedings) in the Russian Federation" (hereinafter – the Arbitration Law) came into force and replaced the Federal Law dated July 24, 2002, No. 102-ФЗ "On Arbitration Courts in the Russian Federation" (hereinafter – the Arbitration Law).

The reform of arbitration proceedings in Russia is due to the impossibility of the previously existing legislation on arbitration courts to ensure a high level of protection of subjective rights of participants in civil legal relations.

As a result of the reform of the institution of arbitration in Russia in 2016, arbitration institutions with the status of permanent arbitration institutions (PIAU) emerged. This status may be granted by the Ministry of Justice of the Russian Federation to a subdivision of a non-profit organization that performs arbitration administration functions on a permanent basis. At the moment, Russian arbitration centers with the status of PIAU include:

The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) is Russia's leading permanent arbitration institution administering primarily international commercial disputes, the successor to the Foreign Trade Arbitration Commission established at the All-Union Chamber of Commerce in 1932.

ICAC is among the largest and most authoritative arbitration centers recognized by both domestic and foreign businessmen.

Every year the ICAC receives from 250 to 300 international commercial disputes involving companies from 40-50 countries, which exceeds similar indicators of the leading arbitration centers of England, Sweden, and Germany.

The number of cases in which both parties are non-residents of the Russian Federation is growing annually.

The analysis of ICAC arbitration practice also indicates a trend towards an increase in the number of cases with large claims exceeding USD 10,000,000. The share of such cases over the last 5 years has increased from 3.5% to 23% of the disputes considered.

In 2017, ICAC celebrated its 85th anniversary. In total, ICAC has handled more than 10,000 cases over the years.[3]

The Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC), established in 1930, is today one of the oldest maritime arbitration tribunals in our country and in the world.

The IAC was originally established to consider only those disputes arising in connection with salvage of ships and cargoes at sea. Today, along with traditional disputes arising out of cargo transportation, chartering, marine insurance, salvage, collision between ships, fishing operations, the Commission's proceedings may include disputes arising out of brokerage and agency agreements, ship repair,

[3] International Commercial Arbitration Court, https://mkas.tpprf.ru/.

ship management, fishing, and a variety of other relations arising in the field of merchant shipping.[4]

The Russian Arbitration Center at the Autonomous Nonprofit Organization "Russian Institute of Modern Arbitration" (RAC) is a permanent arbitration institution established at the Autonomous Nonprofit Organization "Russian Institute of Modern Arbitration" (RISA) and operating with the support of the Federal Chamber of Lawyers of the Russian Federation and the St. Petersburg International Legal Forum.[5]

The Arbitration Center at the All-Russian Public Organization "Russian Union of Industrialists and Entrepreneurs" is a permanent arbitration institution carrying out activities on administration of arbitration (arbitration proceedings) in accordance with the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" and the Law of the Russian Federation "On International Commercial Arbitration".

The right to perform the functions of the arbitration institution is granted to the Russian Union of Industrialists and Entrepreneurs on the basis of the order of the Government of the Russian Federation dated 27.04.2017 No. 798-p. The Arbitration Center is the legal successor of the Arbitration Court at the RUIE (established in 2006), the Arbitration Commission at PJSC Moscow Exchange (established in 1994) and the Arbitration Court of the National Association of Stock Market Participants (NASMP) (established in 1997).

The National Center for Sports Arbitration at the autonomous non-profit organization "Sports Arbitration Chamber", which is a permanent arbitration institution administering arbitration (arbitration proceedings) of disputes in professional and top-level sports, including individual labor disputes. Only it, according to Article 36.2 of the Federal Law No. 329-ФЗ "On Physical Culture and Sports in the Russian Federation" dated December 4, 2007, can administer all disputes in professional and high-performance sports, including individual labor disputes.

The Arbitration Institution under the All-Russian Industry Association of Employers "Union of Machine Builders of Russia" (the youngest permanent arbitration institution, which currently has the right to administer only domestic disputes).[6]

[4] Maritime Arbitration Commission, https://mac.tpprf.ru.

[5] MURANOV, A.I. Russian' Institute of modern arbitration and "Russian" arbitration center: a study of their role in the arbitration sphere in the Russian Federation. GONGO-structures? Declarations and Reality. How the vertical of power works in arbitration (M., 2020).

[6] Ministry of Justice of the Russian Federation, https://minjust.gov.ru.

Among foreign arbitration institutions, only the Hong Kong International Arbitration Center and the Vienna International Arbitration Center had such status until recently.[7]

4 The concept of arbitration court in Russia

In the previously existing legislation on arbitration courts the concept of "arbitration court" was disclosed through the indication of two main types in which it exists – "permanent arbitration court" (such courts are sometimes called "institutional", "institution" and "arbitration court formed by the parties to resolve a particular dispute" (or arbitration court ad hoc – from Latin "for a given case"), which in the literature is also sometimes called "isolated arbitration court" or "isolated arbitration".[8]

The above definition of the concept of "arbitration court" did not reveal the legal essence of this institution, did not define the features that separate arbitration courts from state courts and international arbitration.

In the legal literature, there are doctrinal definitions given to arbitration courts.

Thus, R.F. Kallistratova believes that "a lawyer, disclosing the term 'arbitration court', should emphasize in the study of its status as a permanent entity that it is a non-state law enforcement body, carrying out its activities on the basis of self-government, that the decisions of the arbitration court are sanctioned by the state, therefore have a mandatory-coercive character".[9]

In its turn, Ya.F. Farkhtdinov writes that "arbitration courts, regardless of the forms of their organization, are public law enforcement jurisdictional bodies (courts) authorized by the state to resolve disputes of civil law character, and their activities have a legal, law enforcement character with all the ensuing legal consequences".[10]

Another opinion was made by E.A. Vinogradova, that states: "Arbitration court is a person (persons) elected by the parties or appointed by them in a certain order, considering and resolving the dispute submitted to their consideration by agreement of the parties, in the order, also determined by these parties, and

7 MAIA, A., FLÓRIO, R.A. Online Dispute Resolution (ODR) / Mediação de Conflitos On-line Rumo à Singularidade Tecnológica? Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, 39, 2023; PRESCOTT, J.J., SPIER, K.E., YOON, A. Trial and Settlement: A Study of High-Low Agreements. The Journal of Law & Economics, vol. 57, n. 3, 699, 2014.

8 LEBEDEV, K.K. Legal service of business (corporate lawyer) (M., 2001); KARABELNIKOV, B.R. Recognition and enforcement of foreign arbitral awards: Scientific and practical commentary to the New York Convention (Moscow: CJSC, "Yustitsinform", 2001).

9 KALLISTRATOVA, R.F. Alternative legal proceedings for the resolution of economic disputes, Judicial system of Russia, 5, 239, 2000.

10 FARHTDINOV, Ya.F. The role of arbitration courts in the system of bodies for the protection of violated or challenged civil rights, Arbitration Court, 5/6, 35, 2006.

authorized to make a decision having for the parties the degree of binding force, which is directly or indirectly defined in their agreement".[11]

"Arbitration courts are non-state independent courts elected by the parties to a legal relationship themselves to resolve a dispute arising between them".[12]

This statement quite succinctly formulates the essence of arbitration courts and indicates all their main features: non-state character; independent character; electability by the participants themselves; focus on the resolution of disputes.

Thus, in general, the researchers are in agreement. The arbitration court is understood as a non-state body, the purpose of which is to resolve a civil-law dispute, and which is elected by the participants of the disputed civil-law relationship themselves.

The new Arbitration Law defines an arbitral tribunal as "a sole arbitrator or a collegium of arbitrators". An arbitrator ("arbitral judge") is defined as "a person chosen by the parties or chosen (appointed) in the manner agreed upon by the parties or established by federal law to resolve the dispute by the arbitral tribunal".

Thus, the legislator in the above definitions has fully reflected the legal character of the concept of "arbitration court", namely, it is a jurisdictional entity of a private character designed to resolve civil-law disputes referred to it for consideration.

The new Arbitration Law retains the notion of "an arbitration court formed to resolve a specific dispute". At the same time, the concept of "permanent arbitration institution" has been introduced, which is a subdivision of a non-profit organization that performs the functions of administering arbitration on a permanent basis.

The Arbitration Law establishes that the activities of arbitrators within the framework of arbitration (arbitration proceedings) are not entrepreneurial.

The arbitral tribunal, i.e., arbitrators, shall not be civilly liable to the parties to the dispute, as well as to the arbitral institution in connection with the non-performance or improper performance of the arbitrator's functions, with the only exception: the damage caused as a result of the arbitrator's culpable acts may be compensated in a civil action in a criminal case only on the basis of a court judgment that has entered into legal force.

It should be taken into account that arbitration courts do not belong to the judicial system of the Russian Federation,[13] do not carry out justice and legal proceedings in civil cases, as state courts do it.

[11] VINOGRADOVA, E.A. Legal bases of organization and activity of the arbitration court (M., 2003).

[12] Commercial Law: textbook: in 2 parts; ed. by V.F. Popondopulo, V.F. Yakovleva. 3rd ed., revision and additions (Moscow, 2002).

[13] Decision of the Constitutional Court of the Russian Federation of April 13, 2000, No. 45-O "On refusal to accept for consideration the appeal of the Independent Arbitration (Arbitration Tribunal) Court at the

One of the significant factors in the development of arbitration proceedings in Russia is the strengthening of the country's international position. With the growing number of international commercial transactions, there is a need for an effective mechanism of dispute resolution, which makes arbitration procedures increasingly in demand both inside and outside the country.

Arbitration proceedings in Russia play a key role in ensuring fairness and efficiency of dispute resolution in the commercial sphere. Its importance is due to several factors:

- Arbitration procedures provide faster, and more efficient dispute resolution compared to litigation, which reduces time and financial costs for the parties.
- The parties are able to choose their own arbitration procedures, rules and venue, which provides flexibility and adaptability to the specific needs and requirements of the case.
- Arbitration tribunals often specialize in certain types of disputes, which provides a deeper understanding of the context of the case and more competent decision-making.
- Arbitral awards are usually easier to enforce than judicial awards, which increases the efficiency of the enforcement process and builds confidence in arbitration as a dispute resolution mechanism.

5 Conclusion

Modern arbitration proceedings in Russia are in line with international trends in the field of alternative dispute resolution. In particular, with the increasing number of international commercial transactions and investments, there is a growing demand for dispute resolution mechanisms that would provide a high degree of protection of the rights and interests of parties from different countries. In this context, arbitration proceedings in Russia are becoming increasingly attractive for both domestic and foreign parties.

One of the important international trends is the development of digital technologies and their introduction into arbitration processes. In particular, the use of electronic platforms for arbitration procedures can significantly simplify access to arbitration, speed up the dispute resolution process and make it more transparent and efficient.

Another significant area for the development of arbitration proceedings is the strengthening of international cooperation in this area. Russian arbitration courts

Chamber of Commerce and Industry of the Stavropol area to check the constitutionality of Article 333 of the Civil Code of the Russian Federation" // Reference legal system "Garant".

actively cooperate with foreign partners, share experience and best practices, which contributes to improving the quality of services and the attractiveness of Russian arbitration for foreign parties.

However, despite the positive trends, arbitration proceedings in Russia also face challenges. One such challenge is the need to further improve the legal framework and legislation governing arbitration procedures. This includes the settlement of issues related to the application and recognition of arbitral awards abroad, as well as ensuring reliable protection of the rights and interests of the parties at all stages of arbitration proceedings.

It is also worth noting that due to global changes such as technological innovations, changes in the international political environment and economic trends, arbitration proceedings must constantly adapt and improve in order to effectively respond to the challenges and opportunities presented by modern business.

Thus, arbitration proceedings in Russia play a key role in the resolution of commercial disputes, ensuring that disputes are resolved quickly, efficiently and fairly within a framework of legality and fairness. Its development and importance continue to grow in the context of modern Russian and international legal practice, as well as under the influence of international trends in alternative dispute resolution. At the same time, arbitration proceedings face challenges that require continuous improvement and adaptation to changing conditions.

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Pre-trial procedures in disputes on the protection of intellectual rights

Ruslan Sitdikov

Associate Professor of the Department of Environmental, Labor Law and Civil Procedure of the Faculty of Law of the Kazan (Volga Region) Federal University. E-mail: Ruslan.sitdikov@gmail.com. ORCID: https://orcid.org/0000-0002-1116-8031.

Rosa Salieva

Doctor of Law. Professor of the Department of Business and Energy Law of Kazan Federal University. Head of the Laboratory of Legal Problems of Subsoil Use. Ecology and Fuel and Energy Complex of the Academy of Sciences of the Republic of Tatarstan. E-mail: Roza.Salieva@kpfu.ru. ORCID ID: 0000-0003-0278-4948.

Abstract: Pre-trial conflict resolution procedures do not cease to be in demand, and the development of their legal regulation does not lose its relevance. Disputes on protecting intellectual rights are no exception, and most countries have established special pre-trial procedures. However, specific difficulties emerge when applying the legal norms related to pre-trial conflict resolution procedures in disputes on the protection of intellectual rights, which can be clearly demonstrated while studying the Russian experience using the mentioned pre-trial procedures. The paper aims to analyze and define the peculiarities of pre-trial procedures in disputes on protecting intellectual rights in Russia. Using systemic approach, as well as comparative legal and formal legal analysis allowed author to define the peculiarities of pre-trial procedures in disputes on the protection of intellectual rights in the Russian Federation: special requirement on the mandatory pre-trial claim procedure is a departure from the general approach, according to which such procedure is required for disputes arising from transactions or unjust enrichment, and is probably due to the complexity of these disputes; in the administrative pre-trial procedure of dispute examination in the Chamber of Patent Disputes the parties have a wide enough set of procedural rights and opportunities, and the procedure is quite close to the judicial procedure, and in some respects even exceeds it.

