Asesorías y Tutorías para la Investigación Científica en la Educación Puig-Salabarría S.C.
José María Pino Suárez 400-2 esq a Lerdo de Tejada. Toluca, Estado de México. 7223898475
RFC: ATI120618V12

**Revista dilemas contemporáneos: educación, política y valores.**
**http://www.dilemascontemporaneoseducacionpoliticayvalores.com/**
**Año: VII Número: Edición Especial Artículo no.:107 Período: Noviembre, 2019.**

**TÍTULO:** Aspectos teóricos y legales de la institución de mediación.

**AUTORES:**

1. Dra. Irina N. Klyukovskaya.

2. Cand. Ph.D. Aminat K. Kardanova.

3. Cand. Ph.D. Oleg N. Lauta.

4. Cand. Ph.D. Lyudmila A. Popova.

5. Cand. Ph.D. Viktor E. Semenov.

**RESUMEN:** El artículo analiza los fundamentos teóricos y legales de la institución de la mediación en la Federación de Rusia. Los autores formaron construcciones legales de un acuerdo de solución, así como una legislación sobre un sistema de procedimientos previos al juicio para resolver disputas. Se analizan las instituciones de procedimientos de conciliación y liquidación.

**PALABRAS CLAVES:** derecho consuetudinario, mediación, mediador, partes en conflicto, resolución de disputas.

**TITLE:** Theoretical and legal aspects of the institution of mediation.

**AUTHORS:**

1. Dra. Irina N. Klyukovskaya.

2. Cand. Ph.D. Aminat K. Kardanova.

3. Cand. Ph.D. Oleg N. Lauta.

4. Cand. Ph.D. Lyudmila A. Popova.

5. Cand. Ph.D. Viktor E. Semenov.

**ABSTRACT:** The article discusses the theoretical and legal foundations of the institution of mediation in the Russian Federation. The authors formed legal constructions of a settlement agreement, as well as legislation on a system of pre-trial procedures for resolving disputes. The institutions of conciliation procedures and settlement are analyzed.

**KEY WORDS:** customary law, mediation, mediator, conflicting parties, dispute resolution.

**INTRODUCTION.**

At present, more attention has been paid to the development of the mediation institute in Russia, scientific research in this area has intensified, scientific discussions are ongoing, in particular, on the possible directions of mediator activity [Bizhan N.R., Komarov S.A. (2012), p. 50-54; Gavritsky A.V., Kobleva M.M. (2019), p. 26-29]. However, the effectiveness of the institution of mediation is reduced due to the low legal education of the population. Hence, the progressive development of the institution of mediation is possible only with a significant change in legal awareness in society.

In many countries of the world, the norms of customary law were mainly applied (Serbia, the Netherlands, USA, Austria, Canada, Australia, Bulgaria and other countries), mediation is part of the legal system and culture [10]. In these countries of the world, relevant legislation has been adopted that promotes the development of the mediation institution [Borisova E.A. (2011), p. 18-29].

In the historical past, a world deal was called a “world”, “peace agreement”, “world record”, “amorous tale” or “final agreement”, which was recorded in a “row or final letter”. The term "final" itself indicated the end of the reconciliation, which was not subject to revision. “Mediation is a special form of mediation,” and mediation is a broader legal category than mediation. It should be noted that “mediation is one of the alternative ways of resolving conflicts [Ts. A. Shamlikashvili // URL: http://www.mediacia.com/].

Mediation is a procedure of voluntary reconciliation of conflicting parties by involving a mediator in negotiations [6].

**DEVELOPMENT.**

**Research of methodology.**

Theoretical and methodological provisions were presented by the works of Russian scientists on the organization and activities of the mediation institute, the conclusions and suggestions received in the course of fundamental and applied research in this area in modern realities, as well as the related problems in perceiving the mediation institution as a necessary component of legal culture.

The study used such scientific methods of cognition as analysis and synthesis, comparison, observation, forecasting, and deduction.

**The results of the study.**

Firstly, the process of creating an institution of conciliation procedures and a settlement agreement in Russia was launched at the end of the 14th century. The foundation for the formation of the legal structure of a settlement agreement was laid in the second half of the 19th - early 20th centuries in Russia. It was then that an integrated system of views on conciliation procedures was actively developing [Salimzyanova RR, Sabirova L.L. (2012), p. 218]. Alternative dispute resolution is a process aimed at resolving disagreements of conflicting parties, based on voluntariness, equality, taking place outside the state judicial system [Klementov V.L. (2012), p. 9].

