Theoretical and practical aspects of conciliation and mediation procedures in the protection of labor rights

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Abstract: The article is devoted to the use of conciliation and mediation procedures in protecting the rights of workers. Conciliatory procedures, by the standards of the science of civil procedural law, are a relatively young legal institution. For a long time, conciliation in court proceedings was exhausted by the conclusion of an amicable agreement - a universal option for ending the activities of the parties to settlement of the dispute. Over time, largely thanks to the recommendation of the Committee of Ministers of the Council of Europe, this institution received not only serious theoretical, but also legislative development. New conciliation procedures were proposed, they began to clothe de jure in independent arrays of legal norms within the framework of civil procedural legislation. In the new Labor code of the Republic of Uzbekistan, the definition of conciliation-mediation procedure is defined, its function and structure is covered that shows its importance has increased in our legislation.

Keywords: conciliation procedure, labor rights, conciliation and mediation procedure

Peculiarities of the method of labor law predetermine the possibility of independent resolution of arising contradictions by the participants of labor legal relations without recourse to state jurisdictional bodies. The institute of conciliation and mediation in many countries has long become stable and traditional. However, this does not mean that there is any universal model of this institution. At the same time, in each state the principle of this institution is the principle of voluntariness of conciliation for the purpose of prevention and resolution of labor dispute[1]. Remarkably little scholarly work has been done on mediation or other third-party interventions in collective labor conflicts. Not unexpected, at least not for two reasons. First, expanding labor disputes between groups have a detrimental social effect and often cause large “collateral damage” for parties not involved in the main conflict. Second, there is a growing body of scholarly research on conciliation mediation that is being conducted in a variety of domains. On the other hand, mediation in collective labor conflicts has not gotten as much attention as it should because it is very different from mediation in

[1] Мотина, Е.В. Применение примирительных процедур при разрешении трудовых споров за рубежом

other situations, including divorce or individual labor disputes. Mediation of collective labor disputes has an established history that is quite lengthy.

As practice shows, the peaceful resolution of collective labor disputes is the most civilized way to reach a compromise between the parties. Detailed and clearly developed conciliation procedures lead to the most harmonious resolution of disputes, make it possible to successfully combine the interests of the parties and improve the situation of both employees and employers. It is also necessary to understand that the creation of working mechanisms for resolving collective labor disputes will not only fill the gap in existing legislation, but also ensure a balance of interests of workers and employers, taking into account the requirements of a market economy, increase their involvement in social partnership and stimulate the parties' interest in the results of labor.

Conciliation is generally understood as a process in which the parties in labor relations, the employer and the union-invite a neutral third party, a mediator, to help them resolve their differences. The mediator does not have a decisive vote regarding the conflict between the parties, but helps to find a mutually acceptable solution that the parties agree to on a voluntary basis. Thanks to his skills and methods, the mediator only helps both parties, and does not resolve the dispute using authoritarian methods[2].

At the same time, the participation of a mediator is only one of the forms of conciliation and mediation procedures. When resolving collective labor disputes their various forms may be used:

(i) consideration of the dispute by a conciliation commission,

(ii) (ii) resolution of the dispute with the participation of a mediator,

(iii) or (iii) resolution dispute in labor arbitration.

In the United States, the following figures are provided that prove the high effectiveness of conciliation and mediation procedures in resolving collective labor disputes:

1) In the first year of conciliation in the US coal industry in the 1980s, 153 complaints were filed, of which 89% were resolved without recourse to arbitration. This so-called "grievance review through conciliation procedures" allowed disputes to be resolved three months faster than in arbitration, and a third cheaper.

2) In the USA, conflicts arising in the railway and aviation industries are resolved in accordance with the norms of the law on labor relations in the railway industry; both industries have an exceptionally large value when considering mobility, distance, etc. in the US. The country has an administrative body, the National Conciliation Commission, which in its activities is obliged to adhere to strict standards. However,

[2] Conciliation procedures in labor relations in foreign countries, Labor Arbitration Court. 2019 http://www.trudsud.ru/ru/docs/publications/primiritelnye-protsedury-v-trudovykh-otnosheniyakh-vzarubezhnykh-stranakh/

from the reports it follows that during its existence, 97% of all conflicts were resolved peacefully, and since 1980, less than 1% of cases have been recorded that had negative consequences for the functioning of the transport sector.[3]

In addition to the high efficiency of conciliation and mediation procedures, they meet international standards in the field of settlement of collective labor disputes, as they allow minimizing the degree of government intervention in conflict resolution, maximizing the interests of the parties and simplifying conflict resolution procedures.

Mediation and conciliation are the main Alternative Dispute Resolution (ADR) methods that used in employment disputes in all the EU Member States. These forms have in common involvement of a third party who is called upon to mediate a dispute that arises either between two individuals involved in the employment relationship (then the dispute is individual) or between two collective actors, such as employers, unions, or employers' associations (then the dispute is collective). Though it's not always simple to distinguish between the three processes, in general, the type and level of third-party intervention serves to highlight the differences between them.

