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Development of settlement arrangements in civil legal proceedings

The article is devoted to the analysis of the current legislation and judicial practice of the application of settlement arrangements in the civil legal proceedings, as well as the development of proposals for their development. The article gives a description of the types of settlement arrangements provided for by national civil procedural legislation, analyzes the judicial practice of applying settlement arrangements in civil proceedings and develops proposals to improve the institution of settlement arrangements. The advantage of settlement arrangements for the court is a significant reduction in the load, since it increases from year to year, which may affect the quality of decisions and the execution of judicial acts. However, this factor cannot be recognized as the primary reason for helping the parties to reconcile, since the elimination of the conflict and dispute between them should be a priority in reducing the number of civil cases that require a trial and a decision. In addition, the article presents the results of a study of the dynamics of the development of the application of settlement arrangements over the past three years, taking into account the prevailing judicial practice to determine the growth trend of disputes settled by peaceful means, the level of distribution and popularization among the population.

Keywords: settlement arrangements, amicable agreement, participatory procedure, mediation, alternative dispute resolution, judicial mediation.

Introduction

Due to the intensive development of the state institutions in economic, cultural, social spheres, the development of entrepreneurship, attraction of investors and other important factors, the number of court appeals is increasing every year, which is not the evidence of confidence in the court, but an indicator of the level of contradictions and conflicts in society. Undoubtedly, the Constitution of the Republic of Kazakhstan guarantees everyone the right to judicial protection, and the court, in its turn, is the only body empowered to distribute justice and designed to protect the rights, freedoms and legitimate interests of the citizens and organizations [1]. Therefore, processing of applications submitted to the court that meet the requirements of the civil procedure law and other related to its jurisdiction is the responsibility of the court.

In accordance with the Concept of Legal Policy of the Republic of Kazakhstan, the directions for the modernization of legal policy are determined, including the consolidation of various ways and means of reaching a compromise between the parties to private-law disputes (mediation and others) [2].

At the time of signing the Concept, the norms of the Civil Procedure Code of the Republic of Kazakhstan dated July 13, 1999, provided the only alternative to deciding on the case — an amicable agreement [3], which was not referred to as a conciliation procedure and was settled upon the receipt of the relevant petition from the parties. The role of the court was only to verify the terms of the agreement for compliance with the requirements of the law.

In this regard, to implement the tasks set in the Concept, based on the international practice, the Law of the Republic of Kazakhstan «On Mediation» was adopted on January 28, 2011, which regulates social relations in the field of mediation and determines in which category of cases it can be used, its principles and the procedure, as well as the status of a neutral agent — a mediator, whose participation is mandatory for this type of conciliation procedure [4].

On November 20, 2013, the Leader of the Nation in his speech at the VI Congress of Judges stated: «The Institute of Mediation has been established in Kazakhstan — the process of reconciliation of the parties with the help of an extrajudicial mediator. This institution needs to be developed and brought to the world level... This will have a positive impact on the judicial system of Kazakhstan, will help reduce the burden on the courts... The procedure for handling civil cases should be convenient and quick for the parties to the process, focused on their reconciliation...» [5].

Within the activities carried out in pursuance of the above instructions, on April 11, 2014, based on the Law on Mediation, the Supreme Court of the Republic of Kazakhstan launched a pilot project to introduce a conciliation procedure named judicial mediation into civil justice involving a judge.

The positive results of the application of the mediation procedure in civil proceedings involving the mediator and the conciliating judge were the basis for their legislative establishment in the Code of Civil Procedure dated October 31, 2015, enacted on January 1, 2016, in which chapter 17 was devoted to conciliation procedures [6].

In addition to concluding amicable agreement and settling a dispute through mediation, this chapter provides for participatory procedure that is innovative for Kazakhstan legislation and implies reconciliation of the parties with the mandatory participation of attorneys of the parties, without the participation of a judge.