Secondly, in the historical past, many traditional cultures valued the figure of a mediator along with priests and leaders, and sought their help in resolving conflicts. In the process of evolution, the institution of mediation has become more effective, eliminating significant shortcomings in the conduct of conciliation procedures. For example, at that time, confirmation that the transaction was concluded and both parties were satisfied with its conditions, it corresponded to their interests - there were enough handshakes with witnesses and the parties had to fulfill their obligations voluntarily, as the transaction was mutually beneficial. So, the formality of the transaction was absent, and moral standards were of great importance.

Thirdly, the Federal Law of the Russian Federation “On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (mediation procedure)” dated July 27, 2010 No. 193-ФЗ [9], which established the mediation procedure as an alternative way to resolve disputes, actually changed the pre-existing practice of pre-trial proceedings.

Decree of the Government of the Russian Federation dated December 27, 2012 No. 1406 (as amended on December 24, 2018) “On the federal target program“ Development of the Russian judicial system for 2013-2020 ”[10] set the task of more active use of information technologies, which will significantly reduce the load on courts, including arbitration and arbitration, as well as improve the quality of decisions, and the use of mediation will minimize the participation of state mechanisms and increase the effectiveness of the judicial system.

Mediation is a modern and technological tool of civil society. It should be remembered that in some cases the participation of the court as a body administering justice is mandatory and requires consideration of the case in a court of general jurisdiction. Consequently, it cannot be argued that mediation can replace legal proceedings.

The content of the mediation procedure, as promising for our country, is that the mediator assists the parties in negotiating and helps to achieve a mutually beneficial solution to the case. The value of mediation is that flexibility, informality, and an economically quick procedure allow the parties to the conflict to resolve disputes, while continuing business cooperation and developing partnerships.

According to the current Russian legislation on mediation, disputes arising between entities can be resolved with the help of media technologies that arise from relations in the field of civil law, business law, etc., with the exception of collective labor disputes, as well as disputes affecting the interests of third parties.

Mediation and the judicial procedure for the settlement of disputes differ from each other, in particular:

- The mediator, as a mediator in the settlement of disputes, does not issue a final verdict.
- The rules of procedure for the consideration of disputes by mediation entities are established independently.
- The duration of the mediation depends on the initiative of the subjects of the dispute.

The Federal Law on Mediation outlines three types of agreements on which the mediation procedure is based. In addition to the mediation agreement concluded by the parties at the end of the conflict resolution, the mediation procedure includes an agreement on the application of the mediation procedure and an agreement on the conduct of the mediation procedure. The mediation agreement, as a general rule, is the last, is the most significant of the three for civil circulation.

The result of the conciliation procedure is the execution of a mediation agreement, which contains information: about the parties and the subject of the dispute; about the mediation procedure and the mediator; obligations agreed upon by the parties, terms and conditions for their implementation.

A mediation agreement, in contrast to a court decision, is a civil law transaction. And violation of its terms by the parties may entail consequences provided for by civil law for non-fulfillment or improper performance of obligations, including termination of the agreement in court.

The specified document, unlike a court decision, is not subject to publication in the public domain.

The settlement of the dispute through the mediation process, regardless of its results, does not detract from the parties' rights to apply for judicial protection [S. Nikolukin (2013), p. 62].

Currently, the legislator has paid insufficient attention to protecting the rights of the parties to a mediation agreement. The current situation is aggravated by the proclamation of the principle of voluntariness in the performance of a mediation agreement, which is simultaneously one of the key principles in mediation, which excludes, according to some researchers, the possibility of its enforcement.

The legislation on mediation determines that the mediation agreement is executed on the basis of the principles of voluntariness and good faith of the parties. The establishment of the principle of voluntariness in the performance of a mediation agreement has generated numerous discussions in the legal literature. The main issues are the issue of protecting the rights of a bona fide party in case of non-fulfillment or improper execution of a mediation agreement and the possibility of its enforcement.

