ON MODERN METHODS OF RESOLVING A DISPUTE BETWEEN ENTREPRENEURS

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ABSTRACT

The article discusses modern ways of resolving conflicts in the arbitration process, analyzes such types of conciliation procedures as mediation, judicial conciliation. The need for further implementation and development of these institutions in the arbitration process is noted. Pre-trial methods of dispute resolution are also considered. Special attention is paid to arbitration proceedings and the activities of ombudsmen for the protection of the rights of entrepreneurs as alternative ways of resolving conflicts in a particular area of entrepreneurship.

Keywords: Conflict resolution. Methods of conflict resolution. Conciliation procedures. Judicial conciliation. Commissioner for the protection of the rights of entrepreneurs.

SOBRE MÉTODOS MODERNOS DE RESOLUÇÃO DE DISPUTAS ENTRE EMPRESÁRIOS

SOBRE LOS MÉTODOS MODERNOS PARA RESOLVER UNA DISPUTA ENTRE EMPRESARIOS

RESUMO

O artigo discute formas modernas de resolução de conflitos no processo de arbitragem, analisa tipos de procedimentos de conciliação como mediação, conciliação judicial. A necessidade de maior implementação e desenvolvimento dessas instituições no processo de arbitragem é observada. Métodos pré-julgamento de resolução de disputas também são considerados. É dada especial atenção aos processos de arbitragem e às atividades de ouvidorias para a proteção dos direitos dos empresários como formas alternativas de resolução de conflitos em uma determinada área do empreendedorismo.


RESUMEN

El artículo discute formas modernas de resolver conflictos en el proceso de arbitraje, analiza tipos de procedimientos de conciliación como la mediación, la conciliación judicial. Se señala la necesidad de una mayor implementación y desarrollo de estas instituciones en el proceso de arbitraje. También se consideran los métodos de resolución de disputas previos al juicio. Se presta especial atención a los procedimientos de arbitraje y las actividades de los defensores del pueblo para la protección de los derechos de los empresarios como vías alternativas de resolución de conflictos en un área particular del espíritu empresarial.

INTRODUCTION

Currently, entrepreneurs are given the opportunity to participate in business relations using modern potential, including Internet technologies, many processes are managed remotely. The realities of business urge the entrepreneur to use also modern methods of his protection, by contacting the competent authorities, arbitration courts (courts of general jurisdiction), as well as through the use of alternative methods of conflict resolution (https://www.lawteacher.net).

Article 12 of the Civil Code of the Russian Federation (The Civil Code of the Russian Federation (part one) of 30.11. n. 51-FZ. Collected Legislation of the Russian Federation n. 32. Art. 3301. 1994) (hereinafter referred to as the Civil Code of the Russian Federation) establishes methods of protecting civil rights. It should be noted that the list is not exhaustive. Some of these methods have found additional consolidation in individual articles of the Civil Code of the Russian Federation, others permeate the entire code. Some of the above methods can be implemented out of court, in self-defense, others only in court. It seems that the most common form of conflict resolution is going to court. According to Art. 4 of the Arbitration Procedure Code of the Russian Federation (THE ARBITRATION PROCEDURE CODE OF THE RUSSIAN FEDERATION of 24.07.2002. n. 95-FZ. Collected Legislation of the Russian Federation, n. 30. Art. 3012. 2002.) (hereinafter referred to as the Arbitration Procedure Code of the Russian Federation), an interested person has the right to apply to an arbitration court for the protection of his violated or disputed rights and legitimate interests. Protection of violated rights in court often occurs by filing a statement of claim with the court.

METHODS

The main methods that were used in the course of writing this work are: the comparative legal method, the method of complex analysis, the method of interpretation, the legal sociological method, the method of system analysis and the method of intersectoral approach.

RESULTS AND DISCUSSION

At the same time, it is worth noting that, despite the high quality of the administration of justice, after the arbitration court makes a decision on the case, the conflict between the parties may not be completely settled, while business relations and ties have already been damaged. So, for example, the plaintiff applied to the court to recover only part of the debt, which implies in the near future filing a claim for the collection of a penalty or the remainder of the debt. In another situation, the court may decide to partially satisfy the claims.

