Mediation as a Way to Resolve Conflicts

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Abstract

Purpose The article considers mediation as a way of resolving conflicts, based on consensus and cooperation. Mediation is recognized as an alternative procedure for resolving disputes with the participation of an intermediary, promotes the development of partnership business relations and the formation of business ethics and harmonizes social relations. Family law dispute is one of the type of conflicts. Therefore, in the article we will consider the peculiarities of the use of mediation for the settlement of family disputes. Mediation increasingly penetrates not only the sphere of social and economic conflicts, but also involves subjects of family legal relations in this procedure. An analysis of the current state of mediation and its role in resolving family disputes will also be carried out within the framework of the declared topic. Mediation as a pre-trial method of resolving civil legal disputes is closely integrated into civil proceedings. It can be most effectively implemented in the field of family law. Of greatest importance may be the focus of mediation on the voluntary resolution of disputes arising between subjects of family law relations. Often, disputes go into the stage of conflict, which makes the use of a mediative procedure even more necessary. Traditionally, conflicts within the family are considered the most problematic, since their participants are people who are in a blood-related relationship. This makes the process of resolving such conflict situations quite difficult. It should be borne in mind that overcoming the conflict by judicial and administrative authorities does not lead to reconciliation of the parties, but in most cases negatively affect the interests of the child.

Keywords

Conflict • Disputable situation • Mediation mediator • Legal entities • Family • Family conflicts • Civil disputes • Independent intermediary • Civil and family legislation

JEL Classification

K490 • K42

1 Introduction

Nowadays, mediation has become widespread in all civilized countries. In the Russian Federation, mediation officially appeared almost ten years ago, and it is already possible to take the first results and highlight the main positive and negative aspects. In foreign practice, this is one of the significant ways to resolve legal conflicts. Mediation has a long history and becomes widespread, becoming subjects of study of sociology, jurisprudence, psychology and other social sciences.

For the first time, mediation is officially enshrined in the sources of law in the Justinian Code (530–533 AD). In Roman law, the institution of mediation was denoted by the terms of the concept of "intermediary"—internuncius, medium, interpolator, conciliator, interpres and mediator. Mediation, in its modern interpretation, has been keeping a report since the second half of the twentieth century. During this period, in common law countries, legal disputes could be resolved by the parties to the conflict in a pre-trial manner, and if the case was already considered by the court, the judge could invite the disputants to turn to the services of a professional mediator. This practice was further spread to

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resolve the dispute in the field of entrepreneurship, and later in politics they began to attract such negotiators. The experience of the USA and Great Britain was adopted by the countries of Western Europe, where later they adopted special regulatory acts governing mediation procedures.

In terms of application, mediation affects a wide range of legal relations: the family sphere (divorce, division of inheritance), economic and labor (conflicts within the organization and between firms), the public legal sphere (e.g., environmental protection), political (conflicts between ethnic groups and between countries), criminal field (between the guilty and injured) and many others.

The purpose of mediation is not only to resolve the disputed situation, but also to preserve peaceful relations, the opportunity to continue business cooperation and develop relations in the future. Mediation is a system of conflict resolution based on consensus and cooperation, and it is the beginning of coexistence on new jointly developed rules.

The application of mediation in family law has a special character, which is determined by the very specificity of marriage and family legal relations. Thus, in accordance with Art. 2 of the Family Code of the Russian Federation, "family legislation establishes the procedure for the implementation and protection of family rights, the conditions and procedure for marriage, termination of marriage and its invalidation, regulates personal non-property and property relations between family members: spouses, parents and children (adoptive parents and adoptees), and in cases and within the limits provided for by family law, between other relatives and other persons, determines the procedure for identifying children left without parental care, the forms and procedure for their placement in the family, as well as their temporary arrangement, including an organization for orphans and children left without parental care".

