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The development of mediation in Russia: Problems and Prospects

Isaenkova Oksana Vladimirovna

Full Doctor of Law, professor,
head of the department of civil procedure,
director of the Law Institute of Legal Administration,
Saratov State Academy of Law,
P.O. Box 410056, Chernyshevskogostr., No. 104, Saratov, Russia;
e-mail: oisaenkova@mail.ru

Abstract

The article examines the experience of the three-year Federal Law on 27 July 2010 No. 193-FZ "On alternative dispute resolution procedure involving intermediaries (mediation procedure)" in the Russian Federation. Examined the legislation in the field of mediation and its application in practice, scientific views on the institution of mediation in Russian law and the experience of other countries with a developed system of mediation.

The purpose of the article – to help create an effective model of regulation and implementation of mediation in the Russian Federation with scientifically grounded conclusions.

The author considers in detail historical, geographic, political, economic, social, legislative conditions for the use of mediation as criteria for testing the effectiveness of existing regulations in the Russian Federation on mediation. These criteria should help to address the underlying causes of insufficient effectiveness of modern mediation in Russia and to identify possible ways of their elimination on the basis of international experience, while maintaining the positive national best practices in the field of legal relations in the sphere of dispute resolution.

Compared the goals and objectives of mediation and civil proceedings, specific attention is paid to preventive issues and ways of its solving.

Criticized the current situation, in which the legislator having named the principles of mediation, determined the content of only one of them, namely the confidentiality of information relating to the mediation procedure, when the principle of cooperation and equality of the parties has no implementation guarantees that would be regulatory vested.

Keywords

Mediation, alternative ways of dispute resolution, civil procedure, conciliation, mediation principles.

Introduction

Despite almost three years has passed since the adoption of the Federal Law on July 27, 2010 No. 193-FZ "On alternative dispute resolution process involving intermediaries (mediation procedure)"¹, mutatis mutandis to the RF Commercial Procedural Code and Civil Procedural Code, mediation procedure continues to be on early stage of development, and mediative direction

of civil proceedings of reformation itself became a hot dispute among academics. Respectable legal journals such as "Journal of Civil Procedure", "Russian Laws: experience, analysis, practice" dedicate entire issues to the problems of mediation in civil proceedings and almost none of conferences on civil process does without reports and discussions on the subject. Experience of modern mediation is extremely important by the fact that principles and axioms laid down in legislation on mediation and its practical application at this stage will affect all subsequent transformation of the legal system in this direction. Coming months should conceptually define the Russian mediation system for decades, either ensure its stable positive development or slow down the reform of civil proce-

1 "Federal Law on July 27, 2010 No. 193-FZ "On alternative dispute resolution procedure involving intermediaries (mediation procedure)" ["Federal'nyi zakon ot 27 iyulya 2010 g. No. 193-FZ "Ob al'ternativnoi protsedure uregulirovaniya sporov s uchastiem posrednikov (protsedure mediatsii)"], *Rossiiskaya Gazeta*, available at: www.rg.ru/2010/07/30/media-cia-dok.html

ture in this direction, predetermining the low efficiency of the dispute settlement mechanism with the help of a mediator. A positive instance of relatively rapid development of mediation can be observed in Australia, where a working system for resolving disputes through mediation have been created over the past 15 years, which actively involves the individual states, as well as judicial and other governmental authorities².

The essence of mediation as a legal phenomenon

The concept of mediation procedure is understood as a way to resolve disputes with the assistance of a mediator, based on voluntary consent of the parties to achieve a mutually acceptable solution, applied in the mediation agreement.

Mediation is referred to an alternative method of dispute resolution, though hardly accessible, expensive and less reliable³. However, it seems that

these deficiencies of mediation are to be corrected in the development of its application in the territory of the Russian Federation, which must take place using conventional adaptation criteria introduced in the Russian legal reality of the legal elements.

Thus, establishing the goal to optimize mediative direction of civil procedure reformation one should define the way, what the element of the right is a mediation itself and its regulative norms, and what the criteria for its correct implementation, adaptation and exercise in the Russian legal reality should be used.

