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P.T. Esenbekova

Tashkent state university of law, Tashkent, 100047, Uzbekistan, tsulscience@tsul.uz

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Cover Page Footnote

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THE ESSENCE OF CONCILIATION PROCEDURES IN THE SYSTEM OF ALTERNATIVE DISPUTE RESOLUTION IN CIVIL PROCEEDINGS

Esenbekova Patima Tanirbergenkyzy,
Tashkent state university of law, Tashkent, 100047, Uzbekistan

Annotation: the article discusses debatable questions about the concept and essence of conciliation procedures in the system of alternative dispute resolution methods in civil proceedings, discusses the phenomenon of conciliation procedures from the point of view of related sciences, in particular conflict management and the theory of the negotiation process.

Keywords: conciliation procedures, settlement, reconciliation of the parties, settlement of the dispute, optionality, conflict, legal process.

Аннотация: мақолада фуқаролик суд ишларида низоларни ҳал қилишнинг альтернатив усуллари тизимидаги келишув жараёнлар концепцияси ва моҳияти ҳақида мунозарали масалалар муҳокама қилинади. Музокаралар жараёнининг назарий масалалари, хусусан, конфликтологияси ва муҳокама процесси назариясида келишув тартиб-қоидалари ҳақида фикр юритилади.

Калит сўзлар: келишув тартиб-қоидалари, келишув битими, томонлар келишуви, низоларни ҳал қилиш, ихтиёрийлик, зиддият, суд процесси.

Аннотация: в статье рассмотрены дискуссионные вопросы о понятии и сущности примирительных процедур в системе альтернативных способов разрешения споров в гражданском процессе, рассмотрен феномен примирительных процедур с точки зрения смежных наук, в частности, конфликтологии и теории переговорного процесса.

Ключевые слова: примирительные процедуры, мировое соглашение, примирение сторон, урегулирование спора, диспозитивность, конфликт, судебный процесс.

In modern scientific doctrine, the idea of “justice of compromise and social peace” is actively pursued, within which is justified to rethink the functions and goals of the judiciary and put the task of reconciliation of the parties first, and not resolve the matter.

Reforms of civil court proceedings of the last decade, carried out in a number of developed countries, in particular, Great Britain, Germany, France, show that the development of alternative dispute resolution methods, which at present mean the whole system of both pre-trial (non-judicial) dispute resolution options, and embedded in the trial of consensual procedures, identified one of the most important areas associated with improving the efficiency of justice.

In the Republic of Uzbekistan and in the Republic of Kazakhstan, as well as throughout the international community, there is a clear increase in interest in conciliation procedures as alternative ways to resolve disputes. Thus, according to Article 166 of the Civil Procedure Code of the Republic of Uzbekistan [12] and Article 174 of the Civil Procedure Code of the Republic of Kazakhstan, the court takes measures to reconcile the parties, assists them in resolving the dispute at all stages of the process [13].

It should be noted that despite the very active use, the term “conciliation procedures” remains undefined in procedural science. Conciliation procedures are usually considered as a kind of alternative dispute resolution methods, that is, those social means that are alternative to the judicial method of resolving conflicts that dominates in modern society. At the same time, in the system of alternative dispute resolution methods, conciliation procedures are opposed to arbitration (arbitration court) as non-judicial methods of conflict resolution.

Traditionally, jurisdiction refers to the authoritative activity of the competent authorities on various issues arising in the field of law [3, c.16]. As noted in the literature, the jurisdictional form of conflict resolution forms a certain order of actions by its participants, the main one being the law-enforcement body endowed with authority, which forms the concept of “jurisdictional process”. This

approach led to a certain peculiarity of the procedural relations - the obligatory participation in them of the authority - the judicial body [4, c.68].

In contrast, the essence of the conciliation procedures is not the resolution of the dispute between the parties by someone third (even if the person is chosen by mutual agreement of the parties) by making a binding decision for them, but the search for ways out of the conflict by the parties themselves.

In this respect, the opinions of V.I. Krussa on understanding conciliation procedures in the aspect of the variety of such a method of protection as joint use of [5, c. 165], as well as S.I. Kalashnikova that one of the most distinguishing features of conciliation procedures compared with jurisdictional (power) mechanisms for resolving legal conflicts is the nature of the interaction of participants in a controversial relationship based not on competition, but on negotiations [3, c. 9, 12]. The definition of conciliation procedures through the term "friendly resolution of disputes" is widely used in foreign literature, which underlines their non-adversarial nature [3, c. 8].