Keywords: Pre-trial settlement. Russia. Claim procedure. Intellectual rights protection. Chamber of Patent Disputes.

1 Introduction

Against the background of ever-increasing judicial burden, pre-trial conflict resolution procedures do not cease to be in demand, and the development of their legal regulation does not lose its relevance.[1]

[1] VALEEV, D., KRSLJANIN, N. Kazan arbitration day: The rule-of-law development and regional governance. Russian Law Journal, Vol.5, Is.2, 129, 2017; MALESHIN, D., SILVESTRI, E., SITDIKOV, R., VALEEV, D.

This thesis is relevant not only for Russia, but, perhaps, for most countries of the world.[2] Disputes on the protection of intellectual rights are not an exception in this respect.[3]

The special legislative requirement on the mandatory pre-trial claim procedure for the settlement of disputes on the protection of intellectual rights related to the recovery of damages and/or compensation for the violation of exclusive rights is a departure from the general approach. Such a procedure is required for disputes arising from transactions or unjust enrichment, and is probably due to the complexity of these disputes.

The special claim procedure for settling a dispute on early termination of the legal protection of a trademark due to its non-use allows guaranteeing the protection of the rights and interests of both the right holder (as it gives them sufficient time to think over the proposal and respond to it) and the plaintiff. It happens due to the subsequent calculation of the three-year period of non-use will be carried out until the date of sending a claim and not filing a lawsuit, which eliminates the risk of evasion / circumvention by the right holder by starting to use the goods.

In administrative pre-trial proceedings before the Chamber of Patent Disputes, the parties have access to a wide range of procedural rights and opportunities, and the procedure is quite similar to, and in some respects even superior to, the judicial procedure.

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3 LIDE, E. C. ADR and cyberspace: the role of alternative dispute resolution in online commerce, intellectual property and defamation. Ohio St. J. on Disp. Resol., 12, 193, 1996; MITCHELL, R. T. Resolving Domain Name-Trademark Disputes: A New System of Alternative Dispute Resolution Is Needed in Cyberspace. Ohio St. J. on Disp. Resol., 14, 157, 1998; BLACKMAN, S. H., & MCNEILL, R. M. Alternative Dispute Resolution in Commercial Intellectual Property Disputes. Am. UL Rev, 47, 1709, 1997; SMITH, M.A. Arbitration of Patent Infringement and Validity Issues Worldwide, HARVJ.OF LAW &TECH, 19, 299, 2006.

For example, one of the advantages of dispute examination in the Chamber of Patent Disputes is that the members of the collegium are persons with specialized knowledge of the subject of the dispute. This practically eliminates the need to appoint an expert examination or engage specialists; allows critical evaluation of evidence containing information related to special knowledge; allows the parties to compete not only in matters of law and facts, but also in the relevant area of specialized knowledge.

At the same time, there is a problem that the Chamber of Patent Disputes is subordinate to the body/person whose acts/decisions it reviews. The fact that formally the final decision is made by the Head of the Russian Federal Service for Intellectual Property (and not by the Board of the Chamber of Patent Disputes), in our opinion, does not really remove this problem. The real role of the head here is reduced not to "making" the decision, but to its "approval" (as it was called in the former rules), since the head of Russian Federal Service for Intellectual Property does not personally participate in the examination of the dispute and, accordingly, cannot or should not "make" decisions on the dispute. This problem may create risks of violation of the guarantees of independence and impartiality in the examination of disputes in the Chamber of Patent Disputes.

The aim of the paper is to analyze and define the peculiarities pre-trial procedures in disputes on the protection of intellectual rights in Russia. Using systemic approach, as well as comparative legal and formal legal analysis allowed author to define the peculiarities of pre-trial procedures in disputes on the protection of intellectual rights in the Russian Federation.

2 Peculiarities of the pre-trial procedure for IP rights' disputes

Disputes on the protection of intellectual rights are characterized by a special legal regulation of their pre-trial settlement, which is expressed in:

- procedural peculiarities of sending a claim both for all cases on the protection of intellectual rights and for their separate objects;
- the existence of specialized administrative bodies and/or procedures for consideration of certain cases.[4]

Non-observance (including improper observance) of the pre-trial procedure of consideration of a dispute on the protection of intellectual rights may lead both to non-acceptance of the claim by the court and to more serious negative

[4] HAZIEVA, G.B., SITDIKOVA, R.I., SAFIN, Z.F., BLYZNETS, I.A. The script work in the complex object of copyrights // Revista san Gregorio, 3, 53, 2018; POTAPENKO, E.G. Procedural and legal consequences of failure to comply with the mandatory claim procedure when applying to the arbitration court, Arbitration and civil procedure, 5, 27, 2021.

consequences. Those might be the loss of tactical advantage in the dispute, omission of the limitation period or the limitation period of application to the court, as well as to unnecessary expenses.

General statements on observance of the pre-trial procedure of economic dispute settlement (not only on protection of intellectual rights) are contained in Part 5 of Article 4 of the Arbitration Procedural Code of the Russian Federation. Civil-law disputes on recovery of money on claims arising from contracts, other transactions, as a result of unjust enrichment, may be submitted to the arbitration court after the parties have taken measures for pre-trial settlement after the expiration of thirty calendar days from the date of sending a claim (demand), unless other term and (or) procedure is not established by law or contract.

Other disputes arising from civil legal relations shall be referred to the arbitration court for resolution after observance of the pre-trial dispute settlement procedure only if such procedure is established by federal law or contract.

Economic disputes arising out of administrative and other public legal relations may be submitted to the arbitration court for resolution after observance of the pre-trial dispute settlement procedure if such procedure is established by the federal law.

Compliance with the pre-trial dispute resolution procedure is not required in cases of establishing facts of legal significance, cases of awarding compensation for violation of the right to trial within a reasonable time or the right to execution of a judicial act within a reasonable time, cases of insolvency (bankruptcy), cases of corporate disputes, cases on the protection of the rights and legitimate interests of a group of persons, cases of writ proceedings, cases related to the performance by arbitration courts of the functions of assistance and control in relation to arbitration courts, cases of recognition and enforcement of decisions of foreign courts and foreign arbitration awards, and also, if otherwise not provided by law, when the prosecutor, state bodies, local government bodies and other bodies apply to the arbitration court in defense of public interests, rights and legitimate interests of organizations and citizens in the field of business and other economic activities.[5]

A special statement on the claim procedure for settling disputes on the protection of intellectual rights is contained in Paragraph 5.1. of Article 1252 of the Civil Code of the Russian Federation, and it applies to all objects of intellectual

[5] VLADIMIROVICH, M.A., SERGEEVICH, E.K. Alternative dispute resolution in digital government. Revista Brasileira de Alternative Dispute Resolution – RBADR, ano 04, n. 07, p. 119, jan./jun. 2022; HAZIEVA, G.B., SITDIKOVA, R.I., SAFIN, Z.F., BLYZNETS, I.A. The script work in the complex object of copyrights // Revista san Gregorio, 3, 53, 2018; POTAPENKO, E.G. Procedural and legal consequences of failure to comply with the mandatory claim procedure when applying to the arbitration court, Arbitration and civil procedure, 5, 27, 2021; KOLZDORF, M.A. Infringement of exclusive rights on the Internet: controversial issues of protection. Arbitration Disputes, 3, 115, 2018.

rights. Thus, if the right holder and the infringer of the exclusive right are legal entities and (or) individual entrepreneurs, and the dispute is to be considered in the arbitration court, before filing a claim for damages or payment of compensation, it is obligatory for the right holder to file a claim.

The claim for compensation of losses or payment of compensation may be brought in case of full or partial refusal to satisfy the claim, or failure to receive a response to it within thirty days from the date of sending the claim, unless another term is provided by the contract.

A claim shall not be required to be filed by the right holder prior to filing a claim not related to the recovery of losses or compensation, namely:

- on recognition of the right;
- on suppression of actions violating the right or creating a threat of its violation;
- compensation for damages;
- seizure of a material storage media;
- publication of the court decision on the infringement.

In addition to the above, for disputes on early termination of legal protection of a trademark, Russian legislation establishes the rules for sending and content of a claim, as well as prescribes possible options for pre-trial settlement. Thus, according to Part 1 of Article 1486 of the Civil Code of the Russian Federation, legal protection of a trademark may be terminated prematurely in respect of all goods or part of the goods for individualization of which the trademark is registered, due to non-use of the trademark continuously for three years.

The interested person who believes that the right holder does not use the trademark in respect of all goods or part of goods for individualization of which the trademark is registered, shall send to such right holder a proposal to apply to the Federal Executive Body in the Field of Intellectual Property with an application for waiver of the right to the trademark. Other way is to conclude with the interested person an agreement on alienation of the exclusive right to the trademark in respect of all goods or part of goods for individualization of which the trademark is registered (hereinafter referred to as the proposal of the interested party).[6] The proposal of the interested party shall be sent to the right holder, as well as to the address specified in the State Register of Trademarks or in the relevant register provided for by the international treaty of the Russian Federation.

[6] POTAPENKO, E.G. Procedural and legal consequences of failure to comply with the mandatory claim procedure when applying to the arbitration court, Arbitration and civil procedure, 5, 27, 2021.

The proposal of the interested party may be sent to the right holder not earlier than after the expiration of three years from the date of state registration of the trademark.

If within two months from the date of sending of the interested party's proposal the right holder does not submit an application for waiver of the right to the trademark and does not conclude with the interested party an agreement on alienation of the exclusive right to the trademark, the interested party within thirty days after the expiration of the said two months shall have the right to apply to the court with a statement of claim for early termination of the legal protection of the trademark due to its non-use.

A new proposal of the interested party may be sent to the right holder of the trademark not earlier than upon expiration of a three-month term from the date of sending the previous proposal of the interested party.

The decision on early termination of legal protection of a trademark due to its non-use shall be adopted by the court in case of non-use by the right holder of the trademark in respect of the relevant goods for individualization of which the trademark is registered, within three years immediately preceding the day of sending to the right holder of the interested party's proposal.

Legal protection of the trademark shall be terminated from the date of entry into legal force of the court decision.

Paragraph 30 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 22.06.2021 No. 18 "On some issues of pre-trial settlement of disputes considered in civil and arbitration proceedings" the above statement of Article 1486 of the Civil Code of the Russian Federation is further specified by the following.

The proposal of the interested party to the right holder of the trademark, who does not use it continuously for three years, to apply to the Russian Federal Service for Intellectual Property with a request to abandon the right to the trademark, or to conclude with the interested party an agreement on alienation of the exclusive right to the trademark in respect of all goods or part of goods for individualization of which the trademark is registered, shall be sent, taking into account the provisions of Article 165.1 of the Civil Code of the Russian Federation, to the address of registration of the citizen at the place of residence or stay, and to the citizen, who is a registered trademark owner. In addition, the proposal of the interested party shall also be sent to all addresses specified in the State Register of Trademarks or in the relevant register provided for by the international treaty of the Russian Federation.

Sending the offer to these addresses indicates compliance with the pre-trial dispute resolution procedure provided for by Article 1486 of the Civil Code of the Russian Federation, even in case of their actual unreliability (Article 51, Paragraph 2, Article 1232, Paragraph 1 of the Civil Code of the Russian Federation).

Non-observance of this procedure is the sending of a proposal by an interested party to only one of the addresses specified in Article 1486.1 of the Civil Code of the Russian Federation; to an address not specified in the Unified State Register of Legal Entities or in the State Register of Trademarks; by e-mail rather than to the postal address of the right holder; before the expiration of three years from the date of state registration of the trademark.

If the actual receipt of the interested party's proposal is confirmed (Paragraph 1 of Article 165.1 of the Civil Code of the Russian Federation), the violation of the procedure for sending it may not indicate non-observance of the mandatory pre-trial dispute settlement procedure.

In the event that the interested party has sent the proposal with violation of the procedure or terms provided for by Paragraph 1 of Article 1486 of the Civil Code of the Russian Federation, it is possible to send a new proposal before the expiration of the above three-month term from the date of sending the previous proposal.

According to Paragraphs 2 and 3 of Article 1248 of the Civil Code of the Russian Federation, in some cases, the protection of intellectual rights in relations related to the filing and consideration of applications for patents for inventions, utility models, industrial designs, selection achievements, trademarks, service marks, geographical indications and appellations of origin of goods, with state registration of these results of intellectual activity and means of individualization, with the issuance of relevant title documents, with challenging the provision of these results and means of legal protection or with its termination, is carried out administratively, respectively, by the Russian Federal Service for Intellectual Property and other authorized state bodies. The decisions of these bodies come into force from the date of adoption. They can be challenged in court in accordance with the procedure established by law.

In this case, the costs of the party to the dispute associated with compliance with this procedure shall be reimbursed to the party to the dispute in whose favor the federal executive body made the decision, by the other party to the dispute. These expenses consist of patent and other fees, as well as costs, including amounts of money payable to experts, specialists and translators, reasonable fees for the services of patent attorneys, lawyers and other persons providing legal assistance (representatives), and other expenses incurred in connection with the consideration of the dispute. If, based on the results of the consideration of the dispute, a decision is made to partially satisfy the claims, expenses are subject to reimbursement to the party to the dispute in proportion to the volume of satisfied claims. In the event that, upon consideration of the dispute, a decision is made to partially satisfy the claims, the costs shall be reimbursed to the party to the dispute in proportion to the volume of satisfied claims.

The Order of the Ministry of Science and Higher Education of the Russian Federation and the Ministry of Economic Development of the Russian Federation of April 30, 2020, No. 644/261 approved the Rules for consideration and resolution of disputes in the administrative order by the Federal Executive Body in the Field of Intellectual Property.