Generally, always before undertaking any reform it is necessary to define the criteria of the possibilities of using the experience of other countries in the sphere in which we are going to change something, or, particularly, to introduce a new legal phenomenon. But the situation is probably explained by the peculiarities of the Russian mentality, when reformation (not only in the sphere of civil procedure law in general, but also more globally – concerning all or a significant

2 Kuzbagarova, V.A. (2005), *Mediation in enforcement proceedings: dissertation* [Primirenie storon v ispolnitel'nom proizvodstve: dis. ... kand. jur. nauk], St. Petersburg, pp.46-47.

3 Strel'tsova, E.G. (2012), "Organization of mediation as an element of state policy in the sphere of protection of the rights and interests (based on the Russian his-

torical and contemporary international experience)" ["Organizatsiya mediatsii kak elementa gosudarstvennoi politiki v sfere zashchity prav i interesov (na osnove rossiiskogo istoricheskogo i sovremenno-go zarubezhnogo opyta)"], *Vestnik grazhdanskogo protsesssa*, No. 6, p. 49.

part of the superstructure of society) is performed without clearly defined objectives and means to achieve it, without designated tasks and methods of their solution. That's why well-known Russian reforms tend to have clearly defined start date, and their ending mostly blurred or not defined at all. An allocation of purposes and objectives of the various states before lawmakers in the field of mediation, and the comparison of these goals, objectives and ways to achieve them with the goals, objectives of mediation in Russia can help to avoid such a situation.

So, what a legal phenomenon is mediation?

From the point of individual authors, for instance, E.G. Strel'tsova, alternative ways of dispute resolution, which includes mediation as well, "not included in the system of protection of law, and are in a position of procedures separate from justice and not relating to justice"⁴. In Strel'tsova's opinion, alternative ways of dispute resolution may be "too lightweight for the full protection of the violated (contested) rights or legally protected interest"⁵. Indeed, the absence of a centralized system of mediation is a major obstacle both in its progressive development and territo-

rial distribution. The judges themselves point on the low use of mediative procedures in the courts, particularly in commercial courts, naming as reasons the ethical considerations that do not allow admonishing on the weak position of the opposite party. "It is not in our tradition, it is much related to the West" – S.Yu. Chucha⁶ describes the attitude of the judiciary to the mediation. In contrast to this position, S.K. Zagainova advises to turn to foreign experience, proven by the Mediation Center of the Urals State Law Academy, confirming that "upon the decision to choose mediation to resolve a legal dispute that fact is decisive that the judge told the parties on the alternative ways of dispute resolution"⁷.

However D.A. Medvedev in his speech to representatives of public au-

6 Chucha, S.Yu. (2011), "If it's not for a conciliator, no one knows how could the dispute end" ["Eсли by ne mediator, neizvestno, chem by zakonchilsya spor"], *Zakon*, No. 2, p. 39.

7 Zagainova, S.K. (2012), "Formation of the mediation practice in civil cases in Russia as an example of the legal experiment "Development and testing of the mechanisms of mediation integration in civil proceedings" ["Formirovanie v Rossii praktiki mediatsii po grazhdanskim delam na primere pravovogo eksperimenta "Razrabotka i aprobatsiya mekhanizmov integratsii mediatsii v grazhdanskoe sudoproizvodstvo"], *Vestnik grazhdanskogo protsessa*, No. 6, p. 29.

4 Ibid.

5 Ibid. P. 55.

thorities on the current state of the judicial system described the importance of mediation as an alternative way of dispute resolution procedure, indicating that the activities of this institution is aimed at developing a new culture of Russian dispute resolution⁸. T.V. Sakhnova emphasizes that non-judicial dispute resolution procedures don't have to be alternative to jurisdictional, including judicial. Despite the fact that the Russian current legislation on mediation perceived an American model from the perspective of the above scientist, mediation is possible as an independent non-judicial (but not alternative) procedure, as prejudicial and as part of a special judicial procedure, which confirms a roman mediation experience⁹.