It seems that in this case, both parties will disagree with such a judicial act: the plaintiff with the fact that the requirements were not satisfied in full, and the defendant in general with the fact that the requirements were satisfied in principle, since he initially took a position that there were no grounds for satisfying the stated requirements. As a result, both parties or one of the parties file appeals, cassation complaints about cancellation (partial change) of a previously issued judicial act. In any case, it is worthwhile to summarize that as a result of the classical resolution of the conflict in an arbitration court (i.e., through a court decision), one of the parties to the dispute remains in a “losing” position.

It seems that the most desirable result of the end of the consideration of the dispute, both for the parties to the process and for the arbitration court, is the issuance of a judicial act, which would satisfy everyone and subsequently not be subject to appeal. In this regard, the most acceptable outcome of the case is a timely proposal by the court to the parties to try to resolve the conflict in other possible ways, i.e. not by considering the case on the merits (www.ksbar.org/page/settle_dispute).

In this regard, article 134 of the APC RF deserves attention. It is noted that the arbitration court of first instance, after accepting the application for proceedings, issues a ruling on the preparation of the case for trial and indicates to the parties the opportunity to seek assistance from the court or mediator, including a mediator, judicial conciliator, in order to resolve the dispute or use other conciliation procedures. ... It is also indicated here that in order to resolve the dispute, the judge takes measures to reconcile the parties, including the possibility to suggest that the parties use any conciliation procedure. The arbitration court promotes the reconciliation of the parties by explaining to the parties the possibility of concluding a settlement agreement and the consequences of its conclusion, seeking assistance from a mediator in order to resolve the dispute (Arbitration process: Textbook. 7th ed. revised and add. 2017).
Analysis of Art. 134 of the Arbitration Procedure Code of the Russian Federation allows us to conclude that the current procedural legislation provides for the following basic methods of dispute settlement: 1) seeking assistance from the court; 2) seeking assistance from an intermediary; 3) mediation; 4) appeal to the judicial conciliator; 5) and also indicates the possibility of using other conciliatory procedures.

According to the text of this article, the main possible ways of resolving the dispute are given (they are clearly indicated), however, some uncertainty arises, since there is an indication of the legislator that it is possible to resort to other conciliatory procedures. In this regard, it seems advisable to separately prescribe in the text of the Arbitration Procedure Code of the Russian Federation, all possible ways of settling disputes, including by securing and disclosing what exactly is understood at the legislative level by other conciliatory procedures in the context of Art. 134 APC RF.

Relatively recently, changes have been made to the Arbitration Procedure Code of the Russian Federation through the introduction of Art. 138.2. The named article fixes the types of conciliatory procedures. In particular, it is noted that disputes can be settled through: 1) negotiations; 2) mediation, including mediation; 3) judicial conciliation; 4) the use of other conciliatory procedures, if it does not contradict federal law. Within the framework of this article, we will focus on the above methods of settling disputes, and also reveal other possibilities for resolving a conflict situation. Article 138.4 of the APC RF is devoted separately to the mediation procedure. First of all, it is worth mentioning a separate law (FEDERAL LAW OF 27.07.2010), which regulates an alternative dispute settlement procedure with the participation of a mediator dated 07/27/2010.

In our opinion, the application of the mediation procedure in practice contributes to the development of business partnerships, the formation of business ethics, and the harmonization of social relations. The mediation procedure is understood as a way of settling disputes with the assistance of a mediator on the basis of the voluntary consent of the parties in order to achieve a mutually acceptable solution. The parties participate in the mediation procedure on the basis of the principles of voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independence of the mediator (In foreign countries, the mediation procedure is used quite effectively. See, for example, Mediationsrecht (2015).

The activity of a mediator can be carried out both on a professional and non-professional basis (https://www.dirjur.de). Of interest is the activity of a mediator on a professional basis, since the mediation procedure for disputes referred to the court before the commencement of the mediation procedure can be carried out only by such mediators. A number of special requirements are imposed on the personality of a professional mediator: 1) they can be persons who have reached the age of twenty-five; 2) having higher education, 3) who have received additional professional education on the application of the mediation procedure.