There are opinions in the literature that the implementation of a mediation agreement is not always ensured by the possibility of applying coercive measures, since this contradicts the very essence of the mediation procedure. In support of such positions, it is argued that mediation itself is a voluntary procedure, during which the parties independently agree on mutually beneficial conditions.

With this in mind, it is assumed that the parties are interested in the conscientious and voluntary execution of the mediation agreement concluded by them, and the availability of ways to protect the rights of the parties in case of non-fulfillment or improper execution of the mediation agreement will be contrary to the basic principle of mediation - the principle of voluntariness. Scientists note the inconsistency of legislation regarding the implementation of a mediation agreement.

It should be noted that in the mediation agreement, the parties as a result of the settlement of the dispute jointly defined their new obligations instead of the previous ones. Consequently, the parties voluntarily assume certain rights and obligations in accordance with the terms of the mediation agreement.

The principle of voluntariness in relation to the implementation of a mediation agreement is interpreted differently. So, some authors argue that in this case, the principle of voluntariness is expressed in the voluntary conclusion of the contract and, thus, the assumption of obligations (freedom of contract).

A mediation agreement concluded as a result of a mediation procedure, by virtue of the principle of freedom of contract, can be concluded in any form (Articles 421, 434 of the Civil Code of the Russian Federation) [3]. Citizens and legal entities are free to conclude a contract. No one has the right to force the parties to conclude a mediation agreement. In the event that no agreement on disputed legal relations has been reached, the mediation procedure is terminated on the grounds established by Article 14 of the Federal Law on Mediation [8].

It should be noted that the proclamation of the principles of voluntariness and good faith in the performance of a mediation agreement does not affect the possibility of applying methods of protection and measures of responsibility to the guilty party in case of non-performance or improper execution of the mediation agreement. The indicated possibility extends to the mediation

agreement, which is both a civil law transaction, and approved by the court as a settlement agreement with the peculiarities inherent in each of these types of mediation agreement [3].

Compulsory execution of a mediation agreement is possible subject to its approval by the court as a world agreement. The terms of a mediation agreement, which is a civil law transaction, can also be enforced, but only after a court ruling on a new dispute arising from the non-execution or improper execution of such a mediation agreement as a contract and issuance of a writ of execution based on such a decision.

An indication of the application of the principles of voluntariness and good faith in the performance of a mediation agreement at first glance deprives the parties of guarantees for the protection of their rights by the state. However, in reality this is not so. The consolidation of the principle of voluntariness in the execution of contracts and other bilateral agreements does not deprive the party of protection from unfair behavior of the other party.

## CONCLUSIONS.

Based on the foregoing, it can be concluded that mediation in Russia existed long before the adoption of the 193-FZ and was often used based on Mr. customary law. Today, mediation is becoming an independent phenomenon of Russian legal reality. In this sense, mediation can be considered as a complex interdisciplinary institution, which combines the norms governing relations related to the settlement of disputes in the framework of conciliation procedures.

The reasons for the unpopularity of the mediation institution in our country compared to other states are: insufficient level of legal culture of the population, low level of information about the institution of mediation. It is necessary to work to popularize mediation and its procedural technologies for the settlement of disputes among the general population.

**Conflict of interest.**

The authors confirm the absence of a conflict of interest.

**BIBLIOGRAPHIC REFERENCES.**

(In Russian).

