THE ROLE AND IMPORTANCE OF THE PRINCIPLE OF VOLUNTARINESS IN THE PROCESS OF MEDIATION IN THE SETTLEMENT OF DISPUTES IN UZBEKISTAN

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Annotation: *The article deals with the issues of the principle of voluntariness in the process of mediation in the settlement of disputes, the possibility and admissibility of limiting voluntariness in mediation. It is concluded that the principle of voluntariness means the rule according to which the beginning and conduct of the conciliation procedure, as well as the conclusion and execution of the agreement, are carried out exclusively at the will of the mediation participants.*

Key words: *principle, voluntariness, dispute settlement, mediation, agreement.*

In the Decree of the President of the Republic of Uzbekistan dated February 7, 2017 No. UP-4947 “On the strategy of actions for the further development of the Republic of Uzbekistan”, the issue of introducing elements of restorative justice, in particular mediation, into national legislation and law enforcement practice is relevant. The need to solve it is due to both the liberalization of judicial and legal policy and the need to optimize procedural procedures[1].

According to Article 4 of the Law of the Republic of Uzbekistan dated July 3, 2018. No. ZRU-482 "On mediation" mediation is a way to resolve a dispute that has arisen with the assistance of a mediator on the basis of the voluntary consent of the parties in order to achieve a mutually acceptable solution[2].

The term "mediation" comes from the Latin "mediare" (to mediate, act as a person with the participation of which negotiations are being conducted) and is actively used in foreign countries (English - "Mediation", French "la mediation", German - "die Mediation")[3].

According to Sh.M.Masidikov, mediation is based on certain fundamental principles, has an internal structure, which determines its special place and importance in the system of alternative dispute resolution. Although it is a type of alternative dispute resolution along with such dispute resolution methods as conciliation and arbitration (arbitration), it has a number of significant differences:

- the essence of mediation is the settlement of the dispute by the parties with the help of a neutral third party - an intermediary who assists them in reaching a mutually acceptable agreement and does not have the right to make a decision on this dispute.
- in arbitration, the judge renders a decision on the dispute, which is binding on the parties. And in the conciliation procedure, a third party contributes to the settlement of the dispute up to

[1]Указе Президента Республики Узбекистан от 7 февраля 2017 года №УП-4947 «О стратегии действий по дальнейшему развитию Республики Узбекистан». Собрание законодательства Республики Узбекистан, 2017 г., № 6, ст. 70, № 20, ст. 354, № 23, ст. 448, № 29, ст. 683, ст. 685, № 34, ст. 874, № 37, ст. 982. http://www.lex.uz/ru/docs/3107042
[2]http://www.lex.uz/docs/3805229
[3]Носырева Е.И., Стернин И.Л. «Посредничество» или «медиация»: к вопросу о терминологии // Третейский суд. – 2007. № 1 , –С.10.

advising the parties on the content of the dispute. Whereas in mediation, the mediator does not perform such functions, i.e. does not give advice to either side.

- in the mediation procedure, the mediator only contributes to the settlement of the dispute, defining the contours that are aimed at reaching a mutually acceptable agreement by the parties. This means that the parties themselves find ways to resolve the dispute, are co-authors of the agreements reached. The mediator serves as a guide that leads the disputing parties to their destination - the "agreement"[4].

It should be noted that the principles of law have been thoroughly studied both within the framework of the general theory of law by H.R. Rakhmankulov[5], Kh.T.Odilkoriev[6], E.M. Abzalova[7], A.A. Mukhammadiev[8], S.S. Alekseev[9], V.I.Leushina[10], as well as in industrial sciences. In the science of civil procedural law, the works of Sh.Sh.Shorakhmetov are devoted to the problems of principles[11], D.Yu.Khabibullaev[12], Sh.M.Masidikov[13], M.A. Gurvich[14], V.M. Semenov[15], K.S. Yudelson[16], V.V.Yarkov[17]and other scientists.

Mediation, like any kind of activity, is carried out on the basis of certain principles that express public views and ideas about the organization and procedure for resolving disputes with the assistance of a mediator. After the adoption of the Law of the Republic of Uzbekistan dated July 3, 2018 No. ZRU-482 "On Mediation"[18],in which certain principles of mediation received their legislative consolidation, it became possible to consider them as legal principles, that is, the initial normative and guiding principles for regulating an institution new to national law.

