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MEDIATION PROCESS PRINCIPLES

SUMMARY. In the article the author presents her understanding of the mediation principles. The main goal of this article is the commitment to concentrate theoretical focus on "basic criteria" of the mediation process, not only within the scope of Russia, but also of Europe and the U.S. The key idea is that in any discussion of "formal (legal) and informal procedures" we must take into account values and defects of alternative processes, be they formal or not. This article analyzes such essential procedural elements of the mediation procedure as voluntary character, confidentiality, cooperation and equality of the parties, impartiality and independence, neutrality of the mediator. The author also considers such minimum requirements as awareness and "openness to the results ", as well as responsibility.

KEY WORDS. Principles, mediation, voluntary character, confidentiality, cooperation and equality of the parties, impartiality and independence, neutrality of the mediator, awareness and "openness to the result", responsibility of the parties.

At the turn of the XX century new way of the disputes settlement alternative to the justice conducted by the State courts came into view in many countries of Eurasia, and other parts of the world. On the ground of the adoption of the Federal Law dated July, 27th, 2010 No. 193-FL "On alternative procedure of dispute settlement with the participation of a mediator (mediation procedure)" [1] (further — the Law, the Law on Mediation) the process of mediation integration in the Russian legal culture was launched. The law fixed a model of mediation which is voluntary and carried out on the basis of a mutual consent of the parties that allows characterizing it as private [2]. In this meaning mediation represents a special informal (alternative) procedure which has definite advantages, allowing distinguishing it from procedures in arbitration courts and conciliation procedures, including reconciliation of the parties by the State courts. If to give the developed definition of mediation, it will be the following: mediation is a process of negotiations in which the mediator (intermediary) is the organizer and has control over the negotiations in such a way that the parties agreed satisfy most expediently, realistically the interests of both (all) parties which will result in the settlement of the conflict between the parties. As a type of the procedural activity, mediation procedure cannot take place and be successful without the existence and following certain principles that express public views and ideas (standards) of the arrangement and the order of dispute settlements in association with a mediator. All this, including the future development of the mediation institute in Russia in the conditions of broad integration between the states in the sphere of civil process,

determines the necessity to define, systematize and study the principles of mediation taking into account, as it is required, the foreign experience.

The basic principles, according to the law on mediation, are: voluntariness impartiality and independence of a mediator, cooperation and equality of the parties, confidentiality.

Voluntariness is the first principle of mediation is. Unlike a lawsuit the participation of all arguing parties in the process of mediation is self determined, and a mediator is freely elected (in this regard mediation is similar to the arbitration court). Voluntariness assumes that the parties without coercion from the outside, by a mutual consent make decisions within the process and can, as well as the mediator, refuse to participate in it and stop negotiating at any time. Execution of the voluntariness principle concerning the parties proceeds after the procedure of mediation at a stage of the mediation agreement execution. Section 2 of the Article 12 of the Federal law on mediation contains the direct reference that the mediation agreement must be executed on the basis of the principle of the parties' voluntariness.

The principle of impartiality and independence (neutrality) of a mediator is the second principle that ought to be observed in the course of mediation —. It means that the mediator has to be independent of all parties, and also of a dispute subject. The principle of independence (neutrality) in mediation presupposes that the mediator should be aware of the participants 'outlook, rather than he should keep distance of the parties. In this meaning 'neutrality' is treated as objectivity and justice of a mediator, and excecuting a procedure without exhibiting preference or granting advantages to any of the parties. In this sense H. Besemer uses the term "non-partyism" [3; 43]. A 'degree' of non-partyism is the parties impression rather than subjective feelings of a mediator.

In the European Code of Conduct for Mediators the distinction between neutrality and independence, on the one hand, and impartiality on the other hand [4] is drawn. In particular, according to the Article 2 of the Code, the mediator should not work or, having begun to work, has to stop his activity at finding circumstances that can affect his independence and cause the conflict of interests. Under the Code, such circumstances are as follows: personal and business relations of a mediator with one of the parties; financial and another direct or indirect interest of a mediator in the result mediation; availability of the fact of cooperation of a mediator or other employee of his firm with one of the parties. At the same time, it sets forth that the ability of a mediator to keep full independence and neutrality promotes for impartiality. [4].

