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## **Comparative Analysis of Mediation Procedures and the Judicial Settlement of Conflicts**

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***Abstract:***

*The aim of this article is to identify the specifics of mediation procedures in comparison with judicial resolution of conflicts. As the methodological basis of the research the author uses the dialectical, phenomenological and synergistic methods of analysis, allowing identifying the essence of mediation procedures and their significance for the relations of civil turnover.*

*As a result of the study, the authors concluded that mediation in Russia needs more visibility, because it is more suitable for the resolution of disputes in the sphere of civil turnover within the country and internationally.*

***Keywords:*** *Mediation procedures, dispute resolution in courts, private law-conflict of commercial and public organizations, international economic disputes.*

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## **Introduction**

Nowadays, recourse to court remains the most popular form protection of violated rights in many countries. The court, as the supreme body of justice is not always optimal form resolution of the conflict for the parties to the dispute. Trial in court entails considerable legal costs, withdrawal a huge amount of money which is a matter of dispute from the money turnover and also can damage business and personal relationships of the parties. Besides, it is cause of the serious overwork of courts that affects their performance (Paltsev, 2012).

Judges are on the top of the legal hierarchy. But besides the respect and high public reputation of this kind of activity everywhere in the world, the work of judges in conditions today has many difficulties. There isn't more independent work than a judge in the world. That is why judges have constantly to take care of their objectivity and impartiality, to fulfill and overfulfill legal rule, which is putting pressure on them. Often, it seems that the burden of many social failures is on their shoulders, so often they are guilty in everything. They are the most silent profession. Judges are strict, formal, unavailable, pedantically apply the law, don't permit anything not to relate to law, don't take into account the emotions and interests, they make decisions not by justice, but by the letter of the law, - and everything often leads them to a moral dilemma.

Today, for the resolution of any disputes people always turn to the courts. As a result, the courts are overloaded with cases, and judges under the circumstances (at least in large courts) can't resolve disputes within a reasonable time because of the large number of lawsuits. Everybody constantly talks about the number of judges towards the population, but nobody talks about the number of cases towards the number of judges or the public. They are horrendous if we compare number of cases per judge, for example, in the countries of Europe. Nowadays, one of the sequels the congestion of our courts are countless claims for compensation for a case not within a reasonable time demands, threatening new lawsuits that, in the circumstances, at least pointless (Srdjan, 2010).

In our opinion, in disputes that have already trialed, judicial mediation is a great alternative to the blind instrument of controversial litigation. It unites the legal and moral authority proceedings with the flexibility and adaptability of mediation. Thus, it is not just a qualitative leap in the dispute resolution efficiency, but also a rethinking the role of courts and judges in the administration of justice.

## **Literature review**

The effectiveness of mediation during the court proceedings has been affected the works of many foreign lawyers and legal scholars (Otis, 2011; Organsims, 2010). Besides, many European and American lawyers see a wide sphere of application of the mediation procedure, both in commercial dispute, and other areas (Richbell,

2011; 2010; Crawley and Graham, 2010). The mediation of the Russian Federation has also attracted attention of both practitioners and legal theorists (Fingers, 2012; Shamlikashvili, 2016; Smyg, 2012). It is said that following the adoption of the federal law in Russia (2010) mediation began to penetrate many spheres of human life. Practicing lawyers, judges and legal theorists began to talk about the successful use of mediation in areas such as family law, labor and business. Foreign experience allows us to use the works of European lawyers (Parkinson, 2010; Pel, 2009; Crowley, 2010) as the basis for the formation of our own well-functioning system (Lisitsyn, 2010; Belov, 1998).

### **Methods of carrying out research**

As the methodological basis of the research – dialectical, phenomenological and synergistic methods were used. The dialectical method is the objectivity of the study, historicism, taking into account the unity of qualitative and quantitative determination, determinism and compliance with the principle of negation of negation. As to the phenomenological method, it provides common research entities and private phenomena, types of observations of phenomena and interpretation of the phenomena of values. The essence of the method consists of a synergistic open social system which means its ability to interact with the environment. Also do not forget about how uneven and non-linear social life is.

### **Results**

#### **1. Mediation procedures in modern justice and problems of their implementation**

In modern conditions, extrajudicial and pre-trial settlement of disputes is becoming more and more significant in connection with the constantly emerging number of civil cases entering courts of general jurisdiction.