According to H.T. Odilkoriev and E.M. Abzalov, the principles of law act as a guiding idea, an empirical rule, a leading criterion for the process of formation, development and movement of

[4]Масидиков Ш.М. Сущность медиации и проблемы ее правового регулирования в Республике Узбекистан. Дис…на соискание ученой степени кандидата юридических наук. – Ташкент, 2008. – С.12-13.
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[17]Плешанов А.Г. К вопросу о принципах современной системы гражданской юрисдикции России // Российский ежегодник гражданского и арбитражного процесса. – 2006. № 5. – С.131.
[18]http://www.lex.uz/docs/3805229

rights[19]. As Kh.R. Rakhmankulov admitted, legal principles are understood as the basic and basic norms that express the essence and content of legal norms[20].

According to A. Mukhammadiev, the principles of law reflect the important laws of the development of society in the norms of the legal system. This lack of expression means that important laws of social development are not connected with the legal system. This in turn means that it has nothing to do with the legal system. This can lead to the development of a legal system lagging behind the development of society and the temporary nature of the rule of law. In this regard, the principles of law should, of course, be reflected in the rules of law[21].

According to Sh.Sh. Shorakhmetov, the principles of civil procedure are the main guiding norms of civil procedural law[22].

There is no doubt that the foundations of the mediation process are of great importance due to the following: firstly, they determine the subsequent formation of the mediation process, present the basic principles of self-regulation of the mediation operation, but are also characteristic of the orientation for legislation in improving the institution of peaceful settlement of disputes in joint work with mediator; secondly, the orientation of the rules makes it possible to individualize the mediation process exactly as an independent type of extra-jurisdictional work, to establish a high-quality feature of the principles of this organization, implementation and specifics of legal regulation in accordance with the legal methods of resolving legal disputes (conflicts). Ultimately, mediation underlies the practical activity of the mediator to resolve the differences of the parties. All this necessitates the definition, systematization and study of the principles of mediation.

O. Kholmirzaev and R. Sagatov highlight the following principles of mediation: equality of the parties, voluntariness, mutual respect, confidentiality, transparency of the procedure, impartiality of the mediator[23]. According to F. Otakhanov, mediation is carried out on the basis of the principles of confidentiality, voluntariness, cooperation and equality of the parties, independence and impartiality of the mediator[24].

V.T.Konusova believes that, although the principles of civil proceedings do not fully apply to non-state procedures for settling civil disputes, certain principles are equally inherent in these legal phenomena, for example, the principle of legality, optionality. At the same time, there is no doubt that the meaning of these principles in relation to non-state processes acquires its own refraction, and is also filled with different content[25].

Thus, in accordance with the first of these principles, the decision to resort to mediation is voluntary, which also means that the parties can terminate the mediation procedure or withdraw from it at any time[26]. In addition, if the parties decide to resort to this method of resolving their conflict, the final result depends on them, they are not obliged to comply with the decision made,

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[19] Теория государства и права / Ответственные редакторы Х.Б.Бабаев, Х.Т.Одилкориев. – Ташкент. Издательский дом экономики и права. 2000. – С.215.

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for example, by a judge or an ombudsman[27]. Consequently, they invest personal and sometimes financial interest in achieving a successful result.

It is often said that the distinctive feature of alternative dispute resolution, as well as the basis of their effectiveness in some cases, is precisely their voluntariness[28].

Since the appeal to non-state procedures, participation in them and the fulfillment of obligations taken as a result of their implementation, according to the general rule, is voluntary, we believe that voluntariness can be considered one of the main principles of the analyzed procedures[29].

It should be noted that the principle of voluntariness applies both to the parties and to the mediator.

According to D. Khabibullaev, the principle of voluntariness is freedom of access to procedural rights related to the initiation and termination of civil proceedings in order to protect the violated or disputed or legally protected interests of citizens[30].