2 Materials and Method

Legal science pays great attention to the problem of mediation. Within the framework of civil procedural and arbitration procedure law, mediation problems were considered in the dissertation study by Kalashnikova (2011) "Mediation in the field of civil jurisdiction" and (Eliseev, 2013) "The role of mediation in resolving legal conflicts: theoretical and legal analysis," where it prescribes in detail and comprehensively the mediation process in the Russian Federation. The Institute of Mediation in Resolving Social Conflicts is studied by representatives of legal conflict (Kazimirchuk & Kudryavtsev, 1995; Khudoykina & Vasyagina, 2006) psychology scientists (Allakhverdova Karpenko, 2008).

An analysis of the scientific literature shows that at present a fairly extensive theoretical and empirical basis has been created for an alternative dispute settlement procedure with the participation of an intermediary (mediation procedure). In this regard, new amendments to the law on mediation in our country are being adopted, and new opportunities are emerging for studying this procedure.

3 Results

Society will achieve better results if it does not turn a blind eye to conflicts, but follows certain rules aimed at resolving conflicts. The role of conflicts and their regulation in society is so great that conflict science has been singled out as an independent discipline. As the founder of the discipline (Kozer, 2000), said in his work "Functions of Social Conflict," conflict is a form of socialization, and "conflict, as well as cooperation, has social functions. A certain level of conflict is not necessarily dysfunctional, but is an essential component of both the process of formation of the group and its sustainable existence." In society, conflicts have become diverse, where the interests of different actors collide and intersect. According to sociologist (Darendorf, 2002), circumstances are important for the successful settlement of the conflict: firstly, recognition of various points of view, secondly, the high organization of the conflicting parties and thirdly, the presence of the rules of the game.

Within the framework of jurisprudence, conflict resolution is divided into extrajudicial and judicial. One of the conditions for the consideration and resolution of a case in court is the existence of a disputed legal relationship between the parties. However, the prospect of getting involved in the trial does not look attractive for the participants in the conflict due to financial, temporary and other costs. The legislative improvement of the current judicial process did not form due respect for the court in Russian society due to the postponement of cases for years and the ambiguity of the outcome of the case. Even if the decision is made in favor of the plaintiff, this will not lead to a resolution of the conflict at all, since the guilty party is not in a hurry to fulfill its obligations and again needs to turn to the enforcement authorities. In connection with these circumstances, those in conflict should turn to the services of a mediator. But, if the dispute is subordinated, then the path to the mediator is ordered to its participants, and they can only count on the capabilities of the court. In practice, situations may arise when, in fact, a dispute has not arisen, but there is already a risk of violating the interests of one of their parties.

Therefore, in practice, such conflicts can arise, which, based on their subject composition and circumstances, can be resolved using various forms and methods.

A notable and significant step in the resolution of conflicts was the emergence in our country of an institute of mediation in connection with the adoption of the Federal

Law of July 27, 2010, No. 193-FZ 'On an alternative procedure for the settlement of disputes with the participation of an intermediary (mediation procedure)" (2010). Mediation refers to an alternative dispute settlement procedure involving an intermediary. The mediation procedure can be applied to disputes arising from civil, administrative, other public legal relations in connection with the conduct of entrepreneurial, economic activities, as well as disputes arising from labor and family legal relations.

The main advantage of mediation over the trial is the speed of conflict resolution. Mediators are not bound by the requirements of procedural legislation and do not have workload in the work as judicial bodies. A court decision often does not suit one or both sides of the process, and mediators have more opportunities to hear the parties, take into account their interests, seek a compromise, and find a solution to the conflict that suits the parties. In conditions of overburdened courts, mediation is positively received by the judicial system.

Mediation methods are based on negotiation in line with cooperation and mutual respect for the interests of the parties. Mediation is possible only when both parties want to resolve the conflict. The main principles of the mediation procedure are voluntary, equal rights and cooperation of the parties, confidentiality of the procedure, impartiality and independence of the mediator.

Unlike the court, the decision to terminate the dispute is always made by the parties to the conflict themselves, since the mediator is not empowered to make decisions. Mediation is a negotiation first of all, it is a dialog of the parties, and the mediator is a psychologist and a conflictologist who owns the norms of law. The mediator does not investigate the evidence and does not assess the legality of the requirements of the parties, and his task is to ensure mutual understanding between the parties. The mediator sees a more complete picture of the dispute than each of the parties individually, analyzing the situation the mediator leads the parties to agree.