In Art. 16 of the Law on Mediation separately specifies the possibility of performing the activity of a mediator on a professional basis for retired judges. Lists of such judges are compiled and maintained by the councils of judges of the constituent entities of the Russian Federation. With the adoption of a special law regulating the mediation procedure in arbitration courts, special rooms for conciliation were opened on the territory of the Russian Federation.

So at the stage of the trial, the court, among other circumstances, finds out whether the parties do not want to end the case with an amicable agreement or apply the mediation procedure. In cases where the parties intend to peacefully resolve the existing conflict between them, then, taking into account the opinion of the parties, it assists in this (announces a break in the court session or postpones the trial, explains about conciliation procedures, about their advantages).

As the practice of considering cases shows, in arbitration courts there are cases of concluding mediation agreements with the mediation of a professional mediator, including in the form of amicable agreements submitted for the approval of the court. As a rule, as a result of such agreements, the plaintiff declares a waiver of the claim and the proceedings are terminated. Disputes related to challenging mediation agreements, compulsion to the execution of mediation agreements, claims against mediators arising from their professional activities have not been submitted to the Arbitration Court of the Republic of Tatarstan.

In most cases, mediation agreements, approved by the court as amicable agreements, are executed on a voluntary basis. At the same time, applications for the issuance of writs of execution for compulsory execution take place in isolated cases.
In the context of recent changes in the arbitration process, it is worth noting such a new conciliation procedure as judicial conciliation. So one of the ways to settle a dispute is the participation of the parties in a conciliation procedure with the participation of a judicial conciliator. Judicial conciliation is carried out on the basis of the following principles: independence, impartiality and good faith of the judicial conciliator. Only retired judges can act as judicial conciliators. Arbitration courts of the constituent entities shall submit to the Supreme Court of the Russian Federation information on candidates for judicial conciliators from among retired judges who have expressed a desire to act as judicial conciliator.

This procedure for forming the lists of judicial conciliators seems to be quite justified, since it is at the level of the arbitration courts of the subjects that it is possible to form a qualitative list of candidates for judicial conciliators for approval by the Plenum of the RF Armed Forces. It seems that in this case, when forming the list of candidates at the level of subjects, the merits of specific representatives of the judicial community, their invaluable experience and knowledge are taken into account.

At the present stage of the development of arbitration procedural law, it seems very timely to introduce various types of conciliation procedures into the APC of the Russian Federation and to support the development of these institutions both on the part of the state and on the part of the professional community. Ending conflicts in arbitration courts through conciliation procedures will allow the parties to reach a mutually beneficial, mutually acceptable agreement. The effective use of conciliation procedures in an arbitration court is a real opportunity for maintaining normal business relations between the parties, with the possibility of their subsequent continuation.

At the same time, it seems that often when a disputable situation arises, the parties tend to resort only to those methods that are clearly reflected in Art. 134, 138.2 APC RF. At the same time, such opportunities to resolve the conflict as transferring the consideration of the dispute to an arbitration court, as well as the possibility of involving an ombudsman are overlooked (for example, in the Republic of Tatarstan, the Commissioners under the President of the Republic of Tatarstan for the protection of the rights of entrepreneurs operate).

With regard to arbitration, attention should be paid to the following. It’s not a secret for anyone that 2016-2019, there was a tendency towards a decrease in the number of operating arbitration courts on the territory of the Russian Federation. In our opinion, this was due to the fact that the judicial community, practicing lawyers, lawyers had a number of claims against the already existing arbitration courts. First of all, the claims were related to the quality of administration of justice, quite often at the stage of issuing orders of execution in an arbitration court violation of a procedural nature were revealed, which served as the basis for refusing to issue a writ of execution in such a case and others. Also in opinions and some mistrust were expressed in connection with the overstated (in some arbitration courts) amount of the arbitration fee in relation to the size of the state fee in an ordinary arbitration court.