In this order, disputes on the protection of intellectual rights in relations connected to the filing and consideration of applications for patents for inventions, utility models, industrial designs, trademarks, service marks, geographical indications and appellations of origin of goods, the state registration of these results of intellectual activity and means of individualization, the issuance of the relevant documents of title, disputing the granting of legal protection to these results and means of individualization, or disputing the granting of legal protection to these results and means of individualization. However, not all the above-mentioned disputes shall be considered, but only those directly specified in Paragraph 3 of the above Rules, namely: disputes on the protection of intellectual rights in relations related to the filing and examination of applications for patents for inventions, utility models, industrial designs, trademarks, service marks, geographical indications and appellations of origin of goods, state registration of these results of intellectual activity and means of individualization, and the issuance of the relevant documents of title.

Meanwhile, some disputes on contesting the legal protection of intellectual rights objects are considered directly by the Intellectual Property Court, namely (Paragraph 4, Article 34 of the Arbitration Procedure Code of the Russian Federation):

- on the establishment of the patented;
- on early termination of legal protection of a trademark due to its non-use.

The examination of the dispute shall be carried out at the meetings of the board. Information on the members of the collegium publishes on the official website.

Persons who related to each other or to any of the parties to the dispute, persons who participated in the examination of the corresponding application at the stage of adoption of the challenged decision of the Russian Federal Service for Intellectual Property, as well as persons who have direct or indirect interest in the outcome of the case, or about whom other circumstances are known that raise doubts as to their objectivity and impartiality, may not be members of the collegium and shall be subject to challenge.

The parties to the dispute have the right to submit a request to participate in a panel meeting in the remote access mode via videoconferencing.

The review of the dispute is carried out at the meetings of the collegium, which is formed from among the specialists, the list of which is determined by the Russian Federal Service for Intellectual Property and published on the official website.

Consideration of a dispute may be suspended at the request of a party to the dispute or by decision of the collegium in case of administrative or judicial consideration of another case, the decision on which may be of importance for the results of consideration of the dispute, until the decision on this case enters into legal force, as well as in case of availability of interim measures in respect of the intellectual property object which is the subject of the dispute, until the removal of the relevant measures. Objections, applications and other documents and materials may be filed electronically through the official website.

Having studied the materials of the dispute, having heard all persons participating in the meeting, the collegium shall retire to a deliberative room to form a conclusion on the results of consideration of the dispute, which shall be announced at the meeting. The conclusion of the panel may provide for the satisfaction of the objection or application in full or in part, or denial of the satisfaction of the objection or application. Subsequently, the Collegium of the Chamber for Patent Disputes shall establish a written conclusion, on the basis of which the Head of the Russian Federal Service for Intellectual Property or a person authorized by him shall also take one of the following decisions based on the results of the examination of the dispute:

- to grant the opposition or application in full or in part;
- refusal to satisfy the objection or statement.

3 Conclusion

The special legislative requirement on the mandatory pre-trial claim procedure for the settlement of disputes on the protection of intellectual property rights related to the recovery of damages and/or compensation for the infringement of the exclusive right is a departure from the general approach, according to which such procedure is required for disputes arising from transactions or unjust enrichment, and is probably due to the complexity of these disputes.

The special claim procedure for settling a dispute on early termination of legal protection of a trademark due to its non-use allows guarantee the protection of the rights and interests of both the right holder (as it gives them sufficient time to think about the proposal and respond to it) and the plaintiff, as the subsequent calculation of the three-year period of non-use will be carried out until the date of sending a claim, not filing a lawsuit, which eliminates the risk of evasion on the

part of the right holder by starting to use the trademark, which eliminates the risk of evasion of the right holder by starting to use the trademark.

In the administrative pre-trial procedure of dispute examination in the Chamber of Patent Disputes the parties have a wide enough set of procedural rights and opportunities, and the procedure is quite close to the judicial procedure, and in some respects even exceeds it.

As an example, one of the advantages of having disputes heard by the Chamber of Patent Disputes is that the members of the collegium include persons with specialized knowledge of the subject of the dispute. This accordingly:

- practically eliminates the need to appoint an expert examination or engage specialists;
- allows critical evaluation of evidence containing information related to special knowledge;
- allows the parties to compete not only in matters of law and facts, but also in the relevant sphere of specialized knowledge.

At the same time, there is a problem that the Chamber of Patent Disputes is subordinate to the body/person whose acts/decisions it reviews. However, the fact that formally the final decision is made by the Head of the Russian Federal Service for Intellectual Property (and not by the Board of the Chamber of Patent Disputes), in our opinion, does not really solve this problem. The real role of the head here is reduced not to "making" the decision, but to its "approval" (as it was called in the former rules), since the head of the Russian Federal Service for Intellectual Property does not personally participate in the examination of the dispute and, accordingly, cannot or should not "make" decisions on the dispute. This problem may create risks of violation of the guarantees of independence and impartiality during the consideration of disputes in the Chamber of Patent Disputes.

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The Court of Arbitration for Sport and Athlete Protests: A Focus on the 2020 Tokyo Olympics

Tushar Sharma

Tushar Sharma is a Doctoral Candidate (LAW) at O.P. Jindal Global University, Jindal Global Law School, specialising in Technology Law, Philosophy, and Space Law. E-mail: tsharma2@jgu.edu.in. ORCID: https://orcid.org/0009-0005-0367-4216.

Abstract: This research paper aims to delve into the complex intersection of athlete protests, political expressions in sports, and the Court of Arbitration for Sport's (CAS) role, particularly emphasizing the 2020 Tokyo Olympics. An exploratory design is employed, combining historical context with analytical insight. The structure covers an introduction to CAS and the significance of athlete protests, traces the historical precedent of political expressions in Olympic Games, elaborates on the jurisdiction and procedures of CAS, provides a meticulous overview of the 2020 Tokyo Olympics controversies, and conducts a comparative analysis with previous Olympic CAS rulings. The 2020 Tokyo Olympics witnessed an unprecedented surge in athlete protests and political expressions. Key CAS rulings during these games had a profound influence on athlete behaviour, public opinion, and the stance of the Olympic Committee. Notably, CAS's decisions revealed a cautious approach, balancing the Olympic guidelines and athlete rights. The study illuminates the evolving dynamics between sports institutions and athlete expressions. CAS, as an adjudicatory body, plays a pivotal role in shaping the trajectory of such protests, potentially influencing future Olympic policies. Gaining insights into the intricacies of the CAS decisions empowers sports professionals, athletes, and decision-makers to predict the possible outcomes of upcoming disputes. This in turn contributes to more seamless Olympic events. The present study delves deeply into the CAS's engagement with athlete protests during the 2020 Tokyo Olympics. Distinct from previous research, this work amalgamates historical, procedural, and ethical dimensions, offering a comprehensive understanding of an area that is both intricate and under the global spotlight.

Keywords: Court of Arbitration for Sport. Athlete Protests. 2020 Tokyo Olympics. Athlete Rights.

1 Introduction

As Nelson Mandela said "*Sport has the power to change the world. It has the power to inspire. It has the power to unite people in a way that little*

else does. It speaks to youth in a language they understand"[1] In the expansive world of international sports, the Olympic Games are emblematic of humanity's pinnacle achievements and the spirit of global harmony. Yet, beyond the grandeur and the limelight, the Olympics unfurl a detailed story of individual athletes, their political statements, and the associated debates that arise. While sports predominantly showcase exceptional athletic talent, they've also been platforms for athletes to articulate their convictions and champion societal transformations.[2] The Court of Arbitration for Sport, established in 1984, plays a pivotal role in this milieu. It was conceived to address the intricacies and nuances of sports disputes which often don't neatly fit into standard legal paradigms. Throughout Olympic history, athlete protests have left indelible marks, be it the memorable Black Power salute of 1968 or contemporary digital age gestures. As our world gets increasingly interwoven, the interplay between sports, politics, and society's values intensifies. This underscores the significance of institutions like CAS in overseeing these intersections.[3] The 2020 Tokyo Olympics aptly illustrates this dynamic. Rescheduled due to the global health crisis, these games weren't merely a sporting event but a reflection of humanity's perseverance and ability to adapt. The Tokyo chapter observed an uptick in athlete activism, capitalizing on the global stage to spotlight diverse concerns. In such evolving scenarios, understanding the role of entities like CAS becomes crucial in shaping, managing, and guiding the broader narrative.[4] This paper aspires to fill the current knowledge gap, offering insights into the nuanced dynamics between CAS, athlete protests, and the 2020 Tokyo Olympics.

Objective of the Research Paper

- Examine the foundational principles and roles of the CAS in arbitrating sports disputes.
- Understand the historical trajectory of athlete protests and political expressions in Olympic Games.
- Dissect CAS's jurisdiction and procedure with respect to athlete protests.
- Explore specific instances of athlete activism during the 2020 Tokyo Olympics and CAS's response.

[1] Nelson Mandela used power of sport to unify, rebuild South Africa, SPORTANDDEV, https://www.sportanddev.org/latest/news/nelson-mandela-used-power-sport-unify-rebuild-south-africa.

[2] Paul B. Zimmerman, *The Story of the Olympics: B.C. to A.D.*, 63 CALIFORNIA HISTORY 8 (1984).

[3] James A. R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 THE AMERICAN JOURNAL OF COMPARATIVE LAW 161 (2002).

[4] Nick Nocita, *POLITICS AND THE OLYMPICS*, 41 HARVARD INTERNATIONAL REVIEW 24 (2020).

- Analyse the ramifications of CAS decisions on athlete behaviour, public perception, and the International Olympic Committee's position.
- Conduct a comparative analysis of CAS rulings over different Olympics to discern trends or shifts in approach.
- Delve into the ethical implications surrounding CAS's rulings, focusing on freedom of speech, athlete rights, and public sentiment.

This research paper systematically explores the relationship between the Court of Arbitration for Sport and athlete protests, focusing on the 2020 Tokyo Olympics. Starting with a historical overview of athlete protests, the study delves into CAS's jurisdiction and procedures. It then highlights specific athlete activism instances during the Tokyo Olympics and analyses CAS's consequential decisions. By contrasting CAS rulings across different Olympics, the paper identifies evolving trends and addresses the ethical implications of these decisions.[5] Ultimately, the study synthesizes key insights, forecasting potential impacts on future Olympic Games and athlete activism dynamics.

2 Historical context

The Olympic Games, representing a synergy of diverse nations and cultures, have always been more than a mere athletic competition. They epitomize unity, peace, and shared human endeavour. The Olympic Games, dating back to 776 BC in ancient Greece, have long been a convergence point for not only athletic excellence but also political and socio-cultural expressions. Over the years, as the event's prestige grew, it became a global stage where athletes could amplify their voices on contentious issues. However, the intertwining of sports with political activism in this premier event hasn't always been straightforward, and the Olympic Committee has had to strike a balance between preserving the sanctity of the games and recognizing athletes' rights to express themselves.[6]

One of the earliest and most iconic instances of athlete protests in the modern Olympic Games occurred in 1968. Tommie Smith and John Carlos, two African-American athletes, raised a black-gloved fist during the American national anthem as a symbol of Black Power and human rights. Their act wasn't just an isolated protest; it reflected a broader global civil rights movement. This silent gesture resonated across continents, sparking both commendation and criticism.[7] Notably, the International Olympic Committee (IOC) viewed it as a breach of the

5 *Id.*

6 Zimmerman, *supra* note 2.

7 Why Black American Athletes Raised Their Fists at the 1968 Olympics, HISTORY (2023), https://www.history.com/news/black-athletes-raise-fists-1968-olympics.

Olympic Charter, leading to their suspension from the US Olympic team. Fast-forward to the 1980s; the Cold War politics took centre stage, with the US and its allies boycotting the Moscow Olympics in 1980, and the Soviet Union and its allies reciprocating by skipping the Los Angeles Games in 1984. While not an individual athlete protest, these boycotts underlined the strong political undercurrents flowing through the Olympic Games. Regional disputes too found echoes in the Olympics.[8] For instance, in the 2000 Sydney Olympics, North and South Korean athletes marched together under a unification flag, symbolizing hopes for a unified Korean Peninsula. Such moments, albeit fleeting, emphasized the potential of sports diplomacy. However, protests haven't been limited to global politics alone.[9] Environmental concerns, gender equality, and indigenous rights have also been highlighted. For instance, during the 2016 Rio Olympics, marathon runner Feyisa Lilesa made a cross-wrist gesture as he crossed the finish line, drawing attention to the persecution of the Oromo people in Ethiopia.[10]

Existing Olympic Rules and Guidelines on Athlete Protests

Given the gravitas of this global event, the International Olympic Committee has established a plethora of rules and guidelines to ensure the smooth conduct of the games. Chief among them are regulations concerning athlete protests and political expressions, which have often been subjects of considerable debate and scrutiny. Central to this discourse is Rule 50 of the Olympic Charter. It explicitly states, "No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues, or other areas." The underpinning philosophy of this rule is to preserve the neutral spirit of the Games, ensuring that it stands as a beacon of unity, devoid of divisive forces. However, it's essential to recognize the multifaceted nuances embedded in Rule 50.[11] On the one hand, it seeks to uphold the fundamental principle that sport should be free from external influences, such as politics or commercial interests. In a world brimming with divisions, the Olympic Games offer a sanctum where global citizens unite under the emblem of fair competition and mutual respect. On the other hand, athletes, as representatives of their nations, bring with them not just their sporting prowess

[8] Myles Burke, *In History: How Tommie Smith and John Carlos's Protest at the 1968 Mexico City Olympics Shook the World*, https://www.bbc.com/culture/article/20231011-in-history-how-tommie-smith-and-john-carloss-protest-at-the-1968-mexico-city-olympics-shook-the-world.