Traditionally, non-judicial ways of resolving a conflict have been called alternative, that is, those legal forms that exist in parallel with the system of state courts and are referred to as an alternative to initiating a case in court [7, c. 109]. However, over time, the concept of "alternative dispute resolution" has changed significantly: they began to understand the procedures that exist not only in parallel with the judicial system, but also within it as an alternative to a full-scale process [6, c. 29; 17, c. 168]. As correctly noted. S.I. Kalashnikov, the definition of the concept of "alternative dispute resolution" is becoming more conventional. The term "alternative" means "opposed to another and excluding him", while the use of mediation does not exclude the right of the parties to go to court, and vice versa, the consideration of the case in court is not an obstacle to appeal to the mediator. In addition, there is a clear tendency to integrate mediation into the activities of state bodies, including courts. Mediation (as well as other conciliation procedures) is gradually losing its "alternative" character and is increasingly being used on a par with and in connection with other ways of protecting violated subjective rights [3, c.7, 9, 16-18].

In this regard, the concept of "conciliation procedures" currently covers not only those methods of reconciliation of participants in a legal conflict that exist outside the framework of legal proceedings, but also those that exist within it. The content of the concept of "conciliation procedures" in its modern sense extends to both extrajudicial (pre-trial) and judicial (procedural) activities to resolve the dispute between the parties.

To define the concept of conciliation procedures, the key, in our opinion, should be understanding them as manifestations of the disposition principle [8, c. 101]. By virtue of a dispositive start, the parties should have the right to choose options for resolving the dispute and use either a full-scale procedure for the consideration and resolution of the dispute in court (arbitration court), which ends with the adjudication of the case, or informal, simplified, alternative procedures. If the goals are achieved within the framework of the latter, the jurisdictional proceedings will not start or will be terminated.

It is not by chance that the development of alternative dispute resolution methods itself was associated with the expansion of the dispositive (private) process started, with the overcoming of the monopoly of the court (jurisdictional) dispute resolution method. In particular, according to F. Sander, the founder of the "court with multiple doors" concept, the judicial process is a universal, but often the least effective means of resolving most legal conflicts. When choosing a dispute resolution procedure, it is necessary to take into account its peculiarities, and only in this way can a "proper forum" be provided to protect the violated subjective right. The situation when the parties are forced to go to court in the absence of an alternative should be changed. Instead of "one door" leading to the restoration of justice through the judicial process, one should create "several doors", that is, provide the parties with the right to choose such a procedure that would best meet their interests in terms of cost, efficiency, level of trust, predictability of the result [3, c.8, 226].

The definition of the term "conciliation procedures" is directly related to the resolution of the question of what their purpose is, since most often in the literature the term conciliation procedures is used to designate procedures aimed at developing a settlement agreement [6, c. 24, 33]. In particular, according to S.L.Degtyareva, whatever conciliation procedures are used by participants in a controversial substantive relationship, in a real civil and arbitration process they are forced to turn to the institution of amicable settlement, i.e. they will be able to consolidate all the achieved results only in the form of a settlement agreement (or use other forms of expression of will known to the current procedural law - waiver of a claim, recognition of the claim) [2, c. 393].

The opinion that a settlement is the sole purpose of conciliation procedures, and, therefore, the feature of the concept of conciliation procedures, should be questioned. The goal of reconciliation of the parties goes beyond the sole conclusion of a settlement agreement, which is only one of the possible outcomes of the conciliation procedure.

First of all, it should be noted that the “settlement agreement” in the legal system belongs to the categories of civil procedural law. The settlement agreement is an agreement that is concluded by the parties in the framework of legal proceedings. At the same time, the conciliation procedures, as mentioned above, cover not only consensual procedures within the judicial procedure, which are an alternative to the traditional adversary process, but also procedures that are entirely out of court (pre-trial, extrajudicial). Therefore, the purpose of conciliation procedures as their essential feature should be formulated in such a way as to encompass not only intra-judicial, but also extra-judicial reconciliation. But even if we allow the possibility of using the term “settlement agreement” not in the strict sense as an institution of civil procedural law, but solely with the emphasis on the fact that by content it means an agreement reached by the parties as a result of mutual concessions, then this term does not seem appropriate to indicate the purpose of conciliation procedures.