It is difficult to agree with those representatives of the procedural science that consider mediation as an interdisciplinary institute, reasoning on the presence of rules on mediation in the Federal Law on July 27, 2010 No. 193-FZ "On alternative dispute resolution process in-

volving intermediaries (Mediation Procedure)", RF Civil Procedural Code, RF Commercial Procedural Code, Art. 20 of the RF Civil Code, Art. 30.1 of the Federal Law on March 13, 2006 No. 38-FZ "On Advertising"¹⁰. According to such arguments one would have to admit as an interdisciplinary institute, for instance, the judicial proceedings arising from public law as well.

At the same time, it is still too early to speak about the appearance of mediative law after the adoption of a separate law on mediation in Russia, if it ever be possible at all. According to a quite rightly observation of D.A. Fursov, legislation must not be confused with the structural units of law, which sectoral affiliation may not match in name with the description of legislative acts¹¹.

Mediation efficiency criteria

Basic premise of mediation development in Russia, in our opinion,

8 "Blog of Dmitry Medvedev" ["Blog Dmitriya Medvedeva"], available at: <http://blog-medvedev.livejournal.com/53074.html?page=2>

9 Sakhnova, T.V. (2013), "Civilised process: mission in a changing world" ["Tsivilisticheskii protsess: missiya v menyayushchemsya mire"], *Vestnik grazhdanskogo protsessa*, No. 1, p. 27.

10 Nosyreva, E.I. (2012), "The application of rules on mediation in civil proceedings" ["Primenenie norm o mediatsii v grazhdanskom sudoproizvodstve"], *Vestnik grazhdanskogo protsessa*, No. 6, p. 11.

11 Fursov, D.A. (1999), "The concept of branch of the arbitral procedure law" ["Ponyatie otrasli arbitrazhnogo protsessual'nogo prava"], *Gosudarstvo i pravo*, No. 1, p. 27.

should be something that does not need tracing to transfer positive achievements of international experience (in this case – the U.S.) on the model and the concept of the Russian mediation development, but primarily to identify criteria – economic, social, political, lawmaking, law enforcement, historical and others, that can reveal opportunities to adapt foreign positive experience in the legal field in Russia. The same criteria should help to identify the main reasons for the lack of effectiveness of mediation in contemporary Russia and identification of possible ways of their elimination on the basis of international experience, while maintaining positive national developments in the field of legal relations and dispute resolution.

D.Yu. Maleshin calls historical, geographical, political and economic conditions as factors affecting the basic elements of civil procedural system¹². Taking all these conditions as criteria for testing the effectiveness of the rules on mediation, let us add to their number the social and lawmaking.

Economic criteria are fairly mobile and conditioned primarily by the

12 Maleshin, D.Ya. (2011), *Civil procedural system of Russia: Author's thesis* [*Grazhdanskaya protsessual'naya sistema Rossii: avtoref. dis. ... dok. yur. nauk*], Moscow, p. 12.

state of the country's economy in whole, stratification of society in terms of material well-being, large number of citizens who have a level of wealth above the real subsistence level (so-called "middle class"), the possibility of the state to provide its own citizens with a minimum living standard and existing minimum standards of legal protection. Economic analysis of law, as noted by S.A. Kurochkin, inter alia, allows scientifically envisage the effects of changes in the current legislation, taking the economy as a science of rational choice in a world where people's needs are beyond the capability to meet them¹³.

For the time being it is the economic criterion that cannot let us talk about centralized state mediation process development.

Stressing the importance of the early onset of the real-time state warranty for fast and effective legal protection, it should be admitted that the forecast for the foreseeable future in this respect is disappointing. As rightly observed by V.V. Yarkov who attempted to

13 Kurochkin, S.A. (2013), "Economic analysis of law as a promising method for the study of civil procedure" ["*Ekonomicheskii analiz prava kak perspektivnyi metod issledovaniya grazhdanskogo protsesa*"], *Vestnik grazhdanskogo protsesa*, No. 1, pp. 37-38.

determine the future of the civil jurisdiction, "it is likely that resource limitation will remain, which society can direct to the development of the civil jurisdiction, that can directly affect the projections"¹⁴. This thesis, stated 13 years ago, remains relevant for today, when the state is on the way to simplify procedures of the protection of rights, often to the detriment of such axioms as the validity of the judgment¹⁵.