To facilitate the situation of judges is the widespread introduction of conciliation procedures, extrajudicial and pre-trial ways of settling disputes, including mediation, into the Russian legal system. After all, the procedure of mediation can be applied at any stage of the settlement of a conflict that has arisen - and as non-judicial, if the parties manage to settle the dispute with the help of an intermediary and the necessity to appeal to the court on this issue is no longer possible, and as a pre-trial case, if the dispute is not resolved with the mediator's participation and the interested person is forced to go to the court.

Over the years after the introduction of the Law on Mediation, a lot has been created. In particular, the number of trained mediators is several thousand people and in 41 subjects of the Russian Federation it is possible to apply to 94 providers. Their greatest concentration is observed in Moscow, Yekaterinburg and Novosibirsk. Thanks to this, thousands of disputes are resolved through mediation in

Russia. More often, mediate procedures are used in marriage and family relationships. We are talking about disputes over settling conflicts between relatives, spouses, parents, children, that is, in the area where the judicial process entails destructive consequences. Also, through mediation, labor, property and regulatory disputes are successfully resolved. In more than one third of the Russian regions, courts are involved in mediation about 2,500 Russian courts out of 299,000 represent information on mediation to the parties.

Finally, in 17 subjects of the Russian Federation, about 30 organizations are engaged in the preparation of mediators, and the number of trained mediators has now exceeded four thousand people.

Accumulated in recent years, the experience of mediation has shown the necessity for a wider popularization of this procedure with an explanation of the positive consequences of its application. Precisely because of the lack of such information that citizens fail to perform it properly, and one of the parties claims that it needs a court decision, not reconciliation.

In this regard, it is very relevant to note V.F. Yakovlev with respect to the significance of the level of culture of our society: "It is this level that determines the degree of conflict in society and the ability to get out of controversial situations on the basis of a developed system of human relationships. That is, our ability to negotiate depends on the level of culture" (Yakovlev, 2016). It seems very effective to introduce mediation in the courts as a mandatory pre-trial order of dispute resolution. If the plaintiff cannot present an agreement on the procedure of pre-trial settlement of the dispute agreed with the defendant, the application submitted to the court is transferred to the mediator who conducts the mediation procedure with the parties. Such mediators can be specially trained employees of the court.

This procedure for the pre-trial settlement of a dispute may be conducted at the time or instead of preparatory to a judicial dispute, the judge's actions. The advantage for the parties of this type of mediation is that the mediation conducted by the court employee will not require additional material costs, since it will be conducted free of charge. It should be emphasized that this is an international trend. In democratic, developed countries, the introduction of alternative methods of dispute resolution is successfully promoted by judicial communities.

As a rule, judges are deeply convinced that their mission is not only to resolve disputes, but also to push the parties to take on greater responsibility for solving their problems. It means that the judge himself will act as a mediator; rather, he will always remember that in a number of cases, mediation can prove useful to the parties and the maintenance of civil peace in society as a whole.

After all, "mediation allows not only to resolve the dispute, but also to regulate relations, precisely because if the mediation procedure is well established and well

implemented, it allows harmonizing the interests of the participants in the relationship. That is, create the conditions for people to leave the conflict situation with the least losses" (Yakovlev, 2016).

## **2. The advantages of mediation in the resolution of private law conflicts in the area of civil service relations**

The rapid development of progress and foreign economic relations is the cause not only maximum expansion and increase the number of commercial enterprises, but also the active cooperation of these companies on the territory of one state and beyond. Any work in modern conditions, as a rule, closely connected with conflicts arising in this sphere. The meanings of conflicts are various. Its can arise between employees, management and subordinates, brunches of the company and another competing company. But despite the meaning of conflicts, it should be resolve in short time.

The mediation process is characterized that the parties involved in a dispute participating in the mediation process, find possible solutions of the problem. The settlement of the dispute using the mediation procedures has proved as effective way in many areas. The advantages of this method of alternative resolution of conflicts need to consider more detail, to note every aspect. First of all, you should specify that the mediation process is able to produce the best options for resolving disputes. The same events are seen totally different due to various factors, such as education, political views, age, and culture. But it doesn't mean that some are right and others are not right, it means that their points of view are different. And only during the mediation this aspect may be taken into account. Decisions are always taken by the parties of the conflict and in the process of searching all interested persons take part in it. The mediation procedure is that the final decision should satisfy all parties, and it means that every participant should take into account not only their own needs but also the others' interests. Such work doesn't create the atmosphere of confrontation, as during the trial, it's on the contrary cooperation. The solution, which the parties of the dispute found together are able to satisfy them much greater than the solution imposed by third parties above.