If we go beyond the framework of legal science and try to consider the phenomenon of conciliation procedures from the point of view of related sciences (in particular, conflictology and the theory of the negotiation process), then it should be noted that the concept of “compromise” in these scientific areas corresponds to the legal concept of “compromise agreement” (asymmetric agreement). Along with compromise (asymmetric) agreements on the results of the negotiations, so-called integrative (consensual) agreements can be achieved (and their achievement is the primary task of the modern negotiation theory).

Two close ones correspond to these types of agreements, nevertheless, different strategies of behavior of the parties to the conflict - finding a compromise (resolving the conflict through mutual concessions, when each side loses something) and cooperation (resolving the conflict through finding an option that simultaneously satisfies the interests of all conflicting parties).

Unlike a compromise, cooperation is characterized as a style of “mutual victories,” in which both parties are interested in working out a mutually beneficial solution. Such a decision requires a significant investment of time, diplomacy, negotiation skills and mutual efforts, but this is justified, since the great potential of cooperation is aimed at establishing long-term relationships regardless of subjective bias. [4, c.83].

O.V.Allahverdova defines mediation as “the negotiation process in which the mediator is the organizer and manages the negotiations so that the parties come to the most beneficial realistic and satisfying interests of both (all) parties to the agreement, as a result of which the conflict between the parties will be resolved” [1, c. 177].

S.I. Kalashnikova notes that the algorithm of the conciliation procedure, in particular mediation, is focused on the search for typical, creative, mutually beneficial (consensual) decisions [3, c. 125, 245].

Thus, if we talk about the goals and results of conciliation procedures, the term “agreement” is the most appropriate rather than “amicable agreement”.

However, one should agree with A.N.Kuzbagarov, despite the fact that the result of the reconciliation of the parties in material and procedural relations, as a rule, takes the form of a written agreement, the etymology reconciliation is much wider than such a category as the agreement [4, c. 92].

It seems correct that the outcome of the conciliation procedure may find expression accurately not only in the parties concluding an agreement, but also in their unilateral actions to waive subjective rights or assume subjective duties (in conflictology correspond to this style of behavior in conflict as an adaptation, when in the framework of joint actions, one of the parties to preserve the relationship refuses to meet their interests in favor of the other side). Within the framework of judicial conciliation procedures, such a result of reconciliation of the parties will be documented by the actions of the claimant in refusing the claim or the defendant in recognizing the claim.

At the same time, in order to scientifically develop the concept of “conciliation procedures”, the opinion expressed in the legal literature that one-sided actions of the parties cannot be fully identified with conciliation procedures requires its understanding.

In particular, the approach of GD Uletova, which differentiates the concepts of “conciliation” and “voluntary execution of court decisions” in relation to the enforcement proceedings, is

interesting, noting that reconciliation is a longer process than voluntary execution of the requirements of the executive document. The author joins A.N.Kuzbagarova that reconciliation has signs of internal consistency in the process from resolving a dispute (at the request of one of the parties to the conflict to compel the other to a particular behavior) to enforcement of actions that the court deems necessary to restore peaceful, harmonious and partnership. As for the voluntary execution of the requirements of the executive document, this is a result of a less complicated procedure that can be achieved without court approval through the mediation of a bailiff or professional mediator. "The difference between conciliation and voluntary execution ... lies in the fact that reconciliation of the parties in the enforcement proceedings is possible only if the execution was preceded by a private law dispute, considered in civil or arbitration proceedings, and the enforcement document is based on a court decision that the dispute essentially resolved [9].