However, in a highly developed country, which is a classic example of the United States, and whose model was used for the introduction of mediation in Russia, American jurists themselves call the right, judicial review and lawyers – a very expensive thing¹⁶. Though,

the "expensiveness of pleasure" does not preclude the production of these services, since in practice it overlaps another component of the economic criterion – the gross of American citizens have a decisive level of material wealth.

Geographical criteria currently in connection with the development of road communications, and especially due to the introduction of electronic media almost lose much of their significance. But it seems wrong to completely ignore the considerable territory of our state when asking on the prospects of centralized governmental method of mediation development – this approach is unlikely to lead to positive results.

Among *social criteria* a legal culture is ranked first, exists in the state that is going to use a borrowed foreign law institute. In the Russian legal culture a peculiar mentality of Russians plays a significant role, defining the adoption (including in the form of sympathy, conscious subordination) or rejection of the society concerning the proposed reforms.

Reforms of civil procedure and other elements of the legal system conducted in Russia (as any other reforms in

14 Yarkov, V.V. (2000), "The future of civil jurisdiction: an attempt to forecast", *Civil jurisdiction system on the eve of the XXI century: current state and development prospects. Interuniversity collection of scientific works* ["Budushchee sistemy grazhdanskoi yurisdiktsii: popytka prognoza", *Sistema grazhdanskoi yurisdiktsii v kanun XXI veka: sovremennoe sostoyanie i perspektivy razvitiya. Mezhvuz. sbornik nauchnykh trudov*], Gumanitarnyi u-t, Yekaterinburg, p. 37.

15 it is intended an opportunity set out in the Federal Law on March 4, 2013 No. 20-FZ "On Amendments to Certain Legislative Acts of the Russian Federation" for justices of the peace to make decision without analytical part.

16 Fridman, L., Kulikov, A., Kalantarova, M. (1993), *Introduction to American law*.

Trans. from Eng. [Vvedenie v amerikanskoe pravo. Per. s angl.], Progress, Univers, Moscow, pp. 102-103, 206.

Russia as well) almost always start with ideas about compulsion of radical transformations of the reformed relationship or process, but eventually individual elements changes, and not always in a positive way. Earlier the author has proved that such a situation is connected with those characteristic feature of the Russian mentality, whereby Russian citizens have developed a very peculiar attitude to reformation of all areas of social life: on the one hand, the authorities' desire at the beginning of the reform process to rebuild everything quickly and radically and, on the other hand, the rejection of the population, fear of changes at all¹⁷.

Political criteria in a legal state should not have a significant effect on the possibility or ban of the use of foreign legal institution in Russian law. The negative point of policy is a low degree of its predictability, as well as bias and prejudice of political entities (subjects of influence).

Meanwhile, many legal borrowings are based on the foreground state policy to encourage the development of specific legal institutions, and this influence is reflected on the prospects or, conversely, futility of their introduction

17 Isaenkova, O.V. (2002), *Problems of law enforcement in civil jurisdiction [Problemy ispolnitel'nogo prava v grazhdanskoi yurisdiktsii]*, SGAP, Saratov, p. 44.

in Russian law. In jurisprudence even coined the term – "civil procedural legal policy", which existence is justified in monographs and dissertations¹⁸.

It would be very naive to believe that political trends and even ambitions of individual politicians have no effect on the development of legislation and practice in Russia; the role of jurisprudence in this area will always be limited due to the advisory nature of any scientific research in the field of law and proposals for improvement of existing legislation. However, no one should derogate the role of the scientific approach to the improvement of Russian law, especially in the direction of the development of mediation. It is a modern political situation in Russia that does not allow rejecting the results of legal prospecting and entire legal theories only calling them "bourgeois", as it was during the Soviet law and legal science.