The Leader of the Nation gave his assessment of the use of conciliation procedures by the courts at the VII Congress of Judges held on November 21, 2016: «... A careful analysis is needed of why measures to expand reconciliation procedures and out-of-court settlement mechanisms do not give the expected result. There are serious flaws here...» [7].

This criticism is not baseless and relies on statistical data, and in the first years after the institute of conciliation procedures consolidated in civil proceedings in our state, it did not provide the expected result.

Thus, in 2016, the total number of completed cases was 764,963; of them the courts of the republic concluded 7,647 cases (1 %) by amicable agreements, 19,805 cases (2.6 %) were concluded by mediation agreements, 533 cases (0.07 %) — by agreements under participatory procedure. In 2017, of the total number of completed cases (904 464 cases) 5 677 cases (0.6 %) were concluded by amicable agreements, 29 011 cases (3.2 %) — by agreements in mediation, 784 cases (0.09 %) — by agreements under participatory procedure.

Consequently, the increasing use of mediation and participatory procedure in percentage is not very noticeable [8].

Methods

During the study, general scientific methods were applied: analysis, synthesis, generalization; theoretical analysis method — a systematic approach; empirical research methods: comparison, statistical analysis.

Results

The conciliation procedures within the civil process are connected with the justice system, which controls the observance of the rights and legitimate interests of the parties, as well as persons whose interests are affected by the essence of the dispute, and approves the concluded agreement, which has the attributes of exclusivity, obligation and enforceability.

The judicial system improvement and conciliation procedures introduction are predetermined by the priority of this institution as one of the directions of the state's legal policy. Therefore, their active use in civil proceedings will affect the optimization of the national judicial system and its compliance with the international standards, as well as the need to create a conflict-free society and increase the level of legal culture of the population, which is typical for the legal systems of most foreign countries.

The goals of the conciliation procedures are: to achieve a resolution (settlement) of the dispute that suits both parties to the procedure; to resolve a dispute promptly; to reduce material costs; to reduce the level of conflict of the parties; to form and preserve stable relations between the parties due to the elimination of controversial issues; to form legal culture among the population, to contributing to the strengthening of business reputation at the international level; to reduce the burden on the judicial system [9].

Kazakh people were familiar with the conciliation procedures at the time when the legal functions of the state were performed by biys, whose main task was to reconcile the disputants. As the Kazakh law researcher I. Kozlov wrote, the appeal of the biy court «to the conscience of the litigants and the spirit of reconciliation» dominated almost every biy trial [10].

Before the trial, the biys invited the parties to forgive each other and resolve the dispute peacefully, and in most cases their actions were fruitful, since in case of failure to achieve reconciliation, the last word remained for the biy court. Thus, the conciliation procedures are not alien to the people of Kazakhstan, but have long been a well-known phenomenon, and the activities of the biys to reconcile the parties are similar to the procedural actions of a judge in a civil proceeding.

In the Middle Ages European countries strongly encouraged the reconciliation of the parties. In the courts of many countries (including England), especially in the XII–XIV centuries, the so-called «dies amori» (days of reconciliation) were regularly held. The fact is that the word «amor», among its other meanings, was a term meaning reconciliation between the disputants. One of the basic principles of the «Laws of

Henry I» (XII century, England) was the following: «Pactum Legem Vincit et Amor Judicium» («The Agreement supersedes law and amicable settlement a court judgment»). In the days of reconciliation, no adversary proceedings were held, and the judges devoted all their working time to assisting the parties in the settlement of disputes. More than twenty dispute settlement procedures have been counted in the scientific literature, of which mediation, arbitration, negotiations, dispute resolution with the help of an ombudsman, independent expertise on the establishment of controversial circumstances, etc. were wide-spread [11].

The civil procedural legislation of our state provides for the conclusion of a settlement agreement as conciliation procedures, an agreement on the settlement of a dispute through mediation, or an agreement on the settlement of a dispute under a participatory procedure, each of which has its own specific features. In particular, there are differences in the list of persons involved in their application: the settlement is concluded by the parties themselves without involving third parties, mediation is concluded with the participation of a neutral agent in the person of the mediator or conciliator judge, and the participatory procedure is concluded by the parties' advocates.