In fact, the author raises the serious question of what should be considered a conciliation procedure in the enforcement proceedings, since the procedural codes provide for the possibility of conducting a conciliation procedure at this stage of the process. In the reasoning given above, the idea is clearly traced, which should be recognized as correct, that it is possible to speak about conciliation procedures only when there is a conflict between the parties. At the same time, trying to determine what is a conciliation procedure in the enforcement proceedings, we are faced with an ambiguous situation. On the one hand, enforcement proceedings are the final stage of the process for the enforcement of a court decision (which means that there is a conflict between the parties, and the court has imperatively determined a specific way to terminate it). On the other hand, enforcement proceedings can be completely unrelated to the existence of a conflict and the previous consideration and resolution of a legal dispute in court, since not only judicial decisions, but also acts of non-judicial bodies of civil jurisdiction are executed in the manner provided by the procedural rules.

Voluntary execution by the debtor of the executive document based on the court decision, testifies to the reconciliation of parties in the deep philosophical sense of the word as a decision to terminate, pay off, to finally resolve the conflict situation, recognizing that the conflict has exhausted itself. In this sense, the reconciliation of the parties is not connected with the conduct of conciliation procedures only, but acts as the goal, content and result of everything consistent from stage to stage of court procedure.

If the debtor refuses to voluntarily execute the act of the court, it should be noted that the parties did not reconcile, resulting in the court continuing its activities to achieve this social task with the help of the institution of compulsory execution or using conciliation procedures at the stage of enforcement proceedings. Within the framework of the latter, the court, taking into account that at least one of the parties does not agree with the variant of resolving a conflict situation prescribed in a court decision, attempts to search, with the participation of both parties, of a more harmonious way to complete it.

Voluntary execution by the debtor of an act of a non-judicial body can be considered as a result of reconciliation and even more so a conciliation procedure only if, initially, when initiating enforcement proceedings from the debtor, there was a refusal to perform the actions prescribed by the act of the jurisdictional authority because of disagreement with it or lack of funds to meet the collector's requirements. Such a refusal indicates the occurrence of a conflict situation, which can be eliminated either by force (using the institution of compulsory execution) or as part of conciliation procedures, the result of which can be, among other things, the voluntary execution of the debtor's requirements by the debtor.

Thus, unilateral actions of the parties of the legal relationship committed in favor of the other party do not always act as a sign that a reconciliation procedure took place between them. A conciliation procedure always implies the existence of a conflict and interaction between the conflicting parties, aimed at settling it in order to preserve social ties that are significant for them, which can result in an agreement or voluntary unilateral actions to waive subjective rights or assume subjective duties.

In the course of reflection on the meaning of conciliation procedures, one may get the impression that they are associated exclusively with such strategies of the parties to the conflict as compromise, cooperation or accommodation (unilateral concessions). At the same time, it seems correct that within the framework of conciliation procedures other strategies can be observed, in particular, rivalry (rivalry) – a power style aimed at asserting one's position on the "win-lose"

principle, as well as avoidance – the conscious departure of the party from interaction and confrontation.

In this regard, it is important to understand that the conciliation procedure is not only the interaction of the parties that have already entered into contact in order to find options for resolving the conflict (that is, pursuing strategies of compromise, cooperation and adaptation), but also a specially organized procedure (for example, the leadership of the court or mediator), encouraging the parties to interact and abandon such ineffective strategies of behavior in the conflict as avoidance or rivalry.

To develop a scientific definition of conciliation procedures, it seems necessary to elaborate in more detail on the position taken by S.I.Kalashnikova. As the author points out, in some cases, mediation is directed not so much at developing a mutually acceptable solution, as at finding out the grounds for a dispute, preventing disagreements, agreeing on the terms of a deal. In particular, in world practice, depending on the purpose of conducting, there are such types of mediation as a review, preventive, mediation of conflict resolution, deterrence of the conflict, conclusion of contracts, development of a political solution, etc. Its objectives may be different, the author concludes that the purpose of the settlement of the dispute should not be considered as a distinctive feature of mediation [9, c. 15, 53].

In general, agreeing with the position of the specified author, it seems necessary to make a few essential, in our opinion, comments.

First of all, it is necessary to clearly distinguish between such concepts as "goal" and "result" of the conciliation procedure. A conciliation procedure can be defined as unproductive if parties have not reached an agreement or have not taken unilateral actions to resolve the conflict. But the conciliation procedure, as always, aims to change the behavior of parties in a conflict and to carry out the above actions. From this point of view, the purpose of the conciliation procedure should be considered as its essential feature.