Taking into account the direct relationship of mediation with justice, lack of a clear political strategy for reforming the Russian justice system leads to speculation about the possible instability

18 Mal'ko, E.A. (2012), *Civil procedural law policy in modern Russia: Author's thesis [Grazhdanskaya protsessual'naya pravovaya politika v sovremennoi Rossii: avtoref. dis. ... kand. yur. nauk]*, Saratov, 22 p.

of the legislation on mediation, at least until there will be final certainty with the Russian system of justice itself in civil matters and its principles.

Lawmaking criteria for the use of foreign experience in the field of mediation should be emphasized in connection with the Russian legislation on mediation being in infancy. Only in 2010 the first law was adopted – the source of the rules on mediation, therefore, there is almost nothing to compare legislation in this area. Practically there are no developed effective safeguards of law observance of mediators. Thereof could be considered high requirements for persons applying for the position of mediator (legal and psychological education, age and property qualification with a preliminary insurance premium to allow compensation for the harm caused by the actions of mediator, established order of examination etc.). Specialty of the mediator does not imply a complete renunciation of public control over its activities, carried out by the court.

The fact of mediator's responsibility must assume insurance coverage of the mediation process and property qualification for those wishing to engage in such activities. In case of damage caused by actions of mediator, with insufficient insurance fund the property

qualification will allow subjects, whose rights have been violated, to get the real compensation. The property qualification for the mediator should be included with the minimum monetary value of existing property owned by the mediator, as well as a restriction to exploit sites included in the application for licensing as a confirmation of exceeding the qualifications, without the permission of the licensing authority. Such authority could become an appropriate administrations of the Ministry of Justice of the Russian Federation.

The indication in the Art. 1 of the Federal Law "On Alternative Dispute Resolution Procedure involving intermediaries (Mediation Procedure)" does not comply with law making criteria as a separate goal of mediation of social relations harmonization, which looks more like a phrase from a scientific article or monograph, rather than the legal norm, composed according to the rules of legislative technique.

Historical criteria give the opportunity to understand the path of integration of borrowings into a modern law, a mechanism for future interaction of elements taken from the past with those institutions of the Russian law. The use of historical criterion for assessing the perceived effectiveness of introduced

legal phenomenon should primarily depend on whether there was a similar phenomenon in the Russian law before, or whether it is a legal novel for Russia. In the first case (when borrowing is the so-called "well-forgotten old") should be defined what exactly was taken out of the past, whether the re-entered legal rule is an atavism, the effectiveness of this rule during its previous actions in Russia, the reasons for temporary release of the Russian legislator from its normative consolidation.

When the legal institute for Russia appears a novelty, evaluation criteria and its adaptability becomes matching or at least the consistency of the introduced institute to the Russian traditions and at the same time the possibility of organic growth in a state of continuous Russian law reformation.

The ratio of task and objectives of mediation with tasks and objectives of civil proceedings

Having defined the criteria for the possibility of adapting the legal framework for the mediation in Russia, lets define its relation to civil proceedings based on the own definition of civil procedure itself, designed for educational literature.

Civil procedure regulation is a governed by federal law activity of the courts of first instance and justices of the peace to hear and determine disputes arising from civil, family, labor, housing, land, environmental and other legal relations of writ and special proceedings cases, cases arising out of public relations, as well as the implementation of rights and interests protection by courts¹⁹. Note that the concept of civil process in its modern sense is broader than that of civil proceedings. The mediation as a distinct element was introduced in procedural, but not judicial proceedings in 2010.

However, the beginnings of mediation in civil proceedings have always had a place, and mediator function belonged to the court – especially to justices of the peace, which naming speaks for itself. Although mediation in virtue of its modern sense is considered a technology of an alternative method of resolving legal disputes involving third, uninterested party in the conflict, helping persons in dispute to develop mutually acceptable agreement on the dispute, its individual moments are similar to the proceedings, in which the judge decides not only the first four tasks on the preparing the case

19 Isaenkova, O.V., Demichev, A.A. (2009), *Civil Procedure Law in Russia: textbook [Grazhdanskoe protsessual'noe pravo Rossii: uchebnik]*, Norma, Moscow, p. 16.

for trial, established by the Art. 148 CPC RF, but should not ignore the implementation of the fifth task of the same norm – mediation by the parties.