The current media legislation provides the following ways to apply for media services:

- at the stage of a pre-trial conflict situation;
- in the process of consideration and resolution of the case by the court;
- and as part of the execution of the decision with the involvement of the bailiff.

The mediation procedure does not in any way limit the right to judicial protection at any stage of conflict resolution, including the possibility of moving from a judicial form to an extrajudicial one.

In the mediation procedure, you can conditionally distinguish the following stages:

1. The mediator talks about the negotiation procedure, and the parties express their voluntary consent to conduct a procedure to resolve the conflict.
2. The parties to the dispute express their views on the subject matter of the dispute.
3. The parties to the dispute express their attitude to each other's positions and formulate the most pressing issues.
4. Participants in the dispute, with the direct participation of the mediator, are looking for ways out of the current conflict situation.
5. Participants in the dispute come to a consensus and conclude a mediative agreement.

If the terms of the agreement are not respected, the party has the opportunity to consider the issue of its non-performance, as in the case of non-performance of any civil contract.

So, one can distinguish from the advantages of the mediation procedure: It is focused on the mutually beneficial settlement of the dispute, and the decision was made by the parties themselves, saves the time of the parties, is confidential, and helps preserve the relationship between the parties.

The procedure is based on the absence of losing parties and the idea that only a mutually beneficial agreement can be durable. In the future, the parties may have strong personal, business relations, so the methods used serve to resolve conflicts in line with cooperation and mutual respect between the parties (DOCLVS.RU, 2020).

A new step in the development of mediation and giving additional legal effect to the mediation agreement was the Federal Law of July 27, 2010, No. 193-FZ "On an alternative procedure for the settlement of disputes with the participation of an intermediary (mediation procedure)" the rule according to which the mediation agreement reached by the parties as a result of mediation in case of its notarial certification acquires the force of the execution sheet (Part 5 of Article 12 of Law No. 193-FZ) and Article 59.1 of the Framework of Legislation on Notaries, which establishes the rules for certifying a mediation agreement. In such a way, without filing a lawsuit in court, the parties to the conflict turn to the mediator, develop a draft mediation agreement, and then the parties and the mediator go to the notary office, where the notary on the basis of the law and will of the parties to the conflict notarizes the mediation agreement of the parties. If the party does not fulfill the agreement, you can immediately contact the bailiffs by providing a notarized mediation agreement (Federal Notary Chamber, 2019).

Therefore, the notary acted as a guarantee for the execution of mediation agreements, which will help the development of mediation in the Russian Federation. The executive power of the mediation agreement, which is given by a notary

certificate, will increase interest in the procedure for resolving conflicts through mediation and will provide guarantees for the direct execution of the agreement. Notaries are independent and impartial in their activities, their professional responsibility is fully insured, and they become an additional guarantor in the provision of mediative services. In the countries of the continental legal system, notaries demonstrate the effectiveness of their work as a mediator in the case of extrajudicial settlement of civil disputes.

In relation to the field of family legal conflicts, the literature justifies the opinion that "the use of mediation to resolve a family legal dispute allows us to take into account the specifics of family legal relations, their personal-trusting nature and is aimed not only at restoring violated rights, but also at preserving comfortable relations between the subjects of the dispute" (Ivanova, 2014). Family relations arise not only in connection with the registration and dissolution of marriage, but also in personal non-property and property relations between spouses; personal non-property and property relations between other family members; maintenance obligations. This approach can be considered a priority, since it allows you to maintain constructive relations and trust between people connected by blood ties. In a number of existing norms of the Family Code of the Russian Federation (e.g., paragraph 2 of Art. 22, Art. 23, etc.), conditions have already been outlined that allow the active use of mediative procedures in solving marriage and family conflicts. Conciliation procedures are recommended when regulating relationships involving children. This direction is developing within the framework of juvenile justice. However, not all matrimonial relationships can be settled through mediation. This is due to the predominance of peremptory norms in domestic family law. Let us give you an example. The marriage or dissolution of a marriage is subject to state registration and mediation cannot be fully regulated.