At the same time, any complaints about the quality of their work. On the territory of the Republic of Tatarstan, the regional branch of the Arbitration Court “Independent Arbitration Chamber” has been operating for a long time. An analysis of the activities of the named arbitration court allows us to conclude that only 2% of cases from the total number of cases considered by arbitration courts were denied the issuance of writs of execution. At the same time, this court considered about 10,000 cases per year, the regional office in Kazan considered an average of 480 cases annually.

Currently, on the territory of the Republic of Tatarstan and the surrounding regions, arbitration is actively developing at the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs (Russian Union of Industrialists and Entrepreneurs). The Volga-Kama branch of the Arbitration Center at the RUIE was opened in Kazan. The above department carries out its activities on the territory of the Republic of Tatarstan, the Republic of Mari El, the Republic of Mordovia, the Udmurt Republic, the Chuvash Republic, the Perm Territory, the Kirov region and the Nizhny Novgorod region. The question arises, why do the applicants prefer arbitration proceedings as an alternative to arbitration proceedings [https://www.mondaq.com/arbitration-dispute-resolution/7776187]

Obviously, the following can be identified as drivers of the growth of referrals specifically to arbitration. The parties proceed from the simplicity of the arbitration procedure and the flexibility of the rules. Often, arbitration courts consider disputes more quickly than arbitration courts (the average time for consideration is 25-35 days). Arbitration proceedings are aimed at reconciliation of the parties, the participants bear reasonable costs of the arbitration (in some courts a flexible system for calculating and paying the amount of the arbitration fee has been introduced). The confidentiality of the proceedings is an independent incentive for going to the arbitration court.
We believe that an additional way to resolve the conflict in the field of entrepreneurship is the opportunity to resort to the help of the Ombudsman. In particular, in the Russian Federation, the institution of the Commissioner under the President of the Russian Federation for the protection of the rights of entrepreneurs has found a consolidation. On the territory of the Republic of Tatarstan, the Commissioner under the President of the Republic of Tatarstan for the protection of the rights of entrepreneurs operates.

The work carried out by these structures has a beneficial effect on the business climate in the country and the region, a huge amount of work is scrupulously carried out, including the resolution of disputes between entrepreneurs, entrepreneurs and government agencies. On the example of Tatarstan, one can note the appearance of representatives of the Ombudsman in the regions of the republic, which makes it possible to timely respond to the developing situation in the region.

SUMMARY

It should be noted that in 2011, Sakhapov Yu. Z. pointed out the possibility of resolving disputes out of court through the creation of conciliation or conciliation commissions that could operate under the state bodies of the Republic of Tatarstan or be formed, for example, from among their representatives (SAKHAPOV, 2011). Since 2011 in practice, the mediation procedure has developed, recently the possibility of resorting to the assistance of a judicial conciliator has been legislatively enshrined. At the same time, it seems that it is through the mediation of the commissioners for the protection of the rights of entrepreneurs in the Russian Federation and the regions and directly on their sites that such a direction as the pre-trial settlement of disputes between entrepreneurs should be actively developed.

CONCLUSIONS

Summarizing the above, we note the following. First, it is necessary to properly inform the society and entrepreneurs about the existing modern methods of resolving conflicts, both judicial and alternative options for getting out of this situation. Secondly, continue to introduce and effectively develop alternative ways of resolving legal conflicts. Thirdly, to legislate the list of alternative dispute settlement procedures and the possibility of choosing the appropriate procedure.

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FOR MORE INFORMATION ON ALTERNATIVE METHODS OF DISPUTE RESOLUTION SEE: ALTERNATIVE METHODS OF DISPUTE RESOLUTION. Available at: https://www.lawteacher.net. Access: 20 oct. 2020


IN EUROPE AND IN GERMANY IN PARTICULAR, ALTERNATIVE METHODS OF RESOLVING VARIOUS CONFLICTS ARE ACTIVELY USED. For more details see: Deutsches Institut fur Rechtsabteilungen & Unternehmensjuristen. Available at: https://www.diruj.de/. Access: 20 oct. 2020


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