[9] Koreans March as One in Sydney at Opening Ceremony of Olympics - Los Angeles Times, https://www.latimes.com/archives/la-xpm-2000-sep-16-mn-21930-story.html.

[10] David Smith, *Feyisa Lilesa: Being an Athlete Allowed Me to Be the Voice of My People*, THE GUARDIAN, Sep. 13, 2016, https://www.theguardian.com/world/2016/sep/14/feyisa-lilesa-being-an-athlete-allowed-me-to-be-the-voice-of-my-people.

[11] Rule-50-Guidelines-Tokyo-2020.pdf, https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/News/2020/01/Rule-50-Guidelines-Tokyo-2020.pdf.

but also their socio-cultural backgrounds, beliefs, and the political realities of their homelands. For many, the Olympic podium becomes a rare platform to voice concerns, advocate for change, or express solidarity. To place a blanket ban on such expressions, some argue, negates the very ethos of the Olympic spirit, which celebrates diversity in all its forms. While the Olympic Charter, through Rule 50, sets the baseline, guidelines accompanying this rule provide more detailed directions. These guidelines elucidate the kind of gestures, slogans, or symbols deemed inappropriate. For instance, wearing armbands, hand gestures, or kneeling – acts which have historically been associated with protests are generally discouraged.[12]

However, the enforcement of these guidelines is where the real challenge lies. The IOC has often found itself in a quagmire, making decisions that sometimes seem inconsistent. For instance, while Tommie Smith and John Carlos faced repercussions for their Black Power salute in 1968, other athletes in different Olympics who made subtle political gestures escaped without any reprimand. Such perceived inconsistencies have often led to public outcries, placing the IOC in a tricky position. An extension of the IOC's efforts to address this complex issue is the establishment of designated protest areas during the Games. These are zones where athletes can freely express their views without facing penalties. In a bid to give athletes a platform to express themselves, some believe that allowing them to protest is merely symbolic, pushing their concerns to the background rather than showcasing them on the grand Olympic podium. It's worth noting that regional Olympic Committees frequently have their own rulebook, sometimes diverging from the global standards set by the International Olympic Committee. This can either strengthen or weaken the overall guidelines. Such variations inevitably create ambiguity and occasionally lead to disagreements, as athletes grapple with understanding and balancing different sets of rules.[13]

Enter the Court of Arbitration for Sport. Acting as an intermediary, it offers a resolution mechanism for disputes arising from these guidelines. Given the often subjective nature of interpreting political gestures, CAS plays a pivotal role in ensuring justice and fairness. However, even the CAS isn't immune to criticisms, with some viewing its decisions as either too lenient or too harsh. The tension between these two perspectives – preserving Olympic neutrality and respecting athletes rights to express has often meant that the IOC navigates a tightrope, making decisions on a case-by-case basis.[14] This reactive approach, while allowing flexibility, has also opened the IOC to accusations of inconsistency. The Olympic

[12] JoAnne D. Spotts, Global Politics and the Olympic Games: Separating the Two Oldest Games in History, 13 DICK. J. INT'I L. 103 (1994).
[13] Burke, *supra* note 8.
[14] Thomas T. Roberts, *Sports Arbitration*, 10 INDUSTRIAL RELATIONS LAW JOURNAL 8 (1988).

rules and guidelines concerning athlete protests encapsulate a broader narrative of our times – one that grapples with the boundaries of free expression in a globalized world. As the Olympics continue to evolve, so will these rules, echoing the ever-changing dynamics of global discourse. The challenge, as always, will be to find a harmonious path that respects individual voices while celebrating collective unity.[15]

3 The Court of Arbitration for Sport's Jurisdiction and Procedure

Established in 1984, CAS emerged as an initiative of the International Olympic Committee. Positioned as a quasi-judicial body, its primary objective is to offer resolution for sports-related disputes, ensuring a fair, swift, and specialized adjudication process. Over time, its significance has grown, handling disputes that range from doping allegations to contractual conflicts between athletes and sponsors. However, its involvement in cases related to athlete protests has attracted considerable attention. So, when and how does CAS enter the engagement? The stepping stone lies in the very essence of the Olympic Charter. When athletes, or their respective national committees, believe that there's been a misinterpretation or misapplication of the Olympic Charter, especially rules pertaining to protests, CAS becomes the go-to avenue for redressal. But it's not an automatic process. Parties involved typically attempt to resolve disputes internally, through dialogue and mediation. It's only when these initial efforts stumble that CAS's arbitration process comes into play.[16]

The procedure at CAS is designed to be robust yet streamlined. Once a case is brought before it, the parties involved (often the athlete or their representative and the IOC or a relevant sports federation) agree upon an arbitrator or a panel of arbitrators. For instance, the Olympic Charter itself mandates CAS as the final appellate body for Olympic-related disputes, giving it significant clout in matters concerning the Games. These arbitrators, drawn from a closed list maintained by CAS, possess deep expertise in both sports law and the specific issues in contention. Their role isn't merely adjudicatory; they also mediate, trying to foster an amicable resolution. If mediation doesn't bear fruit, the arbitration process intensifies. Parties present their cases, buttressed by evidence, legal provisions, and precedents. What sets CAS apart is its ability to tailor the arbitration process to the unique dynamics of each case. While it abides by its procedural rules,

[15] James A. R. Nafziger, *International Sports Law as a Process for Resolving Disputes*, 45 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 130 (1996).

[16] Centrefield LLP-Stuart Baird & Matthew Bennett, *Sports Law : Court of Arbitration for Sport (CAS)*, LEXOLOGY (2021), https://www.lexology.com/library/detail.aspx?g=59532e84-6609-44ef-baf9-1ef8648650f8.

flexibility is maintained to ensure that justice isn't just done but is perceived to be done. One might wonder about the global reach of CAS. Given that the Olympics host athletes from diverse jurisdictions with varying legal landscapes, does CAS's jurisdiction overshadow these national frameworks? In essence, it does. By participating in the Olympics, athletes and their federations inherently accept the overarching jurisdiction of CAS. Its decisions are binding, and while they can be appealed, such appeals are directed towards the Swiss Federal Tribunal and are limited to potential procedural lapses rather than the merits of the decision.[17] The 2020 Tokyo Olympics highlighted the ever-present need for robust sports arbitration mechanisms. Whether it's the international purview of CAS or the regional focus of The Brazilian Center for Arbitration and Mediation (CBMA), these institutions play a critical role in upholding the integrity of sports. As the world of sports continues to evolve, so too will the complexities of disputes. Thus, the continued collaboration, learning, and growth of sports arbitration bodies will remain essential.[18]

Take, for instance, the case involving Indian wrestler Narsingh Yadav ahead of the 2016 Rio Olympics. Accused of doping, Yadav was cleared by the National Anti-Doping Agency of India. However, the World Anti-Doping Agency appealed this decision to CAS, which subsequently overturned the initial clearance. This instance underscores CAS's supreme jurisdiction in sporting disputes, even when national bodies have made contrary determinations. It's noteworthy that CAS's involvement in athlete protests doesn't mean it inherently supports or opposes the protest's substance. Its role is more nuanced, assessing whether the actions align with the regulations set by sporting bodies, and if penalties levied are proportionate and consistent with previous actions.[19]

Outline of the arbitration process for these specific disputes

From its inception, CAS's jurisdiction has been grounded in consent. Parties involved in a dispute, be it federations, athletes, or other stakeholders, must agree to arbitrate under CAS's auspices. Often, this consent is embedded in the contractual agreements or statutes of sports organizations. Now, when athlete protests come to the fore, CAS's role becomes especially pivotal. Over time, sports arenas, including the Olympic stage, have transformed into platforms where athletes channel voices on societal, political, or environmental issues. And

[17] Code: Procedural Rules, (2023), https://www.tas-cas.org/en/arbitration/code-procedural-rules.html.

[18] Gustavo da Rocha Schmidt, Natália Ribeiro & Daniel Brantes Ferreira, *The Brazilian Center for Arbitration and Mediation (CBMA) as an Appellate Sports Arbitration Institution*, 3 REVISTA BRASILEIRA DE ALTERNATIVE DISPUTE RESOLUTION - BRAZILIAN JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION - RBADR 93 (2021).

[19] Indian wrestler Yadav given four-year doping ban after WADA appeal | Reuters, https://www.reuters.com/article/olympics-rio-doping-yadav-idUSL8N1AZ5VX.

as we've witnessed, these expressions can sometimes collide with established norms, leading to disciplinary actions, such as disqualifications or bans. It is here that CAS's jurisdiction emerges, addressing appeals from athletes or national bodies against decisions made by the IOC or its affiliated entities. However, the heart of our discussion lies not just in understanding CAS's jurisdiction but in delving into its arbitration process tailored for these specific disputes.[20]

Upon an appeal's initiation, a key feature of CAS proceedings is the formation of an arbitral panel, typically comprising one or three arbitrators. The parties involved can either mutually agree on these arbitrators or draw from CAS's list of recognized experts, ensuring the panel's neutrality and expertise. The next juncture, crucial for time-sensitive cases like those during the Olympics, is the expedited procedure. Recognizing the fleeting nature of sports events, CAS has provisions for an ad-hoc division, operating on-site during the Olympics.[21] With a streamlined process, this division ensures decisions within 24 hours, ensuring minimal disruption to ongoing events. For instance, during the Rio 2016 Olympics, the CAS ad-hoc division addressed 28 cases, a testament to its vital role in the swift resolution of disputes. Post the establishment of the panel and the procedure's determination, the arbitration process embarks on its fact-finding mission. Both parties submit written statements, detailing their positions, arguments, and evidence. This written phase, punctuated with document exchanges, allows both parties to comprehend the nuances of the dispute thoroughly. However, CAS's distinctiveness shines in the hearing phase. Unlike traditional court settings, CAS hearings exude a more informal ambiance. Held in a closed environment, without the spectacle of public galleries, these hearings prioritize frank, open discussions.[22] The parties present their cases, often buttressed by witness testimonies or expert opinions. It's worth noting that while legal representation is not mandatory, given the intricate intertwining of sports regulations and legal principles, parties often lean on legal counsel for guidance. Post-hearing, the arbitral panel retreats into deliberations. They sift through the evidence, weighing arguments, and ensuring adherence to the principles of "lex sportiva" – the specific set of laws and customs governing sports. The culmination of this rigorous process is the issuance of an arbitral award, binding on all parties. Yet, the depth of CAS's arbitration isn't solely in its procedural robustness. It lies in its commitment to balance – ensuring athletes' rights are safeguarded while preserving the broader ethos of sports events. Time and again,

[20] Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, An Symposium*, 2012 (2012).

[21] Baird and Bennett, *supra* note 16.

[22] A summary of the CAS Ad Hoc Division decisions at the Rio Olympic Games - LawInSport, https://www.lawinsport.com/topics/features/item/a-summary-of-cas-ad-hoc-division-at-the-rio-olympic-games.

CAS has reiterated the principles of fairness, neutrality, and promptness, attributes that make it an indispensable institution in the sports justice landscape.[23]

4 The 2020 Tokyo Olympics: context and controversies

In the vast annals of Olympic history, the 2020 Tokyo Olympics, held in 2021 due to the global COVID-19 pandemic, stands as an edition both unique and contentious. Beyond the athletic feats, the Tokyo iteration was rife with a multitude of challenges, complexities, and most pertinently for our discourse, controversies related to athlete protests. Initially, the very context of these Games was unprecedented. The global pandemic had wreaked havoc on international sporting schedules, prompting the decision-makers to postpone the Olympics by a year, a first in the modern era. When the event finally rolled out in Tokyo, it was in a severely constrained format. The stadiums, which are usually full of loud fans, were empty during the 2020 Tokyo Olympics. The only sounds you could hear were from the athletes themselves. The omnipresent pandemic protocols, including rigorous testing and quarantine measures, added another layer to the athletes' challenges, both mentally and physically. However, despite these overt operational challenges, it was the undercurrent of athlete activism and protest that truly captured global headlines and ignited debates.[24] In the years leading up to the Tokyo Olympics, the world witnessed significant socio-political upheavals. From the Black Lives Matter movement in the USA to pro-democracy protests in Hong Kong, and a myriad of causes in between, the global socio-political landscape was ripe for reflection in the Olympic arena. Anticipating potential expressions of dissent, the International Olympic Committee offered a minor amendment to the previously discussed Rule 50. While the rule's core tenet of prohibiting demonstrations in official Olympic venues remained, athletes were now permitted to express their views during press conferences and interviews, provided they adhered to certain guidelines. The Olympic flame might have symbolized hope and unity at the Tokyo 2020 Olympics, but the games also bore witness to an undercurrent of dissent, protest, and political expression. In an era marked by global upheavals, from civil rights movements to the lingering effects of a pandemic, the Tokyo Olympics became a nexus where sport intertwined with larger socio-political narratives.[25]

The Tokyo Olympics saw athletes pushing these boundaries. One of the upsetting moments was the display of support for Black Lives Matter (BLM).

[23] Richard H McLaren, *Sports Law Arbitration by CAS: Is It the Same as International Arbitration?*

[24] Olympics review: The highs, lows and controversies of Tokyo 2020 | Coronavirus pandemic News | Al Jazeera, https://www.aljazeera.com/news/2021/8/9/olympics-review-the-highs-lows-and-controversies-of-tokyo-2020.

[25] Nocita, *supra* note 4.