The requirements of independence and impartiality are established in the Article 3 of the Federal Law, in the Model law of UNCITRAL "On international commercial conciliation procedure" (further — the Model law of UNCITRAL (Sections 4 and 5, Article 5)).

Cooperation and equality of the parties is the third principle .Joint nature of actions means that all parties take part in the process. No one party has the right to consider that the only one result is accepted for it (here: "openness to the result"). . Equality of the parties, in turn, means that no one of the parties has any procedural advantages.

They are entitled to express their opinions, to define the agenda of negotiations, to estimate the acceptability of the offers and the conditions of the agreement and to have the same time for the individual work with a mediator. This principle is vested in the Article 3 of the Law on Mediation.

Confidentiality is the fourth principle of mediation. Confidentiality, in a general sense, means the rule owing to which the fact of carrying out the procedure of mediation, and also data, including the oral information, and the papers which were used during the mediation process, are confidential. The cases affecting the bases of the state interests and the legislative requirements are considered as exceptions. Any information received by a mediator from one of the parties within confidentiality, shall not be disclosed to another party without the permission.

The European Code of Conduct for Mediators makes this idea perfectly plain. Confidentiality compliance is, under the Code, a professional duty of a mediator. This principle is vested in the Articles 8 and 9 of the Model law of UNCITRAL. The Article 7 of the Directive of EU about some aspects of mediation (2008/52/EU) indicates that the mediator cannot be forced to give evidence concerning data which he knew during the mediation procedure, except when the parties agreed about something else. The Directive doesn't provide "autonomous", that is an independent, from the will of the parties, duty of a mediator to keep confidentiality [5]. Mediators are considered not to have immunity of witness that could be used by them to protect their own interests (by the general rule against the parties and the third parties), even in case the parties have already refused confidentiality in due form [6].

The principle of confidentiality is more completely covered in the Articles 3, 5 and 6 of the Federal Law on Mediation. According to the Section 2 of the Article there are 5 some exceptions. They can be provided by the agreement of the parties or the Federal Laws. Due to the enactment of the Federal Law providing the confidentiality of mediation some modifications in Section 1 of the Article 69 of the Code of Civil Procedure of the Russian Federation and the Article 56 of the Arbitration Procedure Code of the Russian Federation are made. According to the procedural legislation, mediators cannot be involved in judicial proceedings as witnesses and questioned about circumstances that they have known while carrying out mediation procedure. At the same time the persons participating in arranging or carrying out a similar procedure (in particular, employees of the organizations carrying out its activity) do not have immunity of witness. In this part the standard of the Article 5 of the Law on Mediation does not correspond to the existing procedural laws.

The additional guarantee of protection of mediation privacy is fixed in the same article. It means that reclamation from a mediator and from an organization carrying out the activity on ensuring its realization, information relating to the procedure of mediation, is not allowed, except for the cases provided by the federal laws if the parties have not come on the agreement.

In the literature there is a widely spread opinion according to which, any documents connected with this procedure, are liable to destruction after the process is over. [7; 64]. On the contrary, S.I. Kalashnikova, the author of the statements to the Article 5

of the Law had another idea: with the consent of the parties the mediator has the right to keep the documents used while carrying out the procedure of mediation. Kalashnikov reasons his position with the following: ... it is necessary to keep the documents made during the procedure of mediation, for example, to make further analysis of it. At the same time, the data of the previous procedure can be useful in the situations when the parties again apply to a mediator to agree upon or concretize separate clauses of the contract (transaction or bargains). She emphasizes that to protect the rights of a mediator and an organization carrying out the activity on ensuring the realization of mediation procedure, it is recommended to receive the written agreement of the parties [2]. It should be noted, the requirement to provide information relating to the procedure of mediation, has to be made in written form with specification to the federal law, establishing the right of the user to receive the confidential information.

According to the existing procedural legislation, it is possible to refer to the subjects authorized to obtain confidential information from mediators and relevant organizations: court, the bodies carrying out operational search activity and criminal prosecution, other supervising and supervisory authorities (tax, antimonopoly and others). Hence, this information cannot be provided by inquiries of a natural and (or) legal person. Besides, it should be noted that the civil (arbitration) procedural legislation does not contain restrictions to reclaim the specified information and adoption of the papers connected with carrying out mediation procedure, as admissible and appropriate evidence in the case (the Article 57 of the Civil Procedure Code of the Russian Federation and Article 66 of the Arbitration Procedure Code of the Russian Federation). In accordance with the Criminal Procedural Code of the Russian Federation (Paragraph 3, Article 183) the withdrawal of documents, containing the state secret protected by the federal law referred to confidential information, within criminal legal proceedings is made on the basis of the judicial resolution adopted in an order established by the Article 165 of the Criminal Procedure Code [8; 91-92].