Perhaps this is due to the fact that CPC RF calls mediation a task of only a single stage of civil proceedings, not civil proceedings in general. In Art. 2 CPC RF the term "reconciliation" is not mentioned. According to this norm the task of modern Russian civil proceedings is a proper and timely consideration and resolution of civil cases, clarifying the legal relations between the actors of civil process, as well as reconstruction of the initial situation that existed before civil wrong, and if this is not possible – a fair compensation of the victim upon the consequences of a wrongful conduct. We should not forget about the tasks of prevention – prevention of civil wrongs, enforcement of law and order and the formation of respect for law and justice.

The main task of mediation – to promote the development of constructive relations between the parties, to bring the disputing parties in peaceful coexistence. There is no as such original position existed before, and the question is not in a justice of compensation to the injured party upon the consequences of a wrongful conduct; it is no point in talk-

ing about such a category as an injured person in the course of mediation.

In the course of mediation instead of a volume in content task to protect violated or disputed rights, its recovery, there solved a narrower task to clarify the legal relationship between actors of civil process precisely by settlement of the dispute, and not the mandative resolution. However, the preventive task is the same both for civil proceedings and for mediation process, except that the emphasis in the promotion of respect moves under the mediation from respect of the law and the court to respect of private interests, business practices, business ethics, contractual obligations, including respect to counterparty as a subject of the contractual relationship. At the same time the development of respect of the law, without any doubt, in the mediation does not take a back seat, although remaining no longer the sole or predominant objective of the process.

The fact that tasks and objectives of mediation and civil proceedings are not identical, although to some extent coincide, is justified.

First, norms on mediation and norms on civil proceedings in essence are purely procedural, as they regulate the specific type of legal process. The

theory of "single legal process"²⁰, that has been actively developed in the 70s of the last century, has as its basis the position that the procedural law includes everything, what the procedure is set and the form of taking any actions is secured. Norm on mediation and civil procedural rules regulate legal relations in their dynamics. Hence, the subject of regulation in all these cases includes not only legal nexus between the participants of legal relations, but also procedural activities for implementation of subjective rights and duties.

Second, the moment of entry into legal relationship on mediative settlement of the dispute in many cases coincides with the civil proceedings, not to mention the coincidence of the subject composition of the parties involved. Thus, according to the Center for Legal Tech-

nologies and Conciliation Procedures (Mediation) of the Ural State Law Academy 67 percent of the total number of requests for mediation procedure in 2010 accounted for cases where the dispute is already under consideration at various stages of a civil or arbitration process, in 7 percent cases the dispute was settled by the mediator during the enforcement proceeding, and 26 percent of calls to the mediator came at a time when the parties decided to settle a dispute before the court preference²¹. As you can see from the data presented, over three-quarters of disputes appears a coincidence of the subjects of civil (in the broadest sense, including the arbitration process) process and mediation proceeding.

Third, the final positive outcome of the mediation process in most cases comes settlement agreements approved by the court, which result in legal proceedings to settle disputes being terminated ex rights of further commencement of proceedings upon the identical case. Moreover, the exercise of right to the set-

20 Gorshenev, V.M. (1976), "Methodological problems in the theory of the legal process in a developed socialism", *Legal guarantees of enforcement of law and socialist law regime in the USSR. Interuniversity thematic collection. Issue 3* ["Metodologicheskie problemy teorii yuridicheskogo protsessa v usloviyakh razvitogo sotsializma"], *Yuridicheskie garantii primeneniya prava i rezhim sotsialisticheskoi zakonnosti v SSSR. Mezhvuzovskii tematicheskii sbornik. Vypusk 3*], Yaroslavskii gos. un-t, Yaroslavl, pp. 3-9; Alekseev, S.S. (1971), *Social value of law in Soviet society* [*Sotsial'naya tsennost' prava v sovetskom obshchestve*], Yurid. lit., Moscow, pp. 122-123.