The defect of economic disputes resolution in court is their legal nature. Each of the parties of the trial tries to be before a judge the most advantageous. As a result, the parties of the conflict try to protect their rights using all available remedies. They stop to listen the arguments of the opposite side. But for resolving the conflict the parties should try to understand the true needs of each other, to realize the fact that the problems of each party are their common problems and try to find the appropriate solution to satisfying their needs. There is no such possibility during the trial because someone must win and someone to lose the trial. During the mediation the parties decide the profitable form to resolve the conflict and the most acceptable conditions for both parties.

An important thing of the mediation process is that the decisions taken by the parties make true in the most cases. When the parties to the conflict come to a jointly right decision, they almost never refuse to enforce a judgment. Moreover, the former conflicting parties often cooperate after the settlement of a dispute with a great pleasure. The ability to restore and even to reinforce relations between the parties is another important advantage of mediation. The fact that the parties of dispute recognize common problems and understand that it needs to solve them significantly changes the course of the conflict. Two parties' cooperation means understanding the other party's position and they don't negate it totally. Doubtless there are cases when participants can't continue their business relationship, but even then, they get satisfaction the fact that they have found a fair decision.

However, you should not consider mediation as an easy way to solve problems where everybody wins. It is true, but you don't forget that these decisions are given to parties with great difficulty and often parties of the conflict come to unexpected solutions. Parties are able to agree on everything: merger, joint venture, compensation and even just to stop this conflict. But whatever the decision, it is not accepted by both sides, which arbitration court nor trial cannot offer.

The mediators with large experience understand the ability to correct the mediation process depends on the needs of the parties and their dispute. Today, mediation is well-established and efficient procedure that has proven its efficiency in many European countries. Mediators have a lot of ways to make the mediation process as comfortable as possible for all parties and significantly increase the chance to find the optimal solution for all parties.

Undoubtedly, the ability to make final decisions without outside pressure makes mediation the special procedure. The lack of risk connects with adjudication defuses the situation during the negotiations. As practice shows, the parties to the conflict and their lawyers can't be absolutely sure in the outcome of the trial. Much depends on who makes decisions and how interprets the facts, even a person's mood can influence his decision. Important fact that how parties present their positions, how they answer the judge's questions and so on. There are a lot of unpredictable factors that can influence even the most winning case.

Another advantage of mediation and good reason for the conflicting parties to use it is a significant saving of waste. As statistics shows most mediation disputes were resolved in one day, and, therefore, it cost the parties cheaper than high costs of arbitration court or the trial. And it's not just the material losses for lawyer's payment and other experts; it is also loss of time.

Many participants of conflict admitted that they had reached the stage when they had only one desire – to stop the conflict faster and return to ordinary life. Addressing a lawyer, the litigant often stops to control the situation and begins to lose time and money quickly. It is impossible to predict how much work and often personal time

can take a dispute if it has to defend your interests in court. The mediation allows the parties of conflict to avoid such situation and to overcome conflict. An experienced mediator will never allow the parties to "lose face," he can persuade the parties to take a more flexible position, to stop to attack and defend and begin to cooperate and discuss. Thus, mediation helps the parties to return lost control over the situation. All these circumstances allow considering mediation as a prospective method of dispute settlement.

Today, the courts not only encourage the parties to take part of mediation, but strongly recommend using it. Considering this circumstance, the mediation should not consider as "worth it or not worth it" to use it during the settlement of a dispute, but "when" to do it.

As international experience shows, the resolution of disputes through mediation is possible where certain prerequisites have been created. The main one is, of course, the willingness of entrepreneurs to use these flexible and gentlemanly forms of dispute resolution.