At the same time, it seems perfectly true that the goal of the conciliation procedure should not be tied exclusively to the concept of a legal dispute as a phenomenon of finally formed mutual legal requirements that the parties are willing to submit to the resolution of the relevant jurisdictional body. Conciliation procedures are associated with a broader phenomenon - social conflict as disagreement and confrontation of the parties, based on the contradiction of their interests [4].

Therefore, in our opinion, given the full legitimacy of the thesis that conciliation procedures can exist in the absence of a legal dispute (for example, at the stage of agreeing the terms of the contract), it should be borne in mind that any conciliation procedure is based on the conflict of the parties.

The goal of conflict resolution as one of the essential features of conciliation procedures is used in the scientific literature as a criterion to distinguish them from the related concept of conciliation procedures. In particular, according to T.V.Sakhnova, conciliation and conciliation procedures are non-identical concepts. Conciliation procedures are always associated with the final (in a substantive and legal sense) settlement of a legal conflict; consensus - with the settlement of individual issues related to the subject of the process. According to the author, conciliation procedures are permissible if their subject is constituted by a coordinated, dispositive type of relationship, i.e. such that, in principle, due to their material and legal nature (regardless of the existence of a dispute), allow self-regulation by the will of the parties. By means of conciliation procedures, the removal of the deformation from the material relationship that serves as their subject is achieved. Conciliation procedures are possible in cases where the subject is legal relations of a subordinate type, which include (by virtue of a normative establishment) certain elements of a dispositive nature. In other words, when a legal compromise, mutual concessions regarding the substance of the dispute are not allowed by the rule of objective law, but at the same time, reaching agreement on some elements of the relationship (for example, a conciliation procedure for deferring taxes) [10, c. 20-23].

The definition of the term "conciliation procedures" is connected with another important question, namely, what type of social interaction corresponds to the basis of the procedure. In particular, according to a number of scholars, the settlement agreement in civil proceedings cannot be attributed to the number of judicial conciliation procedures. As indicated by E.A.Treshcheva, the wording stipulated by procedural legislation, which obliges the court to "assist the parties to reconciliation", "assist the parties in resolving the dispute", "take steps to conclude an amicable settlement by the parties" are absolutely not specific and the law does not regulate either the content or the form of such activities of the court, except two actions: to clarify to the parties their procedural rights to appeal to the mediator and conclude a settlement agreement, and also on the court's consideration of the terms of the settlement agreement and dew on his

statement. Under such circumstances, the question naturally arises whether such actions of the court can be considered a judicial conciliation procedure [11, c. 107-108].

According to T.V.Sakhnovoy, a modern doctrine, states the absence of an exact concept of "procedure" and its criteria. "The procedure seems to be an obvious component of both the process and the law in general. However, for modern doctrine, this category largely remains terra incognita. The concept of the procedure is used "by touch" - in a very approximate sense" [10, c. 10]. According to French experts, the procedure is a series of formalized establishments aimed at achieving the expected and deterministic legal result. The procedure is peculiar to the rules, it always has a legally defined beginning and end, its subject and object [10, c. 13-14].

In our opinion, the concept of "procedure" covers social interaction, which can be characterized by varying degrees of formalization. The main feature of the procedure is the fact that this is a certain way organized interaction.

Thus, summing up, it seems correct to give the following definition of a conciliation procedure at the same time from the conflictological and legal points of view. A conciliation procedure is a specially organized (including within a jurisdictional body) interaction of conflicting parties of varying degrees of formality, aimed at encouraging them to change strategies of behavior in a conflict from rivalry (avoidance) to cooperation (compromise, adaptation) and coordination on this basis of ideas of the parties on the ways out of the conflict, which results in the development of an agreement or unilateral actions of the parties, entailing their refusal to use the law iktsionnyh ways to resolve the conflict.

The essence of the conciliation procedure is the joint resolution of the parties to the conflict (independently, under the direction of the court or with the help of an intermediary) of the most expedient option to resolve the legal conflict that has arisen, resulting in their refusal to apply for judicial (other jurisdictional) forms of protection of the law or from continuing initiated jurisdictional process. In the framework of a court case that has already arisen, conciliatory, in our opinion, should be considered procedures that are aimed at the parties using their regulatory powers (including the claimant's refusal of a claim or recognition of a claim by the respondent) in order to complete the process.

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