By the norms of part 2, 3 of Article 174 of the Code of Civil Procedure, the parties can settle the dispute in full of mutual claims or in part by entering into the above agreements on any case of lawsuit proceedings, except for cases arising from public law, unless otherwise provided by the Code of Civil Procedure or law. That is, compared to German law, where conciliation procedures can be carried out only on property disputes, the cost of the claim for which does not exceed 750 euros, as well as on disputes between neighbors and on matters of honor and dignity [12], the domestic legislators are given the opportunity to resolve any dispute of private law, in particular when several requirements are stated, and its consideration in essence only in an unresolved part.

Compared with the legislation of Sweden, where the procedure for the peaceful settlement of a dispute in the court of the second instance and the Supreme Court is impossible, the legislation of our state gives the parties the opportunity to end the dispute at any stage.

One of the advantages of resolving a dispute peacefully is the mandatory return of state duty, which often stimulates the parties to settle a dispute by achieving reconciliation.

In accordance with Part 2 of Article 115 of the Code of Civil Procedure, when the parties enter into amicable agreement or dispute settlement agreements under mediation or participatory procedure, which are approved by the courts of first instance and appeal, the state duty paid in full should be fully refunded from the budget; 50 % of the amount paid when applying to the court of cassation should be refunded.

For example, for 6 months of 2017 the state duty over 1.5 billion tenge was returned to the plaintiffs from the budget [13].

Since January 1, 2016, all three types of conciliation procedures have been officially applied in civil proceedings. Therefore, the analysis covers the period from 2016 till 2018. Thus, for the twelve months of 2016, the courts of the republic resolved 764,952 civil cases in total, including the approval of conciliation procedures — 27,985 cases (4 %). In particular, by the settlement agreement — 7,648 cases, by mediation — 19,804 cases, by participatory agreement — 533 cases.

If we compare the figures of 2016 with the same period of 2015, the number of conciliation agreements increased by 11,265 (in 2015 — 16,684 cases out of 680,810 completed cases) and made up to 3.7 % against 2.4 % of cases completed in 2015. During the analyzed period, mediation was the most widespread — 71 % of the total number of cases completed by conciliation procedures, and the number of amicable agreements decreased by 2,286 (in 2015 — 9 934) [8].

In 2017, the courts of the republic completed overall 904,464 civil cases, including reconciliation procedures — 35,472 cases (4 %), amicable agreement — 5,677 cases, mediation — 29,011 cases, participatory procedure — 784 cases. That is, in comparison with the same period of 2016, the indicator of the number of cases completed with the use of conciliation procedures increased by 7,487 cases. As a result, the total number of cases completed in 2017 increased by 139,769 cases, and there were 7,487 more conciliation agreements than in the same period of 2016 (35,472 / 27,985).

The dynamics of the use of conciliation procedures by the courts has increased, but considering the increase in the number of completed cases, the indicator is insignificant. At the same time, as in 2016, most of them ended with the conclusion of a mediation agreement (29,011 cases out of 35,472 cases — 82 %).

In addition, there is a tendency to reduce the number of concluded amicable agreements for 1,971 cases (in 2016 — 7,648, in 2017 — 5,677 cases), and the growth of participatory agreements, taking into account the increase in the total number of completed cases, is not observed (in 2016 — 533 cases, in 2017 — 784 cases) [8].

In the 12 months of 2018, the courts of the republic completed 39,117 cases using reconciliation procedures, which is 4.5 % of the total number of cases (871,536). Namely, amicable agreement — 6,122 cases, mediation — 32,456 cases, participatory procedure — 539 cases.

Compared to the same period in 2017, the number of cases completed amicably increased by 3,645 cases or 10.3 %, which may indicate the parties' interest in resolving the dispute in alternative ways.