21 Zagainova, S.K., Yarkov V.V. (2011), *Comment to the Federal law "On alternative dispute resolution procedure involving intermediaries (mediation procedure)"* [*Kommentarii k Federal'nomu zakonu "Ob alternativnoi protsedure uregulirovaniya sporov s uchastiem posrednikov (protsedure mediatsii)"*], Inf-tropik Media, Moscow, p. 5.

tlement agreement, including the results of the mediation process, is not unconditional – the court does not approve the settlement agreement of the parties, if it is contrary to the law or violate the rights and legitimate interests of others (Article 39 CPC RF). However, any of the persons involved in an amicable agreement can violate its own interests.

Influence of norms on mediation for civil proceedings also is manifested at the level of changes of the established order of court proceedings in civil actions in connection with the adoption of the Federal Law on 27 July 2010 on "Alternative dispute resolution process involving intermediaries (Mediation Procedure)". The duties of the presiding judge in a civil case include threshold questions concerning the desire of the parties to conduct mediation procedure. In case the parties decide on mediation procedure the court, upon application, may postpone the hearing for up to sixty days. This is the second case of such a long stay of proceedings, as generally the period, for which hearing is delayed included in a general term for consideration and resolution of the case, should not go beyond it. An exception present also cases of divorce, when the court, at the absence of consent of one spouse, may take measures for their reconcilia-

tion and adjourn the proceedings, but not more than for three months (Article 22 of the RF Family Code).

In relation to the tasks and objectives of the mediation process and civil proceedings is noteworthy the fact that if CPC RF contains a separate definitive rule consolidating tasks and objectives of civil procedure and named "Tasks of Civil Procedure" (Article 2), then the norm on the tasks in the Federal law "On alternative dispute resolution procedure involving intermediaries (Mediation Procedure)" is not allocated in a separate article, and they are named in Art. 1 "Subject of regulation and scope of the present Federal Law". It seems that some lawmakers have forgotten the general theory of law, otherwise they would have not identified the subject of regulation and the objectives of the process to be controlled by the specific federal law. However, talking about a literal interpretation of the law, the Art. 1 of the Federal Law "On alternative dispute resolution procedure involving intermediaries (Mediation Procedure)" refers to the goal of "law formation" and, thuswise, this norm is not like an integral part of the current regulation, which should be quintessential, but the paragraph of the Explanatory Note to the draft regulation. These explanatory notes within the legislative

activities are very convenient²², but what is good for Draft explaining, in the regulation itself looks a little awkward.

Principles (fundamentals) of the Russian mediation

Describing the Federal Law "On alternative dispute resolution procedure involving intermediaries (Mediation Procedure)", it is impossible not to mention the problem of consolidation of the mediation basic principles. Mediation procedure is based on its own principles, enshrined in Art. 3 of the Federal Law "On alternative dispute resolution procedure involving intermediaries (Mediation Procedure)", namely, voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independence of the mediator. Thus, four speci-

fied principles the legislator related to regulations. As doctrinal to the called principles of mediation we can add mutual respect of the parties, mediator neutrality, procedure transparency²³, the principle of party autonomy²⁴.

Specialists in the field of mediation procedure are expected to proceed debates on the quantitative and qualitative composition of those principles, which are not named in Art. 3 of the Federal Law "On alternative dispute resolution procedure involving intermediaries (Mediation Procedure)" and are derived from common sense of legislation (optionality, mutual respect of the parties, mediator neutrality, procedure transparency, party autonomy, etc.). As for the principles vested – there are still a lot of ample opportunities for the study of the essence of each principle and their influence on each other and legal relationship of mediation, as legislator, having particularized principles, deter-

22 As an example one can refer to the similar in the meaning text of the Explanatory Note to the Draft of the Executive Code of the Russian Federation: "... the Draft of the Executive Code of the Russian Federation aimed at addressing the major challenges of enforcement proceedings that will better fulfill the requirements of executive documents and protect the rights of citizens and organizations, improve the work of enforcement bodies, increase public confidence in the public authorities, especially executive and judiciary". (materials are at the author of the article as one of the members of the working group on the development of the Executive Code of the Russian Federation).