Although the IOC maintained its stance on not allowing protests during medal ceremonies, it did make a landmark decision by allowing athletes to "express their views" before starting their events. Consequently, we saw gestures like taking a knee or raising a fist, reminiscent of earlier Olympic protests but now a global symbol against racial injustice. Athletes from different nationalities and sports, such as soccer and rugby, demonstrated solidarity with the BLM movement, exemplifying how interconnected global socio-political movements have become. Costa Rican gymnast Luciana Alvarado, at the conclusion of her routine, took a knee, raised a fist, and tilted her head back, a gesture resonating with the Black Lives Matter movement's motifs. Meanwhile, Raven Saunders, an American shot-putter, made an "X" gesture on the podium, symbolizing "the intersection of where all people who are oppressed meet." From a regional standpoint, the Tokyo Olympics also spotlighted political tensions in Asia.[26] For instance, a diplomatic row ensued when the South Korean broadcaster used "inappropriate" images to represent certain countries during the opening ceremony. These images, considered by many to be stereotypical or offensive, stirred debates on cultural sensitivity and national representation in a hyper-connected age. However, not all expressions were confrontational. Some were symbolic, aiming to shed light on long-standing issues. The inclusion of the Indigenous Ainu community in the opening ceremony, though brief, was a significant gesture, acknowledging their presence and history in Japan. In a subtler form of protest, some athletes used their platform to highlight issues like mental health, a pressing concern that transcended borders and resonated with global audiences. Simone Biles decision to withdraw from several gymnastics events, citing mental health concerns, wasn't a protest in the traditional sense. Still, it amplified the conversation around the pressures athletes face and the need for mental well-being.[27]

The Olympics weren't devoid of more direct political statements either. Hong Kong's presence as a separate entity from China, especially in the backdrop of the recent pro-democracy protests and the introduction of the National Security Law, was itself a subtle political statement. Further adding to regional tensions, Taiwan, or Chinese Taipei as it's referred to in the Olympics, found its position often conflated or misinterpreted in the media, pointing to larger geopolitical dynamics at play.[28] The Tokyo 2020 Olympics also witnessed individual acts of courage. Belarusian sprinter Krystsina Tsimanouskaya's refusal to return to her home country

[26] IOC gives athletes more scope for protest at Tokyo Olympics | AP News, https://apnews.com/article/tokyo-olympic-games-2020-tokyo-olympics-race-and-ethnicity-sports-3f8d420b7e94bbafa037d22327efb38b.

[27] Simone Biles receives support from around the web after pulling out of team final, OLYMPICS.COM (2021), https://olympics.com/en/news/support-pours-in-simone-biles-social-media-messages-gymnastics-tokyo-2020.

[28] Hong Kong national security law: What is it and is it worrying?, BBC NEWS, May 22, 2020, https://www.bbc.com/news/world-asia-china-52765838.

after alleging mistreatment by her national committee, and her subsequent plea for asylum, brought global attention to the state of political freedoms in Belarus. Her story became emblematic of the struggles many athletes face in countries where political dissent is not tolerated.[29] These instances from Tokyo 2020 underscore a salient point: the Olympic Games are not isolated from the world's socio-political landscape. Rather, they mirror and sometimes amplify the global zeitgeist. Athletes, representing various countries and cultures, bring with them not just their sporting prowess but also their personal and national narratives. The challenge for bodies like the IOC and CAS lies in distinguishing between genuine expressions of dissent and mere provocations, all while upholding the foundational Olympic values of unity, respect, and excellence. The Tokyo 2020 Olympics, set against a backdrop of a global pandemic and rising geopolitical tensions, were rife with controversies. The athlete protests and political expressions at these games, whether overt or subtle, not only enriched the tapestry of stories but also reminded us of the complex, multifaceted world we inhabit. The games reaffirmed that while sports can be a unifying force, they are also a reflection of our times, echoing global sentiments, struggles, and hopes.[30]

5 Court of Arbitration for Sport's Decisions and their impact

The Court of Arbitration for Sport's, acts as a sort of Supreme Court for sports disputes. Its arbitration verdicts, particularly on matters as charged as athlete protests, can reverberate significantly, influencing both immediate outcomes at sporting events and the broader socio-political landscape. The 2020 Tokyo Olympics, replete with its unique challenges and controversies, provided several moments where the CAS's decisions profoundly impacted the discourse around athlete activism. Delving into the Tokyo Olympics, the backdrop was already set for heightened political expressions. From concerns related to the pandemic to global movements like Black Lives Matter, the stage was ripe for athletes to voice their perspectives on pressing issues. The Olympics, with its global audience, presented a potent platform, and many athletes were prepared to utilize it, even if it meant breaching Rule 50 of the Olympic Charter, which prohibits any form of political demonstrations.[31]

[29] Belarusian sprinter refuses to leave Tokyo | Reuters, https://www.reuters.com/lifestyle/sports/exclusive-olympics-belarusian-athlete-says-she-was-taken-airport-go-home-after-2021-08-01/.
[30] Reilly, *supra* note 20.
[31] Nocita, *supra* note 4.

The Court of Arbitration for Sport often found itself in the spotlight during the 2020 Tokyo Olympics due to the pivotal role it played in determining the fate of athletes and teams embroiled in controversies.

1. *Belarusian Sprinter Krystsina Tsimanouskaya Case:* One of the most prominent controversies of the Tokyo Olympics revolved around Belarusian sprinter Krystsina Tsimanouskaya. After criticizing her national team's management on social media, she was allegedly pressured to leave Japan prematurely. Fearing for her safety upon returning to Belarus, she appealed to the CAS. While the CAS didn't have to make a direct ruling on her asylum case, its decision not to intervene with the actions of the Belarusian Olympic Committee meant the athlete sought and obtained protection elsewhere, notably in Poland.[32]
2. *South African Multiple Medallist Caster Semenya:* While this case predates the Tokyo Olympics, its ramifications were clearly felt in 2020. Caster Semenya, an 800m Olympic champion, was barred from defending her title due to CAS's decision upholding the World Athletics' rule that required her to lower her natural testosterone levels to compete in women's middle-distance races. This controversial decision sparked a global debate on gender, biology, and fairness in sports.[33]
3. *Rule 50 - Athlete Protests*: The International Olympic Committee (IOC) has Rule 50 in place, which states that "No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas." Ahead of the Tokyo Olympics, there were strong indications from certain athlete groups about the intent to protest, particularly to show support for the global Black Lives Matter movement. The CAS played an observatory role here, ready to mediate should any controversies arise from protests during the Games. While the IOC slightly relaxed the rules to allow gestures like taking a knee before the start of play, podium protests were still prohibited.[34]
4. *Russia's Doping Ban*: Another noteworthy CAS decision affecting the Tokyo Olympics was the one regarding Russia's state-backed doping scheme. While the World Anti-Doping Agency recommended a four-year ban, the CAS reduced this to two years. It meant that Russia could not

[32] Staff, *Belarusian Sprinter Who Criticised Coaches Refuses to Be Sent Home*, THE GUARDIAN, Aug. 1, 2021, https://www.theguardian.com/sport/2021/aug/01/belarus-sprinter-krystsina-tsimanouskaya-criticised-coaches-says-she-will-not-return-to-country.

[33] Track's Caster Semenya Loses Appeal to Defend 800-Meter Title - The New York Times, https://www.nytimes.com/2020/09/08/sports/olympics/caster-semenya-court-ruling.html.

[34] IOC extends opportunities for athlete expression during the Olympic Games Tokyo 2020 - Olympic News, INTERNATIONAL OLYMPIC COMMITTEE (2022), https://olympics.com/ioc/news/ioc-extends-opportunities-for-athlete-expression-during-the-olympic-games-tokyo-2020.

officially compete at the Tokyo Olympics, but Russian athletes (under strict conditions) could compete under the banner "Russian Olympic Committee", sans their national flag and anthem.[35]

The ramifications of these CAS decisions during the Tokyo Olympics were profound. Each verdict was much more than a judicial declaration; it resonated with global debates on human rights, gender issues, national pride, and the spirit of fair competition. The decisions made by the CAS are intricate and well-considered. Instead of giving general bans or approvals, they examine the finer details of each situation. They consider the reason for the protest, its possible disturbances, and the larger background. By doing so, they ensure that their choices are based on a full grasp of the situation. The decisions CAS took during the Tokyo Olympics had a bigger impact than just affecting the athletes directly involved. Notably, they ignited worldwide discussions on whether athletes should also be seen as activists. Should they restrict themselves to their sporting roles, or is it their moral imperative to leverage their platform for larger causes? The CAS's rulings, whether in favour of or against athlete protests, added fuel to these debates. Moreover, these decisions influenced public perception. For many viewers, the Olympics isn't just about sports; it's a reflection of global unity and diversity. The way athlete protests were handled, and the CAS's role in arbitrating disputes, played a pivotal role in shaping this narrative. A decision perceived as stifling freedom of speech could draw criticism, while a perceived lenient stance could be viewed as undermining the event's sanctity. Although, national Olympic committees and global sports organizations closely monitored the CAS's rulings, using them as potential benchmarks for formulating their policies on athlete activism.[36]

Influence on Athlete Behaviour:

1. *Expressing Dissent Safely*: CAS's decisions have shown that it provides a protective, albeit limited, platform for athletes to express dissent. Cases such as Belarusian sprinter Krystsina Tsimanouskaya's situation highlighted that athletes can and do raise their voice against oppressive sporting bodies. Such decisions, implicitly, have encouraged many athletes to trust international bodies over their own nations if they feel threatened or oppressed.[37]
2. *Adherence to Sporting Norms*: At the same time, the CAS's rulings, like the one concerning South African runner Caster Semenya, subtly

[35] Russia Banned From Olympics and Global Sports for 4 Years Over Doping - The New York Times, https://www.nytimes.com/2019/12/09/sports/russia-doping-ban.html.
[36] Nocita, *supra* note 4.
[37] Staff, *supra* note 32.

underscored the importance of adhering to globally accepted sporting norms and regulations. It served as a reminder for athletes worldwide that global sports bodies have regulations that must be respected, even if these decisions occasionally border on contentious.[38]

Impact on Public Perception:

1. *A Dual-Edged Sword:* CAS's decisions have often drawn public ire or appreciation, depending on one's perspective. On one hand, CAS's decision in the Semenya case was perceived by many as a violation of human rights, while others viewed it as necessary for maintaining fair competition. Such decisions showcased CAS as a body that makes bold decisions, not always popular, but rooted in its interpretation of fairness and equity.[39]
2. *Perceived Neutrality:* While the CAS has been heralded for its seemingly neutral stance, it's not immune to criticism. Its verdict allowing Russian athletes to participate as the "Russian Olympic Committee" after the state-backed doping scandal drew mixed reactions. While some appreciated the nuanced decision, allowing athletes to compete without penalizing them for state-level misdemeanours, others felt it wasn't punitive enough.[40]

Olympic Committee's Stance:

1. *Re-evaluation of Rule 50:* CAS's observatory stance on the potential athlete protests during the Tokyo Olympics, especially concerning Rule 50, nudged the IOC towards a slight re-evaluation. While the rule, which prohibits any "demonstration or political, religious, or racial propaganda," remained, the IOC permitted gestures like taking a knee before the start of play, although podium protests were still prohibited. CAS's implicit influence meant that the Olympic body had to strike a balance between maintaining the Olympics' sanctity and respecting the evolving global sociopolitical climate.[41]
2. *Doping and Fair Play*: The CAS decision on the Russian doping scandal reaffirmed the IOC's commitment to clean sports. Despite the compromise of letting Russian athletes compete under the ROC banner,

[38] Caster Semenya Won Her Case, But Not the Right to Compete | Human Rights Watch, (Jul. 18, 2023), https://www.hrw.org/news/2023/07/18/caster-semenya-won-her-case-not-right-compete.
[39] *Id.*
[40] Russia Banned From Olympics and Global Sports for 4 Years Over Doping - The New York Times, *supra* note 35.
[41] Rule-50-Guidelines-Tokyo-2020.pdf, *supra* note 11.

> the message was clear: unfair practices would not be tolerated, and nations, no matter how powerful, would be held accountable.[42]

Its decisions, particularly in the spotlight of a global event like the Olympics, influence not just the immediate stakeholders but also the global sporting community and the public at large. Through its nuanced, and occasionally divisive decisions, CAS essentially shapes the narrative around contemporary issues in global sports. For example, considering athletes from various regions, CAS decisions regarding the Tokyo Olympics seemed to adopt a more holistic and globally inclusive approach. Athletes from Africa, Europe, and Asia found themselves at the centre of some of CAS's most crucial decisions, ensuring that the global South and North were represented, and their issues addressed. Moreover, beyond specific decisions, the very existence of CAS as an arbitration body serves as a reminder of the necessity for impartial judicial entities in sports. As sports become increasingly globalized and commercialized, with billions at stake, the role of bodies like CAS becomes even more crucial. CAS's influence on the 2020 Tokyo Olympics cannot be understated. From shaping athlete behaviours, swaying public opinion, to subtly guiding the hands of the Olympic Committee, CAS's shadow loomed large. Whether one agrees with its decisions or not, its importance as an arbiter of justice in the sporting realm remains uncontested. One can only hope that as sports evolve, CAS continues to uphold the principles of fairness, equity, and justice that the sporting world so dearly needs.[43]

6 Comparative Analysis across Olympics

The Olympics, transcending mere sport, often becomes a mirror reflecting global socio-political sentiments. Athlete protests and political expressions, embedded in this fabric, have time and again sought to use the Olympic platform for wider awareness. The Court of Arbitration for Sport, playing arbiter, has had the daunting task of discerning the limits of such expressions.