During twelve months of 2018, 32,456 civil cases were discontinued due to the settlement of the dispute through mediation, this is more than 82 % of the total number of cases completed by reconciliation of the parties [8].

Therefore, in 2018 mediation was the most common among conciliation procedures. In the period from 2016 to 2018, the conclusion of amicable agreements is ambiguous: in 2016 — 7,648, in 2017 — 5,678 (- 1,970), in 2018 — 6,125 (+ 447), which may be caused by the introduction of new types of alternative procedures to the civil process. The same situation was with the participatory procedure: in 2016 — 533, in 2017 — 784 (+ 251), in 2018 — 539 (- 245), and it is not as common as other types of reconciliation. The number of mediation agreements is growing: in 2016 — 19,804, in 2017 — 29,022 (+ 9,218), in 2018 — 32,457 (+ 3,435), and one of the reasons is the expansion of the list of persons authorized to hold it (mediator, conciliator judge).

Discussion

The development of the institution of reconciliation is one of the priority tasks of the state legal policy, and the judiciary is actively involved in the implementation of this task. Thus, memoranda are signed, aimed at mutual cooperation on the issue of comprehensive development and active implementation of institutions for pre-trial and out-of-court settlement of disputes (conflicts); in almost all regions of the republic, mediation centers have been opened in Friendship Houses; regional courts and local akimats conduct explanatory work among the population on the institutions of pre-trial and out-of-court settlement of disputes (conflicts), on the advantages of their use; pilot projects are being implemented; mediation offices open; seminars, training sssions, round tables are held, open doors are organized; the project «7 stones of justice» of the Supreme Court contains the program «Tatulasu: Sotka Deiin, Sotta» (Reconciliation: before the court, in court), etc.

To this day, measures are being taken to develop mediation, in the summer of 2018 a state body was identified, represented by the Ministry of Information and Social Development, responsible for the development of mediation.

In a number of regions, the Councils of Biys have been established under the Akims, whose activities are carried out on a voluntary basis in the interests of the population and do not replace the activities of professional judges. With extrajudicial dispute resolution skills, with sufficient authority and eloquence, Council members help people resolve minor disputes based on mutual respect and equality of the parties, without bringing them to court. It is important that the functions of the Biys Council are educational in nature, they prevent conflicts and offenses [14].

Proposals on the development of conciliation procedures in civil proceedings should, mainly, be of an organizational nature.

Contribution of the Supreme Court and the coordination of the activities of lower courts to enhance the promotion of reconciliation of the parties play a special role among measures for the development of conciliation procedures in civil proceedings. That is, the impulse for the development of this institution comes from the highest judicial body of our state.

The court cannot have a direct impact on the development of amicable agreement and participatory procedure, apart from explaining the procedural law norms and the advantages of their application, as the amicable agreement is based on the independent resolution of the conflict that has arisen, and the participatory procedure is concluded with the mandatory participation of lawyers of the parties that promote reconciliation. Therefore, the court in this case takes a wait-and-see attitude without the possibility of persuading the parties to reconcile. At the same time, the clarification of the norms of the law by the judge, who in the eyes of citizens and legal entities is the only person who can resolve the conflict, as well as the correct perception of the received information can have a significant impact on the disputants' legal awareness.

Regarding mediation in the judicial system, a number of activities are carried out aimed at its development and introduction into legal proceedings as an integral part of the civil process.

However, statistics cannot indicate significant popularization of mediation, so what could be the cause of it?

Firstly, it depends on the quality of services provided by mediators. At present, there is an absolutely uncomplicated algorithm of actions provided for obtaining a certificate of a professional mediator, and if the statutory requirements are met, any person can be given the authority of a mediator. However, the presence of a certificate may not indicate the competence of the mediator.

There are two words in English: certificate and certify. If the mediator receives a certificate, it means that he/she becomes the applicant of a document confirming the course of certification (certificated), issued by an organization authorized to issue diplomas. This, however, does not mean that he/she is a certified mediator [15].