ADR processes should be included in a legal system to resolve employment conflicts, but there are other important considerations to make. Firstly, it may or may not be mandatory to participate in conciliation and mediation in particular. When conciliation or mediation are required, the claimant must first suggest to the counterparty that they try conciliation or mediation before bringing a case before the court. The matter cannot be discussed if the judge determines at the outset of the process that no attempt at conciliation has been made. In this case, the judge could stop the proceedings and require the parties to go through a conciliation procedure.

The nature of the rights at stake should be carefully considered, as any mediation or conciliation includes a transaction involving workers' rights. This is another important consideration. A mediation or conciliation run the risk of turning into a dangerous situation where workers lose their rights without any legal protection if they are fundamental rights or rights that are not available to them. Unless, for instance, the worker's protection is ensured by the fact that the conciliation is carried out in front of a board that includes a public officer or a union representative. We are highlighting the significance of finding a balance between the protection of the employee, who is the weaker party in the employment relationship, and the legitimate needs of justice administration, such as decreasing the court workload. Labor law's structure, which assumes the existence of rights that should be protected even against the will of any worker, could ultimately be reversed if the judicial administration's needs are prioritized over the protection of workers' rights, particularly in the area of

[3] Conciliation procedures in labor relations in foreign countries, Labor Arbitration Court. 2019 http://www.trudsud.ru/ru/docs/publications/primiritelnye-protsedury-v-trudovykh-otnosheniyakh-vzarubezhnykh-stranakh/

fundamental rights. Since it might be challenging to define the conceptual borders between the various ADR forms, we use the definitions of the three primary processes provided by the Report on European Judicial Systems in 2014[4].

Mediation: is a voluntary or mandatory, non-binding private dispute resolution process, in which a neutral and independent person assists the parties in facilitating their discussion in order to help them resolve their difficulties and reach an agreement. It exists in civil, administrative and criminal matters.

Conciliation: the conciliator's main goal is to conciliate, most of the time by seeking concessions. Employees can suggest to the parties proposals for the settlement of the dispute. Compared to a mediator, a conciliator has more power and is more proactive[5].

In many nations, conciliation and mediation are interchangeable in practice, while in others, a differentiation between the two may be possible based on the level of third-party initiative and intervention. It may be stated that prior to the signing of a conciliation agreement, there is a mediation phase in every conciliation.

Y.Kiselev identified four varieties of conciliation procedures used abroad: negotiations between the parties; reconciliation (mediation); labor arbitration; the work of the commission, which investigates the circumstances of the dispute and proposes its solution. These procedures can be applied sequentially or independently. Thus, the concept of "conciliation" is used in law in a broad and narrow sense. In a broad sense, these are types of settlement of a dispute by interested parties independently or with the help of neutral bodies. In the narrow, this is a part of the specified process, which is the activity of a third (neutral) person in order to assist the parties to the dispute in reducing disagreements and reaching an agreement. Conciliation and mediation bodies consider labor dispute in conciliatory order, guided by the principle of expediency. A decision made in this way is a compromise that suits both sides. An important feature of this decision is to equate it in legal force with a collective agreement, which makes it possible to hold accountable a party that does not comply with this decision[6].

Conciliation procedures - consideration of a collective labor dispute for the purpose of its resolution by a conciliation commission, with the participation of a mediator and (or) in labor arbitration. It can be assumed that the conciliation procedure includes conciliation and mediation and arbitration procedures. It seems reasonable

[4] Council of Europe, European Commission for the Efficiency of Justice: European Judicial Systems, Efficience and Quality of Justice.

[5] Conciliation and mediation are defined by the ILO in remarkably similar ways: In order to help the parties reach an agreement, a third party can assist them during negotiations or in case the discussions have reached a deadlock. This process is known as conciliation or mediation. While these phrases are equivalent in many nations, in certain countries they are distinguished based on the level of initiative exercised by the third party. See http://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm

[6] Мотина, Е.В. Применение примирительных процедур при разрешении трудовых споров за рубежом

that the decision of conciliation mediation and arbitration bodies should concern only the inconsistency of the economic interests of the parties[7].

In accordance with Article 570 Labor Code of Republic of Uzbekistan, conciliation and mediation procedures represent a consistent resolution (settlement) of a collective labor dispute, initially in a conciliation commission, and if no agreement is reached in it, in labor arbitration, as well as by mutual agreement of the parties using the mediation procedure.

The conciliation commission is a body created by agreement between the employer and employees (their representatives) to resolve (settle) a collective labor dispute through reconciliation of the parties.

The day the collective labor dispute begins is the day the employer (his representative) communicates the decision to reject all or part of the claims of the employees (their representatives) or the employer (his representative) fails to communicate his decision within the time limits provided for in parts two and three of Article 572 of this Code[8].

Based on the above mentioned article, we can say that the conciliatory-mediation procedure resolves collective disputes.

As claimed by Article 573, Labor Code of the Republic of Uzbekistan, the procedure for resolving (settling) a collective labor dispute consists of the following stages:

- consideration of the dispute by a conciliation commission;
- consideration of the dispute with the participation of a mediator;
- consideration of the dispute by labor arbitration.