If all the above conditions are met, we should talk about the absolute voluntariness of mediation. However, this principle is only partially implemented in practice. In this regard, the question arises as to the possibility and

acceptable limits on voluntariness in mediation.

In the literature devoted to the problems of conciliation procedures, the opinion is expressed that the conduct of mediation by force is acceptable. At the same time, supporters of the concept of compulsory mediation, in support of their position, cite the following arguments.

1. Compulsory mediation is more effective in settling certain categories of cases than litigation. At the same time, it is indicated that the parties often experience fears of initiating the mediation procedure, since such a proposal can be regarded as a recognition of the weakness of their own positions. The objective requirement of mediation solves this problem[31].
2. Mandatory mediation contributes to the rapid spread of the practice of using conciliation procedures[32].
3. Compulsory mediation contributes to the faster development of dispute resolution skills and thus achieves the goals of individual social transformation.
4. Any judicial mediation scheme requires a certain budgetary funding, in this sense, the mandatory referral to mediation is more beneficial, since the total amount of costs is distributed over a larger number of settled cases[33].

Nevertheless, it is difficult to deny the fact that being bound is contrary to the very nature of mediation as a tool for seeking consensus by parties interested in cooperation and out-of-court settlement of disputes that have arisen. The voluntariness of mediation reflects the very idea of

[27]Ibratova F. Problems of a settlement in bankruptcy cases in economic courts //Norwegian Journal of Development of the International Science. – 2019. – №. 28-3.

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[31]Ибратова, Ф. Б. (2019). ПРАВОВЫЕ ПРОБЛЕМЫ МИРОВОГО СОГЛАШЕНИЯ ПРИ РАССМОТРЕНИИ ДЕЛ О БАНКРОТСТВЕ В ЭКОНОМИЧЕСКИХ СУДАХ РЕСПУБЛИКИ УЗБЕКИСТАН. In *ПЕРСПЕКТИВЫ РАЗВИТИЯ НАУКИ В СОВРЕМЕННОМ МИРЕ* (pp. 163-170).

[32]Ibratova, F. B., Kirillova, E. A., Smoleń, R., Bondarenko, N. G., Shebzuhova, T. A., &Vartumyan, A. A. (2017). Special features of modern legal systems: cases and collisions.

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reconciliation, the basis of the differences and advantages of mediation in comparison with other legal processes[34]. The predetermining success factor in the conciliation procedure is the mutual consent of the parties to take part in the mediation procedure and negotiate for a peaceful settlement of the dispute.[35].

The influence of the voluntary principle among the parties continues even after the end of the mediation procedure, during the period of mediation agreement[36]. According to Article 29, part 3 of the Law of the Republic of Uzbekistan dated July 3, 2018 No. ZRU-482 "On Mediation", a direct order is set out that mediation consent is a mandatory implementation of the parties in the prescribed manner and in accordance with the terms provided for in it.[37].

In relation to the mediator, the rule of voluntariness manifests itself in the possibility of refusing to conduct the procedure at any time[38]. It should be emphasized that voluntary consent is due to the work of the principle of loyalty and high professionalism of the mediator[39]. In other words, if a dispute can be the cause of mediation, the mediator has the right to assist the parties in resolving it, there are exceptions when the mediator does not have the necessary competence to conduct mediation according to such criteria as (for example, a family conflict, where a special model is needed mediation), or in the event of a conflict of interest that makes it impossible to maintain loyalty[40].

Summing up, it is important to highlight that the rule of voluntary consent seems to be the main and main beginning of the implementation and conduct of mediation[41]. The operation of this rule is revealed at each stage of mediation, concerns each participant in the process and has the ability to be limited only if the benefit from this restriction exceeds the likely results of denial[42].

According to V.N. Konusova, it is also intense that certain categories of rules of civil procedural law have similar rules in dispute resolution processes. An example is the rule of the independence of the judiciary and that in cases under consideration it follows the principle of an independent, impartial loyal person (arbitrator, expert, mediator, etc.)[43].

Based on the foregoing, it is concluded that the principle of voluntariness means the rule according to which the beginning and conduct of the conciliation procedure, as well as the conclusion and execution of the agreement, are carried out exclusively at the will of the mediation participants.

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