The Civil Procedure Code provides a judge conciliator as a neutral person who can participate as a mediator.

The statistical data do not allow to distinguish between a mediator or a conciliating judge. The mediation procedure has been successfully completed, since in both cases there is one form of mediation agreement and a court decision, therefore the information is filled in into a single reporting column. However, the positive experience of the conciliating judge in the Saryarka district court of Astana city makes it possible to conclude that the conciliating judges make a huge contribution to the development of mediation, and if they were not legally endowed with the appropriate powers, the number of cases with dispute resolved by mediation would be significantly lower. Therefore, in order to maintain a mechanism for evaluation and quality control, we consider it necessary to toughen the requirements for the professional qualities of a potential mediator, as well as to monitor their activities by forming a ranking of their work indicating the total number of disputes mediated and the percentage of cases successfully settled amicably. This innovation would discipline mediators and would make it possible to treat their professional duties in good faith and improve the quality of the services provided. It is also necessary to constantly deepen knowledge, improve the practical skills of mediators and systematically organize advanced training courses. In addition, as in the judicial system, we consider it right to introduce the specialization of mediators in civil law disputes respectively.

According to the English legal proceedings, not only can the parties agree on the appointment of a mediator, but also can give him additional, optional powers, in case when a compromise cannot be reached, a mediator must act as an arbitrator and settle the dispute on the merits. This procedure is called mediation arbitration. This may indicate the professional level of mediators in England, by whom the parties express not only confidence in facilitating reconciliation, but also in resolving the dispute on the merits. Therefore, it would be desirable for a mediator in our state to enjoy the same prestige as in England.

Conclusions

In conclusion, we offer periodic publication of the results of the mediator’s work, since one of the reasons for the parties' distrust of them is ignorance about their professionalism and competence.

Secondly, the main problem in the development of mediation, as well as the amicable agreement and participatory procedure, is the lack of awareness of the population and insufficient explanatory work, since the majority of those involved in the dispute get to know about conciliation procedures only in the courthouse. Ideally, the settlement of the dispute peacefully is preferable before the start of the trial, but if there is no agreement, the judge’s proposal on conciliation procedures is possible before going to the deliberation room to check whether the parties' position has changed and whether they are ready to reach an agreement. As the American poet D. Lowell wrote, «only fools and dead people do not change their opinions». Therefore, a competent approach to the essence of the dispute, control over the emotional state of the parties can positively affect their position regarding reconciliation with the opponent, with the courts playing a key role as an information resource.

In addition, based on the conducted scientific research, we propose making the following changes and additions to the Civil Procedure Code:

In accordance with Paragraph 3 of Article 174 of the Code of Civil Procedure, an application for settlement of a dispute using conciliation procedures may be filled in any case of action proceedings, except in cases arising from public law relations, unless otherwise provided by this Code or law. From the literal interpretation of this provision, it follows that reconciliation in civil proceedings is possible only within the framework of the action proceedings.

In this regard, in part 3 of Article 174 of the Code of Civil Procedure it is necessary to make additions indicating the possibility of making a petition for the amicable settlement of the dispute and for simplified (written) proceedings. At the same time, the norms of Article 177 of the Code of Civil Procedure, which provides for the procedure for approval of agreements, require an amendment indicating the consideration of

the agreement submitted to the court in the framework of simplified (written) procedure, without calling the parties to the court, taking into account the specifics of this type of production. Part 3 of Article 146 of the Code of Civil Procedure needs a norm on compulsory explanation of the court about the possibility of amicable settlement of the dispute and its consequences when notifying the parties and establishing a time limit for the respondent to submit the statement of claim. Also it is necessary to indicate that if the parties make a request for mediation with the participation of the conciliating judge, it is necessary to make the transition from the simplified to the action proceedings.