1. Borisova Ye.A. (2011) Protsedura rossiyskogo posrednichestva: kontseptsiya razvitiya // Vestnik Moskovskogo universiteta. Seriya 11. Pravo. № 5. S. 18-29.
2. Grazhdanskiy kodeks Rossiyskoy Federatsii ot 30 noyabrya 1994 g. № 51-FZ // www.consultant.ru
3. Klementov V.L. (2011) Posrednichestvo v diagrammakh i tablitsakh: uchebnoye posobiye. M.: Radunitsa. 160 s.
4. Nikolyukin S.V. (2013) Pravovyye tekhnologii mediatsii (mediatsii) v Rossiyskoy Federatsii: nauchno-prakticheskoye posobiye. M.: Yustitsinform. 240 s.
5. Panova I.A. (2011) Posrednichestvo: problemy i resheniya // Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoy Federatsii. № 10 (227). S. 73-83.
6. Postanovleniye Pravitel'stva Rossiyskoy Federatsii ot 27 dekabrya 2012 g. № 1406 (s izmeneniyami ot 24 dekabrya 2018 g.) «O federal'noy tselevoy programme «Razvitiye rossiyskoy sudebnoy sistemy na 2013-2020 gody» www.consultant.ru
7. Salimzyanova R.R., Sabirova L.L. (2012) Ponyatiye i sushchnost' mediatsii // Vestnik ekonomiki, prava i sotsiologii. № 1. S. 217-220.
8. Federal'nyy zakon Rossiyskoy Federatsii «Ob al'ternativnoy protsedure razresheniya sporov s uchastiyem mediatora (protsedura mediatsii)» ot 27 iyulya 2010. № 193-FZ. www.consultant.ru
9. Shamlikashvili Ts.A. Posrednichestvo v Rossii. Tekushcheye sostoyaniye. Ssylka. //URL: www.mediacia.com
10. Klyukovskaya I.N., Demchenko T.I., Gabrilyan R.R., Kardanova F.K., Popova L.A. Razresheniye pravovykh konfliktov v kastomarskom prave narodov mira. SJR. Chelovek v Indii, 97 (22). PP 243-258.

11. Bizhan N.R., Komarov S.A. (2012) Vnedreniye mediatsii v protsess formirovaniya pravovogo gosudarstva: st. // Pravovaya mysl'. № 6 (74). S. 50-54; Gavritskiy A.V., Kobleva M.M. (2019) Vozmozhnosti mediatsii v ugolovnom protsesse // Mirovoy sud'ya. Nomer 7. S. 26-29.

(in English).

1. Borisova E.A. (2011) Russian mediation procedure: development concept // Bulletin of Moscow University. Series 11. Right. No. 5. P. 18-29.
2. Civil Code of the Russian Federation (Civil Code of the Russian Federation) dated November 30, 1994 No. 51 – ФЗ // www.consultant.ru
3. Klementov V.L. (2011) Mediation in charts and tables: a training manual. M.: Radunitsa, 2011.160 s.
4. Nikolyukin S.V. (2013) Legal technologies of mediation (mediation) in the Russian Federation: a scientific and practical manual. M.: Justicinform. 240 s.
5. Panova I.A. (2011) Mediation: problems and solutions // Bulletin of the Supreme Arbitration Court of the Russian Federation. No. 10 (227). S. 73-83.
6. Decree of the Government of the Russian Federation dated December 27, 2012 No. 1406 (as amended on December 24, 2018) "On the federal target program" Development of the Russian judicial system for 2013 - 2020 www.consultant.ru
7. Salimzyanova R.R. Sabirova L.L. (2012) The concept and essence of mediation // Bulletin of Economics, Law and Sociology. No. 1. S. 217-220.
8. Federal Law of the Russian Federation “On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (mediation procedure)” dated July 27, 2010 No. 193-ФЗ www.consultant.ru
9. Shamlikashvili Ts.A. Mediation in Russia. The current state. Reference. www.mediacia.com

10. Klyukovskaya I.N., Demchenko T.I., GabrilyanR.R., Kardanova F.K., Popova L.A. Legal Conflicts Resolution in Customaru law of Peoples of the World. SJR. Man in India, 97 (22). PP 243-258.

11. Bizhan N.R., Komarov S.A. (2012) The introduction of mediation in the process of forming a legal state: Article // Legal Thought. No. 6 (74). P. 50-54; Gavritsky A.V., Kobleva M.M. (2019) Possibilities of mediation in criminal proceedings // Justice of the peace. Number 7. P. 26-29.

**DATA OF THE AUTHORS.**

1. **Klyukovskaya Irina Nikolaevna**. Professor of the North Caucasus Federal University, Doctor of Law.

2. **Kardanova Aminat Konshaovna**. Associate Professor of the North Caucasus Federal University, Candidate of Law.

3**. Lauta Oleg Nikolaevich**. Associate Professor of the North Caucasus Federal University, Candidate of Historical Sciences.

4. **Popova Lyudmila Anatolyevna.** Associate Professor of the North Caucasus Federal University, candidate of law, associate professor.

5. **Semenov Victor Egorovich**. Associate Professor of the North Caucasus Federal University, Candidate of Historical Sciences, Candidate of Legal Sciences.

**RECIBIDO:** 10 de octubre del 2019. **APROBADO:** 18 de octubre del 2019.