Modern studies also draw attention to the fixation in the Family Code of the Russian Federation of only a jurisdictional form of protection of family rights (administrative and judicial), which in the current conditions cannot suit all participants in family legal relations. Thus, Ivanova (2013) notes that "the use of mediation, despite such an opportunity established by the Law on Mediation, is not provided for by the Family Code. At the same time, ensuring the unhindered exercise by family members of their rights and resolving family issues by mutual consent, guaranteed by the Family Code, indicate the advisability of using mediation to protect family rights."

The use of mediation in the regulation of disputed situations in marriage and family relations seems to be a wide area requiring specificity by establishing the most possible disputed situations. Notes the heterogeneity of the structure of family disputes, which do not always allow the use of mediation. It classifies as unacceptable disputes about deprivation of parental rights, restriction of parental rights, abolition of adoption: "These disputes serve a common goal—the protection of violated rights of the child, and in most cases they are a measure of responsibility." In her opinion, the mediation procedure should be excluded only in cases of the application of family legal measures to parents and persons replacing them.

Family mediation is a universal procedure, so reducing its meaning exclusively to divorce is not entirely correct. Through family mediation, it is possible to resolve most of the conflict situations that arise within the family; first of all, these are disputes in determining the procedure for participating in the upbringing of a child of a single resident parent; disputes in determining how other family members communicate with the child (e.g., grandparents); disputes over the determination of the child's place of residence; disputes over the upbringing of the child; cases of deprivation of parental rights (Shilovskaya, 2013). Addressing the family mediator in such controversial situations is a correct, civilized order, which will be applied in Russian society after a while.

Summarizing the above, we note that the list of controversial situations in law in respect of which the mediation procedure can be applied is abstractly wide. It should be agreed that this legal procedure can be an effective instrument in the management of complex civil relations. In this case, however, a thorough legislative regulation of the grounds and procedure for its application is required.

4 Conclusion

Based on the analysis of mediation possibilities in resolving social and legal conflicts, the autonomous nature of this means of dispute settlement is noted.

Mediation can be considered as a complex intersectoral institution, which is studied by jurisprudence, sociology, psychology and many other sciences. The mediative procedure is more connected with real reality, which makes it possible to ensure the voluntary implementation of the mediative agreement reached by the parties to the conflict.

Ideally, mediation is an independent out-of-jurisdiction procedure aimed at overcoming differences between all subjects of marriage and family relations and is enshrined in the provisions of the Federal Law "On an Alternative Procedure for the Settlement of Disputes with the Participation of an Intermediary (Mediation Procedure)" and the Family Code of the Russian Federation. At the same time, today mediation is only an optional jurisdictional procedure, the purpose of which is to overcome the differences of the disputing parties at the stage of an unresolvable conflict.

In characterizing family mediation, it is of particular importance to determine the body or official responsible for

conducting mediation. In the legal literature, there are different approaches to determining the subject responsible for conducting the mediative procedure. So, Trofimets (2014) believes that such activities should be carried out by professional mediators–specialists in family conflict science. However, the level of legal training of this category of potential mediators is not clear.

In our opinion, the discussion about the peculiarities of the professional orientation of the family mediator should be based on the provisions of the current legislation. According to Federal Law of July 27, 2010 No. 193-FZ (2010), the activity of a mediator is neither a practice of law nor a legal aid (provision of legal services). The mediator, in accordance with (Federal Law of July 27, 2010 No. 193-FZ, 2010), is deprived of the right to provide legal assistance to his clients. Therefore, the question of the professional affiliation of the mediator seems rather difficult. We believe that the mediator can be a person who has received an education in the corresponding specialty, including both training in psychology, conflict science, and jurisprudence. Obviously, the requirements for a family mediator should be enshrined in the Family Code of the Russian Federation.

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