Part 1 of Article 177 of the Code of Civil Procedure provides for consideration of the petition of the parties to approve the amicable agreement at the court hearing, notifying the persons participating in the case. In case of the duly notified parties' failure to appear in the court and the absence of the application on its consideration without their participation, it is not subject to be heard by the court. At the same time, in Articles 179–182 of the Civil Procedural Code of the Republic of Kazakhstan there are no rules on the consideration of applications for approval of a mediation or participatory agreement at a court session, with the mandatory participation of the parties, the possibility of refusing to approve them if the parties fail to appear in court, and the reference rules for part 1 of the article 177 of the Code of Civil Procedure on these issues. Hence, there is no provision for the court to clarify to the parties the consequences of concluding mediation and participatory agreements, which, in our opinion, is mandatory.

Thus, clarifying the conditions, explaining the consequences of concluding an agreement should be an obligatory stage before approval of the agreement in order to confirm the will of the parties and their real desire for amiable settlement of the dispute, as well as to exclude the facts of coercion to sign it.

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Азаматтық сот өндірісіндегі татуластыру рәсімдерінің дамуы

Мақала азаматтық процестегі татуластыру рәсімдерін реттейтін қолданыстағы заңнама мен сот практикасын талдауға арналған. Мақалада отандық азаматтық процестік заңнамада көзделген татуластыру рәсімдерінің түрлеріне сипаттама берілді, азаматтық сот ісін жүргізуде татуластыру рәсімдерін қолданудың сот тәжірибесіне талдау және татуластыру рәсімдері институтын жетілдіру бойынша ұсыныстар жасалды. Сот үшін татуластыру рәсімдерінің артықшылығы жылдан жылға ұлғайып бара жатқан жүктемені айтарлықтай азайту арқылы қабылданатын сот шешімдері мен сот актілерін рәсімдеудің сапасын арттыру болып табылады. Алайда бұл фактор тараптардың татуласуына ықпал етудің алғашқы негізі бола алмайды, себебі олардың арасындағы қақтығыс пен дауды толықтай жою сот талқылауы мен шешім қабылдауды қажет ететін азаматтық істердің санын азайтудан жоғары тұруы керек. Сонымен қатар мақалада татуластыру рәсімдерін соңғы үш жылда қолдану динамикасына жасалған талдаудың, бейбіт жолмен шешілген даулардың өсу тенденциясын, тұрғындардың арасында оларды тарату мен насихаттау деңгейін зерттеу нәтижелері көрсетілді.

Кілт сөздер: татуластыру рәсімдері, татуластыру келісімі, партисипативті рәсім, медиация, дауларды шешудің балама түрлері, сот медиациясы.

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Развитие примирительных процедур в гражданском судопроизводстве

Статья посвящена вопросам анализа действующего законодательства и судебной практики применения примирительных процедур в гражданском процессе, а также разработке предложений по их развитию. В статье дана характеристика видам примирительных процедур, предусмотренных отечественным гражданским процессуальным законодательством, проанализирована судебная практика применения примирительных процедур в гражданском судопроизводстве и выработаны предложения по совершенствованию института примирительных процедур. Преимуществом примирительных процедур для суда является значительное снижение нагрузки, поскольку она увеличивается из года в год, что может оказать существенное влияние на качество принимаемых решений и оформление судебных актов. Однако данный фактор не может быть признан первостепенным основанием для содействия сторон к примирению, поскольку устранение существующего между ними конфликта и спора должно стоять в приоритете уменьшению количества гражданских дел, по которым требуются проведение судебного разбирательства и вынесение решения. Кроме того, в статье приведены результаты исследования динамики развития, применения примирительных процедур за последние три года с учётом сложившейся судебной практики для определения тенденции роста споров, урегулированных мирным путём, уровня распространения и популяризации среди населения.

Ключевые слова: примирительные процедуры, мировое соглашение, партисипативные процедуры, медиация, альтернативные виды урегулирования споров, судебная медиация.

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