23 Zagainova, S.K., Yarkov V.V. (2011), *Comment to the Federal law "On alternative dispute resolution procedure involving intermediaries (mediation procedure)"* [Kommentarii k Federal'nomu zakonu "Ob al'ternativnoi protsedure uregulirovaniya sporov s uchastiem posrednikov (protsedure mediatsii)"], Inf-tropik Media, Moscow, p. 43.

24 Kalashnikova, S.I. (2011), *Mediation in civil jurisdiction* [Mediatsiya v sfere grazhdanskoi yurisdiktsii], Inf-tropik Media, Moscow, 304 p.

mined the contents of only one of them, namely the confidentiality of information relating to mediation procedure. Art. 5 reveals in detail the content of the notion of information confidentiality in the mediation procedure and guarantees of this principle; the Art. 6 identifies the conditions, upon which the principle is no longer valid. Such principle as a cooperation and equality of the parties, by contrast, not only not referred as a principle in the law hereafter, but has no guarantees of its own implementation, which would have been regulatory consolidated.

After the Art. 3, listing the principles of the mediation procedure, only one provision of the law uses the term "principle" – the Art. 12. Meanwhile, this norm does not speak on the principles of the mediation procedure, but on the principles of a mediation agreement execution, namely the principles of voluntariness and honesty of the parties.

As we can see, the principle of voluntariness acts in this case as a general principle both for the mediation process and for the mediation agreement execution, in contrast to the principle of honesty of the parties, which is presented at first in the Art. 12, and then its content is not interpreted.

The civil procedural law, by contrast, shows the disclosure of principles

and values, which, however, are not listed. Thus, the Art. 2 CPC RF involves the administration of law analogy, i.e. court action "based on the principles of law", the Art. 421 CPC RF speaks on the abolition of the arbitral awards, which "violates the fundamental principles of Russian law", but in the text of the Code and laws adopted in its development any one of the principles is not mentioned, except for the Art. 107 CPC RF, which refers to the principle of reasonableness in terms of procedural periods, without its interpreting.

Conclusion

In summary, we examined the historical, geographical, political, economic, social and law making conditions for the application of mediation as examination criteria of the effectiveness of existing norms on mediation. Analyzed the aims and objectives of mediation and civil proceedings; special focus is given to preventive task and ways to solve it.

It can be concluded that the adoption of the Federal Law on July 27, 2010 No. 193-FZ "On alternative dispute resolution procedure involving intermediaries (Mediation Procedure)" in relation to the mediation procedure solved only part of the problems of this method of

dispute resolution. Many questions remain unsolved concerning fundamentals, principles of mediation, and the task of legal experts in this direction is a careful study of both the law on mediation and its practical application.

One should critically treat the situation in which the legislator, having particularized principles of mediation, determined the content of only one of them, namely the confidentiality of information relating to the mediation procedure, and the principle of cooperation and equality of the parties do not have own implementation safeguards that would have been regulatory consolidated.

In conclusion we express the hope that outlined information will in some way contribute to the establishment of an effective regulatory model of mediation in the Russian Federation. Of course, although any desired model, including the model of mediation in civil proceedings, resembles an ideal that is impossible to achieve, but which should be pursued. Taking into account that rules introduced by the Federal Law "On alternative dispute resolution procedure involving intermediaries (Mediation Procedure)" do not achieve the desired result, we tried to define criteria for the use of already existing experience of the mediation development.

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Развитие медиации в Российской Федерации: проблемы и перспективы

Исаенкова Оксана Владимировна

Доктор юридических наук, профессор,
заведующая кафедрой гражданского процесса,

директор Юридического института правового администрирования,
Саратовская государственная юридическая академия,
410056, Россия, Саратов, ул. Чернышевского, 104;
e-mail: oisaenkova@mail.ru

Аннотация

Автор определяет положительные и отрицательные моменты внедрения процедуры медиации в правовую действительность Российской Федерации, определяет принципы медиации и критерии оценки возможности применения опыта в области медиации других государств.

Ключевые слова

Медиация, альтернативные способы урегулирования споров, гражданский процесс, примирение сторон, принципы медиации.

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