So, conciliation-mediation procedure involves these stages.

Conciliation/mediation may be *voluntary* or *compulsory*. It is voluntary where the parties are free to have recourse to it or not. It is also voluntary where it is undertaken by mutually chosen private third parties, outside the machinery established by the government or by law. In some cases, the law requires that both parties consent to or initiate the use of conciliation. Conciliation/mediation is compulsory where the parties to a labor dispute are required to have recourse of it. Compulsory conciliation/mediation can be used as a means of ensuring that the hostile parties to a labor dispute come together at the negotiating table. Compulsion may therefore be preferred where the labor relations system is not well developed or in cases where the parties are not used to negotiating with each other. Conciliation is also often compulsory in systems which include compulsory arbitration. Another significant reason for requiring recourse to conciliation/mediation in interest disputes is to limit,

[7] Ясинская-Казаченко А. Примирительно-посреднические и третейские процедуры в процессе разрешения коллективных трудовых споров // Кадровик. Трудовое право для кадровика. 2013. № 4. С. 64.
[8] Labor Code of Republic of Uzbekistan

and if possible prevent recourse to industrial action. A strong link between conciliation/mediation and industrial action can be made by requiring the parties to give advance notice of industrial action to the conciliation authority, or by making it illegal to take industrial action without first endeavoring to resolve a dispute by means of conciliation.

A requirement to engage in conciliation/mediation may be based on any of the following, or a combination of them:

- an obligation to notify the competent authority of a dispute;
- a requirement to report disputes to the authorities, who may then be empowered to initiate conciliation/mediation proceedings and/or to require the attendance of the parties at such proceedings;
- a restriction on the choice of the third party called upon to conduct the conciliation/mediation;
- a requirement to participate in conciliation/mediation;
- the prohibition of strikes and lockouts before a conciliation/mediation procedure has been resorted to and completed;
- an obligation to adhere to an agreement concluded during conciliation/mediation;
- in the case of rights disputes, the requirement to have undergone conciliation before the dispute can be considered by a court or tribunal[9].

A party may seek assistance from a third party when they perceive a disagreement or dispute. In fact, this necessitates the clear admission that a disagreement exists. Such recognition is often associated with social action (going from dialogue to action), but many authors also contend that conflict already exists and that in situations where parties are unable to resolve it, third parties ought to become engaged. In many nations, the initial stage is to extend an invitation to a conciliator, who works informally with the parties to find points of agreement and resolution. Foley and Cronin as well as Dix and Oxenbridge provide a good description of this type of conciliation. While Foley and Cronin contend that mediation and conciliation are essentially the same process, conciliation is defined and carried out in many nations as a somewhat informal process in which disputing parties actively look for out solutions with the assistance of a third party. A more official, next stage that uses caucus and, in certain cases, provides the parties with suggestions, is mediation. "Any third-party assistance to help parties prevent escalation of conflicts, helping to end their conflict, and find negotiated solutions to their conflict" is the definition of mediation. According to this description, the third parties may play a variety of roles and hold various positions depending on the society, culture, degree of escalation, and particular people involved. Many different terminologies are utilized, which adds to the complexity. We see that what is

[9] https://www.ilo.org/static/english/dialogue/ifpdial/llg/noframes/ch4.htm

formally referred to as "mediation" in a number of nations resembles arbitration in most cases and is a very formal process in which representatives of the disputing parties negotiate a settlement, with the third party frequently taking on an evaluative role. x. This method is very different from the conciliation that is encouraged by the ILO. According to Foley and Cronin, who updated the ILO guidelines, conciliation is also referred to as mediation. They explicitly argue for a non-evaluative approach and state that the conciliator should not provide opinions[10]

To conclude, conciliation and mediation procedures all aimed to prevent a judicial settlement of workplace issues, either due to the high cost of accessing justice or the enormous workload of judges. One of these goals-the most common being the decrease of process time and the heavy judge workload-usually justifies any legislation aimed at putting one of these Alternative Dispute Resolution methods into practice.

References

1. Labor Code of Republic of Uzbekistan

2. Мотина, Е.В. Применение примирительных процедур при разрешении трудовых споров за рубежом

3. Conciliation procedures in labor relations in foreign countries, Labor Arbitration Court. 2019 http://www.trudsud.ru/ru/docs/publications/primiritelnye-protsedury-v-trudovykh-otnosheniyakh-vzarubezhnykh-stranakh/

4. Council of Europe, European Commission for the Efficiency of Justice: European Judicial Systems, Efficiency and Quality of Justice.

5. Ясинская-Казаченко А. Примирительно-посреднические и третейские процедуры в процессе разрешения коллективных трудовых споров // Кадровик. Трудовое право для кадровика. 2013. № 4. С. 64.

6. https:// http://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm

7. www.ilo.org/static/english/dialogue/ifpdial/llg/noframes/ch4.htm

[10] Foley, K., & Cronin, M. (2015). Professional conciliation in collective labor disputes