1968 Mexico City Olympics: Long before the CAS was established, the Olympics bore witness to iconic protests. The Black Power salute by Tommie Smith and John Carlos during their medal ceremony is still vividly remembered. Both athletes were subsequently expelled from the Olympic Village, signalling a clear intolerance to political gestures.[44]

[42] Russia Banned From Olympics and Global Sports for 4 Years Over Doping - The New York Times, *supra* note 35.
[43] A summary of the CAS Ad Hoc Division decisions at the Rio Olympic Games - LawInSport, *supra* note 22.
[44] Burke, *supra* note 8.

2008 Beijing Olympics: Fast forward to more recent times, in the lead-up to the Beijing Olympics, there was considerable global tension regarding China's human rights record, particularly concerning Tibet. Several athletes voiced their concerns, and while the CAS wasn't directly involved, the IOC consistently tried to stifle any overt political protests, arguing that sports should remain separate from politics.[45]

2016 Rio Olympics: The CAS, in this edition, had its hands full with doping scandals but athlete protests did make a mark. Ethiopian marathoner Feyisa Lilesa crossed his hands above his head as he finished the race – a gesture showing solidarity with the Oromo protests back in his home country. Unlike 1968, Lilesa wasn't penalized, hinting at a softer stance towards athlete expressions.[46]

2020 Tokyo Olympics: As already highlighted, Rule 50 of the Olympic Charter, which prohibits demonstrations or political, religious, or racial propaganda, was thrust into limelight. While the CAS and IOC's guidelines remained clear, there was a tacit acknowledgment of the importance of such expressions. Athletes taking a knee or raising a fist in support of the Black Lives Matter movement, for instance, weren't penalized. This was a marked shift from previous stances, arguably influenced by global conversations around racial justice and equity.[47]

Comparatively, while the CAS and the broader Olympic machinery have maintained a consistent line of keeping the Games 'apolitical', there's been a noticeable shift in approach towards athlete protests. The once rigid stance, as witnessed in 1968, seems to have evolved into a more understanding, if not entirely accepting, one by the time Tokyo 2020 rolled around. This progression is not just reflective of the CAS's evolving jurisprudence but also mirrors the changing global socio-political landscape. However, the path hasn't been linear. While certain gestures are reluctantly accepted, others are still met with retribution. The challenge for CAS and the IOC lies in discerning which protests get the green light and which ones are red-flagged, a task that, given the intricate interplay of global politics and individual rights, will never be straightforward. Yet, it's imperative to note the changing tides. From absolute non-acceptance to reluctant acknowledgment, the Olympic narrative on athlete protests, under the CAS's watchful eye, is undeniably evolving.

[45] China: Olympics Harm Key Human Rights | Human Rights Watch, (Aug. 6, 2008), https://www.hrw.org/news/2008/08/06/china-olympics-harm-key-human-rights.

[46] Ethiopia's Lilesa makes protest gesture at marathon finish | Reuters, https://www.reuters.com/article/us-olympics-rio-athletics-m-marathon-lil-idUSKCN10W0PR.

[47] IOC Athletes' Commission's recommendations on Rule 50 and Athlete Expression at the Olympic Games fully endorsed by the IOC Executive Board - Olympic News, INTERNATIONAL OLYMPIC COMMITTEE (2022), https://olympics.com/ioc/news/ioc-athletes-commission-s-recommendations-on-rule-50-and-athlete-expression-at-the-olympic-games .

7 Ethical consideration

In the international sports, the Olympic Games stand out as the quintessential forum of unity, transcending boundaries of race, religion, and politics. However, history has repeatedly shown that the confluence of sports and politics is unavoidable. Athletes, as global ambassadors, have time and again utilized this platform to voice socio-political concerns. Enter the Court of Arbitration for Sport, which often finds itself at the epicentre of these seismic events, adjudicating with an imperative to maintain both the spirit of the games and respect individual rights. It's within this duality that the ethical considerations are most intricate.

Freedom of Speech: Freedom of speech is universally recognized as an unalienable right. Yet, its application within a controlled environment like the Olympics becomes an area of contention. At the heart of many athlete protests lies the principle of freedom of speech. Athletes, like any other individuals, possess the right to express their opinions. However, when juxtaposed against the backdrop of the Olympics - an event premised on universal values of unity and non-discrimination - the ethical waters become murkier. CAS's adjudication on matters of protest is often viewed through the lens of this fundamental right. For instance, when athletes took a knee or raised a fist in solidarity with the Black Lives Matter movement during the Tokyo Olympics, CAS's tacit acceptance signalled a recognition of their freedom of expression. However, it's crucial to discern the boundaries. The question becomes: Can a global event, representing myriad cultures and values, ever offer a one-size-fits-all guideline for such a complex right? Where do we draw the line? The challenge for CAS lies in balancing this cherished right with the sanctity of the sporting event.[48]

Athlete Rights: While freedom of speech is paramount, it's but one facet of the broader spectrum of athlete rights. Participation, fair competition, non-discrimination, and the right to dignity are equally pertinent. Athletes, despite their celebrity status, are foremost human beings with inherent rights. Beyond freedom of speech, their right to participate, to fair treatment, and to be free from discrimination all come into play. The Olympic Charter, especially Rule 50, which curtails demonstrations or political, religious, or racial propaganda, can sometimes be perceived as infringing upon these rights. CAS's role in arbitrating these issues becomes ethically pivotal. Should an athlete be sidelined or penalized for espousing a cause they deeply believe in, especially when it mirrors global sentiments? The Rio Olympics example of Ethiopian marathoner Feyisa Lilesa's gesture in support

[48] The Olympics are about diversity and unity, not politics and profit. Boycotts don't work, THE GUARDIAN, Oct. 23, 2020, https://www.theguardian.com/sport/2020/oct/24/the-olympics-are-about-diversity-and-unity-not-politics-and-profit-boycotts-dont-work-thomas-bach.

of the Oromo protests becomes relevant. Here, the absence of retribution was arguably a nod to his inherent rights. Yet, a consistent approach remains elusive, adding layers to the ethical debate.[49]

Public Opinion: In an age of global connectivity, public opinion isn't just a background noise; it's a formidable force. Every athlete protest sparks worldwide debates, with diverse perspectives colliding and coalescing. While the Olympics aims to remain neutral, it operates within a world deeply segmented by political, cultural, and social divides. Public opinion, informed by these divides, becomes a significant stakeholder. An athlete's protest can resonate differently across geographies. While one segment may laud it as a brave act of resistance, another could decry it as misplaced activism. CAS, in its judgments, cannot be entirely impervious to these sentiments. The broader acceptance of the Black Lives Matter gestures during the Tokyo Olympics, for instance, was arguably influenced by the immense global support for the movement. However, an over-reliance on fluctuating public moods can compromise the integrity of CAS's decisions. The ethical conundrum then becomes: How much weight should public sentiment carry in CAS's adjudicative process?[50]

While the immediate concerns of protests and CAS rulings are evident, there's a broader ethical perspective that warrants attention. The very essence of the Olympics is about fostering unity, understanding, and peace. When athletes protest, they spotlight global issues, indirectly urging unity and understanding on those fronts. CAS's decisions, thus, carry the weight of this broader Olympic mission. Their rulings aren't merely about an event or an athlete; they are directives that shape the future discourse of sports and its role in global conversations.[51] The nexus of CAS's rulings, athlete protests, and the Olympics is a microcosm of the larger world, with its intricate blend of rights, responsibilities, and ethical considerations. As the world evolves, so do the nature of protests and the consequent challenges for CAS. What remains constant is the imperative for CAS to maintain a delicate balance, ensuring that while the sanctity of the Games is preserved, the voice of the athletes is not stifled. This journey is not just about legal precedents but a commitment to ethical integrity in the face of ever-evolving global challenges. In this intricate dance, CAS's decisions, whether they pertain to the 2020 Tokyo Olympics or any other edition, must be evaluated not just for their legal soundness but their ethical robustness. This dual scrutiny ensures that the spirit of the Games, intertwined with global socio-political realities, is preserved

[49] Freedom of Expression - Athlete Voice and Activism, CENTRE FOR SPORT AND HUMAN RIGHTS, https://www.sporthumanrights.org/freedom-of-expression-athlete-voice-and-activism/.

[50] Timeline: Politics and Protest at the Olympics, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/timeline/olympics-boycott-protest-politics-history.

[51] Nocita, *supra* note 4.

while upholding the rights and sentiments of its most vital stakeholders – the athletes.[52]

8 Conclusion

The Olympic Games, over the years, have evolved to become not only a celebration of sporting talent but also a platform for political, social, and ethical expressions. Throughout history, sportspersons have used the Olympic platform to voice their convictions, sometimes leading to disputes with the Olympic officials. During the 2020 Tokyo Olympics, which took place amidst unparalleled global crises, there was a renewed wave of athlete-led demonstrations and political stances. This brought the Court of Arbitration for Sport into public focus. Dating back to the Olympics early days, these athlete demonstrations have always served as a medium to broadcast sentiments that go beyond just the sporting arena. While the Olympic regulations have usually encouraged a neutral approach, refraining from any political or activist undertones, the real-world application of this neutrality has seen numerous challenges. As societies evolve, so does the interpretation of these guidelines. The CAS, created to address disputes in the world of sports, operates within a specific framework to tackle such athlete demonstrations. Its role becomes pivotal when there are breaches or perceived breaches of Olympic guidelines, ensuring a clear and systematic adjudication procedure. This autonomous institution plays an essential part in striking a balance between the rights of athletes and the overarching goals of the Olympic community. During the 2020 Tokyo Olympics, numerous instances, ranging from gestures during medal ceremonies to attire and accessories bearing messages, showcased the athlete's sentiments. These actions were not just about personal beliefs but also echoed wider societal issues and movements. The CAS's involvement in these cases was inevitable. Their decisions, particularly during these games, had a profound impact, influencing the behaviour of other athletes, shaping public opinion, and even prompting introspection within the Olympic Committee. In comparing the CAS rulings from Tokyo 2020 to other Olympics, it's evident that there's a slow but definite shift towards acknowledging the changing societal dynamics. While the CAS decisions still aim to uphold the Olympic Charter, there's an increased sensitivity towards the rights and voices of athletes. However, the line between maintaining the sanctity of the Games and ensuring freedom of expression remains blurry and is constantly negotiated. The ethical considerations surrounding CAS decisions are vast and complex. While the CAS's primary role is to interpret and enforce existing

[52] Reilly, *supra* note 20.

rules, the ethical underpinnings of those rules and the broader implications for society cannot be ignored. Issues of freedom of speech, athlete rights, and the influence of public opinion are intrinsically linked with the decisions made by the CAS. The tug-of-war between maintaining Olympic neutrality and allowing genuine expressions of belief is a continuous challenge.

Having delved deep into the intersection of the CAS's role and athlete protests, especially during the Tokyo Olympics, it's evident that the objectives of understanding the impact and implications of these decisions were achieved. This research offers a comprehensive overview of the topic, making it a valuable reference for future studies. However, like all research endeavours, this study is not without its limitations. The primary limitation is the confinement of the focus to the 2020 Tokyo Olympics. While this provides an in-depth view of the Games, the ever-evolving nature of athlete protests and CAS decisions suggests that continuous updates and research are necessary to stay current. The implications of this research are multi-faceted. It provides stakeholders, including the Olympic Committee, athletes, and the public, a nuanced understanding of the CAS's decisions and their broader societal impacts. Furthermore, by shedding light on the ethical considerations, this paper paves the way for future debates on how sports can balance between preserving its core values and reflecting the changing societal narratives. To sum up, the Tokyo 2020 Olympics, with its unique challenges, highlighted the intricate dance between athlete protests and the role of the CAS. As society progresses, it's inevitable that the Olympic Games will continue to be a mirror reflecting global sentiments, and the CAS's role in navigating this complex arena will remain crucial.

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Family mediation: theoretical and legal aspect

Yuliya Avdonina

Candidate of Legal Sciences, Senior Lecturer of the Department of Environmental, Labor Law and Civil Procedure of the Faculty of Law of Kazan (Volga Region) Federal University. E-mail: kkafedra983@gmail.com. ORCID: https://orcid.org/0000-0002-4360-0781.

Evgeny Vavilin

PhD in Law. Professor. Head of the Department of Civil Law of O.E. Kutafin Moscow State Law University. Retired judge of the Supreme Arbitration Court of the Russian Federation. E-mail: evavilin@yandex.ru. ORCID ID: 0000-0003-3098-3522.

Abstract: This article examines the significance of the use of family mediation in the resolution of family conflicts from the point of view of theoretical and legal aspects. The context of the work also touches upon the significant issues of mediation regulation at the legislative level concerning the rights and obligations of the participants of the process. The author analyzes the basic principles of family mediation and identifies the advantages of this approach over court proceedings in resolving family disputes. Special attention is paid to the mediator's role and functions in the conflict resolution process. The article also examines the legislative framework regulating family mediators' activities, status, rights, and obligations. The article's main idea is that family mediation is an effective tool for resolving family conflicts, contributes to the safety of family relations and allows the parties to come to a mutually beneficial solution to the problem independently. The article argues in detail the positive sides of family mediation, substantiates the need for its application in modern society and identifies the need for further research in this area for a detailed understanding of all the pros and cons of the use of family mediation in contemporary society.

Keywords: Mediation Institute. Family conflicts. Mediator. Protection of family rights.

1 Introduction

The Family Code of the Russian Federation (hereinafter – Family Code) is based on the need to strengthen the family and family values.[1] This task is realized by improving the existing domestic system of protection of family rights, as well as creating additional necessary conditions for the resolution of family law conflicts.

[1] Family Code of the Russian Federation from 29.12.1995 No. 223-Ф3, The Russian newspaper. No. 17. 27.01.1996.