Commercial and public organizations all over the world use mediation to resolve disputes under contract and settlement of controversies on customer complaints, insurance claims and claims for compensation of damage and also the major disputes of working conditions and payment, planning and development. Many organizations for the protection of the environment use the principles of mediation for planning its activities, the resolution of disputes of environmental protection and the organization of effective dialogue with interested parties. Mediation has also a strong position in the international world, and the mediators won many significant victories at the international level. (Crawly and Gram, 2010)

### **3. The role of mediation procedures for resolving international economic disputes**

The development of globalization and integration processes in the modern world, improve economic relations and contacts, the complexity of business relationships has led to the emergence of international commercial mediation. According to the foreign authors: "international commercial mediation, like international diplomacy can be an important instrument for empowerment by legal systems around the world".

International commercial mediation offers the global business community an effective instrument to manage commercial relationships in a crisis situation. Mediation gives an opportunity for more positive and effective control analysis of the problems and finding their solutions in serious conflicts. It gives an opportunity for the third neutral party of active participation in the management of complex dialogue. Mediation helps the parties to be attentive during negotiations and to consider all the circumstances and prospects of the case. The process of mediation

combines more harmony with market practice because it guarantees the joint decision which is reached during negotiations.

International mediation has proven that it is an effective instrument for resolving international conflicts. Mediation provides a combination of such factors as effective assistance of an independent consultant on the project, disciplinary parties to the conflict and ensures the real participation of companies in solving the problem. These factors often do not use in the complex conflict during the trial, accompanied by the intractability of its members. Wide possibilities of mediation reflect in overcoming intractable contradictions at first sight and gradual change of positions, which, as it seemed earlier, heads of firms are unable to change.

Mediation greatly increases the advantages and positive effects of the negotiations. It helps to avoid delays and solve the internal problems. Mediation has a number of advantages for business partners. At first, it ensures the involvement of an independent third party for problem analysis. Secondly, it creates the possibility of communication for the parties. Thirdly, mediators are consultants for both parties. In the fourth, the parties are able to stop the mediation at any time and avoid the risk of imposed decision by the third party, and at the same time, in the end, it is possible to conclude a binding agreement. In fifth, the parties control the achievement of the result and have all possibilities to do it acceptable and profitable from a commercial point of view.

Mediation technology allows failed joint firms to return to normal work, but if both sides have no particular desire to save the company, they have the opportunity to find the most favorable way out from the Union. Because of tough competition companies have to cooperate with their suppliers and customers and in such conditions the disputes can arise even in a very successful Alliance. It is necessary to develop methods helping to overcome such disagreements in time. So the mediation is a unique instrument for developing the most constructive and business-like approach to the resolution of conflicts arising in any company.

The experience of foreign countries shows that mediation is effective and cost-effective means of conflict resolution. It is spreading swiftly around the world, with a positive trend of application. As for Russia it should be said that, taking into account foreign experience of mediation, it is necessary to consider one important point - blind copying of foreign experience of the mediation doesn't have positive results, although the different legal systems of our time have a lot of means, methods and forms of judicial settlements of disputes.

## **Discussion**

Thus, as a result of the research, the hypothesis has been proven and got further development. From what has been mentioned above, some fundamental conclusions should be made.

1. Accumulated experience of the mediation process has showed the necessity the popularization of this procedure with explanation of the positive effects of its application.
2. Today, the mediation should not consider as "worth it or not worth it" to use it during the settlement of a dispute, but "when" to do it.
3. Mediation has a number of advantages for business partners, as attracts an independent third party to analyze problems. It avoids the risk of imposing solutions from any side and helps to reach a binding agreement.

## **Conclusion**

Based on the conducted research it can be concluded that mediation at the court has become a common fact in the most courts of the USA for the last 15-20 years. Today, the program of mediation is created almost in every court, regardless of its level courts, including District courts of Appeal. The methods which used in these services are different from each other in many aspects. On the one hand they have different criteria and mechanism for referral of the parties to the mediation, and on the other hand the requirements of the persons acting as mediators are different too. And of course, the role of judges in the mechanism of mediation in the court is very important. The judge is able to recommend parties using mediation and to address them. In some courts judges work as mediators themselves. But in spite of differences of these sides they have one common feature, which is extremely important for functioning of the court mediation. It is preservation of choice and use extrajudicial methods of dispute resolution during the trial which help sides to make up a quarrel. Each side of conflict has economic and socio-psychological benefits in the short-term perspective and promotes high level of legal culture in the long-term perspective. The idea of formation of the system of mediation in the court has a lot of supporters outside the US since the XXI century (Shamlikashvili, 2010).

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