It should be noted that confidentiality makes one of the advantages of mediation procedure, in comparison with the state justice. The American professor Carrie Menkel-Midou places confidentiality into key values of informal procedures — according to his version — allowing to bargain and resolve conflicts without precedent creation, and also ensuring secrecy of private affairs for any disputing organizations and individuals [9; 126].

In foreign literature responsibility is mentioned as the basic procedural principle of mediation, along with its fundamental provisions considered above. [10; 13]. According to the German authors, such minimum requirements, as for example, a neutrality of the mediator, a sense of responsibility of the parties, cause a lack of powers of a mediator on decision-making in a dispute, and also such major procedural elements of mediation, as voluntariness, openness to the result, etc.[10; 10]. According to the principle of responsibility, the parties in mediation possess an opportunity to represent their interests and negotiate unassisted. The functions of a mediator are limited only by the given to him procedural powers to vest the parties with a task of constructive search of "the individual decision" [10; 13]. Knowledge acts as a

guarantee that the joint explanation of case papers and achievement of the agreement in judgement will be carried out during mediation without one-side keeping and omission of the facts [10]. The similar state of affairs is based on such key ideas of mediation as "self-determination" and "consent" to choose informal (non-judicial) procedure of dispute settlement, and also on its key values: "the use of the parties' agreement principle" in respect of conflict settlement; direct participation of the parties in settlement of dispute and availability of powers. These ideas in theory and practice of foreign civil process (within Europe and the USA) correspond to the characteristics of non-judicial ways of disputes settlement [11]. It is considered that the common feature of these procedures follows from the principle of a private autonomy (and the autonomy of the parties is admitted in the international contract law): if the owner of the requirement has the right to refuse the right, he has the right to limit the opportunities to place such requirement [12]. Yet high degree of independence of the parties when negotiating can have some restrictions in the interests of justice of mediation process. Thus, according to the European Code of Conduct for Mediators, a mediator has to organize carrying out a procedure of mediation properly, taking into account various facts of the case, including a possible non balance of forces and the rule of law, as well as any wishes of the parties and the necessity of a fast dispute settlement. The parties have to show a voluntary consent with a mediator concerning rules and ways according to which mediation will be carried out [4]. The mediator is the guarantor that the parties are involved in process and have equal opportunities. Moreover, the mediator has to take all necessary measures to guarantee consent of the parties on the basis of full and reliable information[4]. This is his professional competence. On the basis of these reasons, foreign researchers of mediation in a legal context hold the opinion that in the absence of one or two of the above-mentioned criteria, there is no mediation; [10].

Many Russian authors writing on mediation also recognize responsibility of the parties as the central phenomenon in mediation (for example, O. V. Allakhverdova, E.L. Dotsenko) [13]. At the same time in the national legal literature only some researchers mention the principles of responsibility of the parties and transparency (here: in the meaning of awareness) [14; 155], but at the same time the independence of the parties is emphasized in the system of the mediation principles (S.I. Kalashnikov) [2; 49-52]. In the Article 3 of the Law on Mediation this principle isn't named, although its content is taken from the standard of the Article 8 (Section 2) and the Article 11. According to S.I. Kalashnikov, the principle of independence represents a rule according to which, the parties at their own discretion determine the order of holding, the content and the final result of the mediation [2]. We do not accept such perception of "independence" because the author extends the idea of a private autonomy in civil law. Following this way, the scientists dealing with procedures estimate the independence and responsibility raising of the parties in the trial only as the positive tendency caused by the change of ideology of the civil legal regulation [2], [15; 72]. Thus, the dominating doctrine does not give a chance to include the criterion of responsibility of the parties. It is enough to mention here that actually, in practice such

state of affairs creates the feeling of irresponsibility among a mediator and participants of the procedure, both for the decision, and for its execution.

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