Trends in the development of legal knowledge, transformations in the social and legal system dictate the need to use new approaches to the resolution of legal disputes. The creation of appropriate mechanisms that provide the parties with a choice of methods and ways of resolving family law disputes is an urgent state objective. Thus, in the Russian Federation, alternative ways of resolving legal conflicts are becoming more and more widespread. One of such ways is the institute of mediation, which is also used in the dissolution of marriage. The importance of the study is to comprehend mediation as an alternative way of dispute resolution in the dissolution of marriage. This legal institution contributes to the humanization of legal relations arising in the sphere of civil jurisdiction.[2]

Recognition by the Russian state of the priority of human and civil rights and freedoms has led to fundamentally new approaches to understanding the ways of implementation of the constitutional principle of state (judicial) protection. In the legal systems of states all over the world, there is a clear trend that is aimed at simplifying, as well as facilitating access to justice.[3]

Many authors make tremendous efforts to study the institute of mediation, thus revealing the regularities of its development and its introduction into Russian legislation. The relevant issues are overloaded courts, lengthy court proceedings, and in some cases – unqualified consideration of the case and other shortcomings inherent in the judicial system of the state. At the last meeting of the Council of Judges of the Russian Federation, detailed statistics on the handling of cases by Russian courts in 2023 were presented.[4]

Over the last 9 months, the courts have considered 602 thousand cases, 258 of which – in general procedure, the remaining 344 – in special procedure. A Russian judge, on average, considers up to 180 cases and materials per month, and 62% of judges overwork more than twice, while the optimal load should be from 10 to 16 cases per month. In order to process the number of documents that are received annually by district courts only, the staffing level of judges throughout Russia should be increased by 2.1 times, experts argue.[5]

Despite its obvious advantages, mediation is struggling to make its way. According to the Mediation Resource Center, out of the cases considered by the courts of first instance in 2023, only 59 cases resulted in amicable agreements with the participation of a mediator, while in the world practice up to 70-80% of

[2] Civil Procedure Code of the Russian Federation from 14.11.2002 No. 138-ФЗ. The Collection of Legislation of the Russian Federation.18.11.2002. No. 46.

[3] ERMAKOVA, E.P. Features of Online Settlement of Consumer Disputes by e-commerce Platforms in the People's Republic of China. Journal of Digital Technologies and Law, 1(3), 691-711, 2023.

[4] VI All-Russian Congress of Judges, http://www.ssrf.ru/siezd-sudiei/846 (31.03.2024).

[5] Research of the Higher School of Economics has fixed overload of 62% of Russian judges, https://www.rbc.ru/society/17/04/2018/5ad094389a79472df75fa052 (31.03.2024).

cases are resolved with the participation of a mediator and end with the conclusion of an agreement between the parties.[6]

The Federal Law No. 193-Ф3 dated July 27, 2010 "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)" (hereinafter – Mediation Law) is dedicated to the mediation procedure.[7]

This law introduced a fundamentally new "institution" of extrajudicial settlement of legal disputes – mediation procedure – into the Russian legal culture, which causes the need to understand its essential characteristics, principles of activity, place in the system of resolution and settlement of legal disputes. The possibilities of application of the mediation procedure are quite wide. In general, the volume of resolved conflicts can be conditionally divided into two groups of disputes: legal disputes and non-legal disputes. The Law on Mediation regulates the resolution of legal disputes, including those arising from family legal relations.

Unlike other legal relations, family legal relations are characterized by a close intertwining of legal ties between subjects - family members, because the dissolution of marriage can affect the rights and interests of not only spouses, but also other family members. In this regard, the issues of application of mediation as a method of dispute resolution related to the dissolution of marriage need theoretical understanding. Article 18 of the Constitution of the Russian Federation enshrines the following provision: "Human and civil rights and freedoms are directly effective; they determine the meaning, content and application of laws, the activities of state authorities, local self-government bodies and are ensured by justice".[8] However, modern legislation developing this constitutional provision, including in terms of regulation of mediation procedures, needs improvement.

2 Application of mediation in the resolution of family disputes

Family disputes belong to special private law types of conflicts, which are resolved by the courts. This is primarily due to the fact that family legal relations include, in addition to property relations, also personal ones. The second group of relations almost does not lend itself to legal regulation due to the fact that it is based on complex psychological processes.

In the Russian Federation, the resolution of family law disputes involves State bodies and their officials, such as guardianship and custody bodies, the

6 Family disputes, http://mediators.ru/rus/about/ (31.03.2024).

7 Federal Law of 27.07.2010 No. 193-Ф3 "On alternative procedure of dispute resolution with the participation of a mediator (mediation procedure)", The Collection of Legislation of the Russian Federation, 02.08.2010, No 31, Art. 4162.

8 Constitution of the Russian Federation (adopted by popular vote on 12.12.1993), The Collection of Legislation of the Russian Federation, 14.04.2014, No. 15, Art. 1691.

prosecutor's office, internal affairs bodies, commissions on minors and the protection of their rights, civil registry offices and others whose main objective is to protect the family rights of citizens.

The most frequent and complex family disputes are cases related to the dissolution of marriage. Difficulties that arise in resolving family disputes are primarily due to the presence of acute psychological conflict between spouses, which often makes it difficult to reach a compromise.

The increase in the number of court decisions confirms the fact that after the entry into force of the court decision, the dispute between the spouses is not exhausted and the dissenting party by all means influences the situation, further aggravating the conflict. We believe that the resolution of family disputes should take place not only within the judicial process, but also outside, namely through an alternative procedure of dispute resolution with the participation of an independent person – mediator.

According to the practice of application by the courts of Law on mediation, through the application of the mediation procedure various categories of family disputes were settled, such as:

- 86 cases on disputes related to the division of jointly acquired property between spouses;
- 78 cases on disputes related to the upbringing of children;
- 44 cases on the dissolution of marriage of spouses with juvenile children;
- 32 cases involving other disputes arising out of family legal relations.[9]

In addition, as practice shows, the actions of mediators during the period indicated in the certificate were not challenged both in courts of general jurisdiction and in arbitration courts. There are no cases of lawsuits against mediators (in particular, for compensation for damage caused by them as a result of mediation procedures), and there are only a few cases where mediation agreements have been challenged in court.

The advantage of the mediation procedure in resolution of family conflicts is predetermined by the many positive aspects of mediation. The mediation procedure is conducted only with the mutual consent of the parties on the basis of the principles of equality, confidentiality, voluntariness, independence, and impartiality of the mediator-mediator, with simultaneous active participation of the spouses in the search and development of the terms of a mediation agreement to resolve

[9] The information about the practice of application by courts of the Federal Law from July 27, 2010, No. 193-ФЗ "On alternative procedure of dispute resolution with the participation of a mediator (mediation procedure)" for the period from 2013 to 2014 (approved by the Presidium of the Supreme Court of the Russian Federation on April 1, 2015).

the conflict. The result is the creation of conditions for reaching a compromise between the disputants, reflected in the true interests and needs of the parties, which are fulfilled by them on a voluntary basis.[10]

The main aim of a mediator with knowledge of family conflictology in the resolution of family conflicts is to smooth the dispute between the parties, reduce tensions and eliminate contradictory disagreements for the subsequent development of consensual solutions to the issues under discussion, which will form the basis of a mediation agreement.

The mediator's objective when participating in the resolution of a family conflict is to assess the conflict situation, organize negotiations between the spouses, identify the most optimal solutions, and encourage cooperation between the parties.[11]

Judicial resolution of a family dispute, where the decision is always made in favor of one of the parties, leaving the other party "lost", which contributes to the strengthening of the family conflict. In this case, situations may arise where the "losing" party to the dispute may resort not only to legal means of protecting their rights (e.g., appealing a court decision), but also to actions that lie outside the law (e.g., threats or child abduction). In this situation, mediation allows the spouses to prevent such a development and direct their actions in a peaceful direction. In case the family cannot be preserved, the spouses will at least have the opportunity to restore and continue peaceful relations and further cooperation.

Another aim of the mediator is that after the mediation agreement is concluded, neither spouse should feel like a party that has lost. The spouses should remain in friendly and good relations, which will be in the best interests of the children.

[10] FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", Technology in Society, 68, 101872, 2022; FILIPCZYK, H. ADR in Tax Disputes in Poland – The State of Play and Perspectives. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, 205, 2023; FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5, 2021; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law, 36, 2261, 2023; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, 153, jul./dez. 2023; GROMOVA E., IVANC T. Regulatory Sandboxes (Experimental Legal Regimes) for Digital Innovations in BRICS. BRICS Law Journal, 7(2), 10-36, 2020; HALOUSH, H.A. The Liberty of Participation in Online Alternative Dispute Resolution Schemes. International Journal of Legal Information, 36(1), 102, 2008; MAIA, A., FLÓRIO, R.A. Online Dispute Resolution (ODR) / Mediação de Conflitos On-line Rumo à Singularidade Tecnológica? Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 5, n. 10, 39, 2023; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56, 2023.

[11] TROFIMETS, I.A. Mediation and dissolution of marriage, Russian judge, 10, 17, 2014.

When regulating a family conflict, the help of a mediator is simply necessary, as it is a question of preserving, and somewhere even of restoring normal relations between both parents, as the upbringing of a mentally healthy person (a common child) is the aim not only of the parents themselves, but also of the state. After all, a child of any age suffers from the separation of parents, from tense conflict relations between them.

Therefore, parents should make a decision aimed, first, at the well-being of their child; it is also important to enable the child to maintain contact with both parents after their divorce.[12]

Mediation is also of great importance in the dissolution of marriage in court. The mediation agreement should contain conditions regulating the provisions on the division of jointly acquired property, and in the presence of juvenile children – provisions on the issues of further residence of children after the dissolution of marriage, the order, and amount of alimony. Timely submission to the court of such an agreement significantly removes from the court the obligation to independently resolve the issues, which will greatly simplify the dispute resolution procedure, thus the court will be entrusted with only one objective – making a decision on the dissolution of the marriage.[13]

As established by the civil procedural legislation, when preparing the case for trial, the judge must take measures to conclude an amicable agreement between the spouses, including through mediation.

As practice shows, the use of mediation technologies is possible at any stage of court proceedings. These legislative norms are not conducive to the active application of mediation in the resolution of family disputes, because they delay the duration of court proceedings, reset them: instead of considering the dispute on the merits, the judge is looking for ways to smooth out the family conflict that has arisen between the spouses, seeking to try on the parties, which in the end does not always have a positive impact on the existing dispute between the spouses.

The effectiveness of the use of family mediation as a way to protect the rights and interests of citizens, including juveniles, is confirmed by the practice of application in foreign countries. In many countries, mediation is an obligatory stage in the resolution of family law disputes. In addition, in most cases, mediation is provided as a social service. Relevant laws are in force in the USA, Austria,

[12] MIKHEEVA, YU.YU. Mediation as a way to protect the rights and interests of spouses in resolving disputes related to the dissolution of marriage, Traditions and innovations in the system of modern Russian law: a collection of papers (Moscow: RG-Press, 2019).

[13] AKSENCHUK, L.A. Mediation agreement: content and classification, Human and civil rights and freedoms: theoretical aspects and legal practice: proceedings of the annual International Scientific Conference. (Ryazan: Concept, 2016).

and Germany. On June 4, 2002, in Brussels, with the support of the European Commission, the European Code of Conduct for Mediators was adopted, which establishes the foundations of the institution of mediation.[14] In turn, the European Union issued a number of directives regulating the activities of mediators.

Having analyzed the practice of Russian courts, we can conclude that the trend of mediation agreements and cases of resorting to professional mediators to settle family disputes is not high as it is at the very beginning of its formation".[15]

3 Subjects of mediation activities

The spread and integration of mediation into the legal culture indicates that the practice is responsive to the demands of the modern world. As noted by practicing mediators, due to the fact that the population has a low level of legal literacy, representatives of the "mediator" sphere of jurisprudence are responsible for educating the population about the possibilities and advantages of family mediation, for the conscious choice of the most appropriate way of dispute resolution. For each legal specialty, the approaches, role, opportunities, and tools to eliminate a conflict situation can and should be different.

Foreign practice of mediation application indicates that the use of mediation technologies in court can effectively penetrate society and become more in demand in the resolution of family conflicts.

Promotion of mediation in society and its subsequent application as the most priority method of rights protection goes through several stages. At the first stage, judges, in case of mutual desire of the parties, give them the opportunity to apply to a professional mediator. At the second stage, the mediator identifies issues of interest to the parties by means of negotiations – the development of a constructive solution. At the third stage, under the mediator's supervision, the parties conclude a mediation agreement. At the fourth stage, the judge approves the amicable agreement, having verified that this conclusion is indeed the will of the parties.

As practice shows, the judge himself can also perform the functions of a mediator if he has the necessary knowledge and skills in the field of family conflictology. As of October 25, 2019, according to the amendments to the Mediation Law, retired judges may also act as mediators on a professional basis. Lists of retired judges who have expressed a desire to act as mediators on a professional

[14] PARKINSON, L. On the development of mediation in other states, on the prevalence of family mediation in Europe and the USA (M.: Interregional Center for Management and Political Consulting, 2010); MIKKOLA, M., KHAZOVA, O. Child custody disputes in Finland and Russia, Ed. by. Bukvel, 2012.

[15] ELISEEVA, A.A. Family Law at the turn of XX-XXI centuries: to the 20th anniversary of the UN Convention on the Rights of the Child (Moscow: Statut, 2011).

basis are maintained by the councils of judges of the constituent entities of the Russian Federation. In many countries, judges also act as mediators. In order for a judge to act as a mediator, it is necessary for that person to understand the essence of the procedure, the advantages, positive aspects of its application, as well as where the boundaries of its applicability lie. Judges will be effective agents by competently explaining and encouraging the parties to resort to mediation in cases where the dispute can be settled out of court.[16]

In many countries, mediation is used both in first instance courts, as well as in appellate proceedings.[17] In the appellate courts of Canada, the United States of America and Slovenia, there has been an increase in the use of mediation as an alternative dispute resolution method. In these countries, family mediation is most often used at the stage of appealing a judicial act.

The widespread use of mediation as one of the ways of dispute resolution was started as early as September 1, 2009, with the adoption of the project on the use of mediation in the court of appeal. Thus, G. Ristin in his work "It's not over yet. Alternative dispute resolution at the level of appeal" wrote "According to statistical data, already since 2009, out of 70 cases considered in a month, in which mediation was offered in the court of second instance, in 20% of them the participants decided to resort to this procedure, and 33% of them were successfully resolved".[18]

According to the Russian Federation, judges cannot act as mediators. However, they can quite successfully facilitate the reconciliation of the parties. To date, there is a practice of application of mediation skills by Russian judges. These facts allow us to assert that there is a tendency to integrate the mediation approach in the activities of judges. It is through judges that information about the mediation procedure[19] and its advantages is disseminated in society. This contributes to the fact that the idea of mediated dispute resolution can take root in the minds of people as an effective way of resolving family conflicts.

The Fundamentals of the Legislation of the Russian Federation on Notarial System Law provide an opportunity for a notary to act as a mediator. This is

[16] OTIS, L., REITER, E.H. Mediation by judges: a new phenomenon in the transformation of justice, Mediation and Law, 1-3, 12, 2011.

[17] BERNARD, K. Mechanism fine-tuned for 20 years: Mediation in the Federal Court of Appeals of the Ninth Federal District of the United States, Mediation and Law, 2, 34, 2010.

[18] RISTIN, G. Not everything is resolved yet. Alternative dispute resolution at the level of appeal, Mediation and Law, 4, 18, 2010.

[19] D'ALESSANDRO, G. The alternative dispute resolution system in Italy: between harmonization with the requirements of European markets and de-juridicalization, R. Bras. Al. Dis. Res. – RBADR, ano 01, n. 01, 100, 2019.

confirmed by the fact that the notary certifies the mediation agreement reached by the parties in accordance with the mediation agreement.[20]

In some cases, the notary may advise the parties to contact to a mediator in order to resolve the conflict amicably. In addition, the notary may also act as a mediator or apply a mediation approach in its activities.

A striking example is the certification of alimony agreements of the parties, agreements on the division of jointly acquired property, marriage contracts and others.

Sazonova M.I. noted that "notary in its essence is a mediator at the genetic level. After all, he, representing the interests of the parties, acts as a conciliator in the certification of all kinds of agreements, contracts. He balances the civil turnover. Due to this, he reduces the burden on the courts, freeing the state from additional investments in the judicial system".[21]

Despite the fact that the Law on Mediation came into force back in 2010, mediation remains a new, little-studied institution in the Russian Federation. And that is why the notary needs to know the basics of mediation activity to fulfill his direct duties.

Thus, M.I. Sazonova notes that: "In order to widely use mediation, it is necessary to train people who will be able to apply it correctly".[22] After mastering the skills of a mediator, a notary can contribute to the formation and development of the institution of mediation. Moreover, the mastering of mediation[23] skills by a notary will contribute to the formation of a positive image as a representative of this profession.

According to G. Brook, "the attitude of lawyers to alternative dispute resolution depends to a large extent on their personal qualities. If a lawyer is inclined to aggressive adversarial litigation, it is unlikely that he will pay due attention to mediation. If a lawyer believes it is his duty to provide his client with a positive and cost-effective resolution of the dispute at an early stage, he is more likely to resort to mediation".[24]

In addition to notaries, in the course of their direct duties, lawyers can also inform citizens who have sought their assistance about the possibility of settling a dispute through mediation. As practice shows, until recently lawyers perceived the

[20] Fundamentals of Legislation of the Russian Federation on Notarial System (approved by the Supreme Court of the Russian Federation 11.02.1993 No. 4462).

[21] In the old days they used to say: "a notary is a secular priest": Interview with M.I. Sazonova, Mediation and Law, 2, 19, 2010.

[22] See. *Ibid.*

[23] Directive 2008/52/EC of the European Parliament and Council of 21 May 2008, on certain aspects of mediation concerning civil and commercial matters. https://eur-lex.europa.eu/legalcontent/IT/TXT/PDF/?uri=CELEX:32008L0052&from=EL (31.03.2023).

[24] BROOKE, G. Mediation should not be imposed, Mediation and Law, 4, 46, 2009.

mediation procedure exclusively as a competing institution. However, despite this, the mediation procedure of dispute resolution contains a number of advantages for the lawyer. With the help of mediation, the lawyer creates conditions for finding the most effective and suitable to the parties' conditions for conflict resolution, which will help to prevent the latter from being dragged into long-term and costly litigation. At the same time, the party who has applied for help develops trust in the lawyer as a professional who is able not only to bill, but also to actually assist in the resolution of disputes. It can be assumed that the formation of trust to the lawyer in the future can contribute to repeated cooperation in case of conflict and disputes.

In accordance with the norms of the Law on Mediation, a mediator cannot advise the parties, including on legal issues. The mediator's duty is to recommend the parties to seek legal assistance. Applicants need qualified assistance in concluding a mediation agreement. Thus, the need for a lawyer only increases. The role of the lawyer himself is in another:[25] the lawyer contributes to getting the party seeking help to identify the most appropriate option for the settlement of the dispute, as well as in the realization of his interests. In addition, the lawyer and independently can act as an intermediary.

According to Part 3 Article 15 of the Law on Mediation, the activity of a mediator is not entrepreneurial. A mediator is an independent link in the settlement of a conflict situation. The only aim to which he should strive is to work in the interests of both parties. But if we talk about the activities of a lawyer-mediator,[26] then in this case there is no conflict of interest at all.

That is why a mediator[27] must be completely neutral, i.e., he must not be bound to the parties or to one of the parties by contractual obligations to provide legal assistance or be subordinate to one of the parties to the conflict.

The Federal Law of May 31, 2002, No. 63-ФЗ "On advocacy and advocacy activities in the Russian Federation"[28] (hereinafter – the Law on Advocacy) and the Advocate's Code of Professional Ethics of January 31, 2003,[29] do not expressly prohibit an advocate from acting as a mediator. Thus, the right of an advocate to be a mediator does not contradict the provisions of the Law on Advocacy. Art. 9 of the Code of Professional Ethics of Advocates prohibits an advocate from engaging

[25] THANH, H.B. Applying Conflict Coaching to Handle Vietnamese Family's Conflicts. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 03, n. 05, p. 125-135, jan./jun. 2021.

[26] SHASHANK, G. Alternative Dispute Resolution: The Indian Perspective (Oxford University Press, 2018).

[27] OMKAR, A. KRISHNAMURTHY, K. The Art of Negotiation and Mediation: A Wishbone, Funny bone and A Backbone (LexisNexis, 2015).

[28] Federal Law of 31.05.2002 No 63-ФЗ "On advocacy and advocacy activities in the Russian Federation", The Collection of Legislation of the Russian Federation, 10.06.2002, No. 23, Art. 2102.

[29] Code of Professional Ethics of the lawyer (adopted by the First All-Russian Congress of lawyers 31.01.2003), Bulletin of the Federal Chamber of Lawyers of the Russian Federation, No. 2, 2003.

in other (in addition to advocacy) paid activities and providing legal services outside the scope of advocacy. Accordingly, an advocate should carry out mediation activities within the framework of the advocate's practice.[30] Since advocacy is a professional activity of an advocate, the provision of mediation services by an advocate is possible only on a professional basis.

The possibility of lawyers in corporate disputes to become mediators is promising. This will contribute to the fact that the institution of mediation will be publicly recognized and will not be rejected due to the good faith work of mediators. The classical work of a lawyer differs from the work of a mediator by the following features:

- sphere of activity, which is connected with a comprehensive study of the arisen contradictions and conflict situations of different subject categories;
- independent and impartial mediator in the person of a lawyer, who carries out a mutually acceptable search for conditions for the resolution of the arisen dispute;
- a special procedure carried out within the framework of advocate's activity and the advocate-mediator's role in it.

On the basis of the above-mentioned features, the advocate's activity within the mediation procedure can be characterized as a completely new tool in the advocate's activity.[31]

A lawyer-mediator[32] considers the specifics of the legal regulation of the dispute, as well as the legal position of the parties in it. He shall assist the parties in finding the most appropriate solution that will take into account the interests of each party. Within the framework of mediation activity, an advocate shall consider and identify legal and extra-legal peculiarities of the arisen conflict. It follows from this that the lawyer's activity within the framework of mediation activity is aimed at the use of legal norms, within the framework of which it is possible to find various options for resolving the dispute. Consequently, within the framework of mediation the dispute is resolved not as in a judicial procedure, but by the disputing parties. In such cases, the parties to the dispute are fully responsible for the fulfillment of the mediation agreement.

[30] KOZIATINSKAYA, A.V. Participation of a lawyer in extrajudicial dispute resolution, Extrajudicial dispute resolution in territorial communities: Materials of the fourth scientific-practical conference (Kaluga, 2001); DEMIDOVA, L.A., SERGEEV, V.I. Advocacy in Russia (M., Prospekt, 2005); VAIPAN, V. Conflict of interests in advocacy. Commentary to Article 11 of the Code of Professional Ethics of the lawyer, Law and Economics, 6, 108, 2007; MELNICHENKO, R.G. Advocacy (M.: Statut, 2009).

[31] VOSKOBITOVA, M.R. Participation of the lawyer in the realization of the right of citizens to appeal to interstate bodies for the protection of human rights and fundamental freedoms. M., 2009.

[32] VERMA, A. Negotiation for human beings: what, why and how? Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 04, n. 08, p. 17-37, jul./dez. 2022.

A mediation lawyer[33] is in charge of the overall management of the mediation procedure. Although he facilitates the reconciliation of the parties, he cannot determine the issues that will be resolved[34] in the future. Also, the lawyer-mediator cannot adjust[35] the terms of the agreement, allowing the parties to independently decide important conditions in the settlement of the conflict. This will subsequently affect their responsibility for the fulfillment of the paragraphs of the mediation agreement. The mediation procedure is a colossally new area of the lawyer's activity, which allows him to expand the range of professional skills.

The foreign experience of lawyers' participation in alternative ways of dispute resolution, including acting as a mediator, is very extensive.[36]

Mediation activities are widespread in the countries of Western Europe and Scandinavia. There, legal assistance in conflict resolution is considered by advocates and lawyers, which is their exclusive prerogative. This sphere of legal relations is actively mastered.[37]

Some lawyers and advocates instead of conducting cases in court specialize in negotiations, another part – in other alternative methods, including mediation.[38] Foreign practice shows that the participation of a lawyer in the resolution of family disputes and conflicts is recognized as a natural element of professional advocacy.

Almost 14 years have passed since the adoption of the Law on Mediation, and, as practice shows, mediation is slowly but surely entering the life of society. Russian lawyers very rarely apply in practice the approach of combining advocacy and mediation activities, as their foreign colleagues have been doing for a long time.

The state, public authorities and the legal community also face the mission of building a state based on the rule of law, eliminating legal nihilism and improving legal culture in general. This aim cannot be achieved without improving the level of professional training of legal personnel. The use of alternative ways of dispute resolution, focused on the responsibility of the parties themselves, on their awareness when making a decision, is a necessary part of a lawyer's arsenal. Like any other effective institution, mediation should and can be in demand in the Russian Federation.

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33 PANCHU, S. Mediation Law and Practice: The Path to Successful Dispute Resolution (Lexis Nexis, 2022).

34 VLADIMIROVICH, M.A., SERGEEVICH, E.K. Alternative dispute resolution in digital government. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 04, n. 07, p. 119-146, jan./jun. 2022.

35 KRYVOI, Y., DAVYDENKO, D. Consent Awards in International Arbitration: From Settlement to Enforcement, Brooklyn Journal of International Law, 40 (3), 843, 2015.

36 GOLANN D., FOLBERG, J. The roles of advocate and neutral (New York: Aspen Publishers, inc., 2006); NOLAN-HALEY. J.M. Alternative dispute resolution: In a nutshell (West Publishing Co., 1992); MOORE, Ch.W. The Mediation Process. Practical Strategies for Resolving Conflict (London: Jossey-Bass Publishers, 1986).

37 ENTRINGER, F. Development with Insurance, Mediation and Law. Mediation and Conciliation, 1, 12, 2010.

38 RICHBELL, D. Mediation in Russia has huge opportunities, Mediation and Law. Mediation and Conciliation, 1, 48, 2010.

4 Conclusion

As a result of the conducted research, analysis of the legislation of the Russian Federation, as well as the practice of applying the mediation procedure in the resolution of matrimonial and family disputes, it can be concluded that mediation is currently one of the promising forms of settling family disputes. In some regions of the Russian Federation, the practice of concluding amicable agreements and seeking the assistance of mediators for the resolution of family disputes has increased over the last three years.

Targeted informing of the population about the advantages of mediation procedures will contribute to the expansion of the practice of mediation procedures. Improving legislation and raising the level of professional training of mediators are also necessary elements. A mediator should have knowledge of family law, psychology and conflictology, pedagogy, as well as be able to skillfully use various methods of dispute resolution, which will be focused on the responsibility of the parties and their personal awareness.

Thus, the integration of the institute of mediation into the existing procedure for the resolution of family disputes will make it possible to fully realize the advantages of the mediation procedure with the traditional court procedure. Mediation has a huge potential because it is gaining importance against the background of the constantly changing mood in society.

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