Application of alternative dispute resolution in the field of construction projects

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Abstract. The article deals with the features of the Russian Federation legal system that do not allow to fully bring into effect the potential of the out-of-court dispute resolution due to the specific nature of contracts and subject composition of legal relations, especially in the field of construction projects. Examples of these methods are analyzed on the basis of the experience of foreign countries, suggestions for their development are stated, and types of disputes are studied, within which abuse of rights in contractual obligations is possible.

1. Introduction

The current format of interaction and cooperation in the implementation of major projects requires the development and use of effective mechanisms for the rapid dispute resolution. Thus, alternative dispute resolution (ADR), which differs significantly from the trial, acquires special significance. Since the adoption of the Federal Law "On an Alternative Procedure for Dispute Resolution with the Participation of a Mediator (Mediation Procedure)" (hereinafter referred to as the Mediation Act), more than six years have passed, but during this period state arbitration courts and parties to disputes failed to fully bring into effect the ADR's potential due to a number of reasons, among which, above all, are:

1. Conservative and static character of the legal system of the state.
2. Extremely low state fee and opportunity not to use qualified legal assistance when applying to court. That is, the costs of the trial can be minimal, which certainly creates an incentive for the parties.
3. Lack of awareness of the ADR procedural features.
4. Absence of a culture of dispute resolution by “intellectual” methods, which require the parties to make certain efforts to reach mutual concessions.
5. The existence of the tradition to use judicial proceedings as the pressure on the other side of the dispute and the systematic abuse of procedural rights.
6. Certain competition between mediators and lawyers, the lack of the latter incentive to attract a mediator and the desire to bring the case to court.
7. Fragmentary attempts by the state to develop and expand the scope of ADR.

In general, referring to the statistics on disputes, that were considered by state arbitration courts of the first instance in 2016, the percentage of settlement agreements is extremely low - only 2.2%. The number of cases involving a mediator is 37 out of 157136 (in 2015 - 29 out of 1531473 disputes). Apparently, if the parties have appealed to court, in the overwhelming majority of cases they are trying to complete the trial and are extremely reluctant to make concessions. With regard to out-of-court
settlement, statistics are more favorable - if the contract fixes the condition for the application of ADR and the parties enter into a mediation agreement, it is executed on a voluntary basis in 80% of cases.

It should be noted that the main objective now is to develop particularly the pre-litigation stage of dispute resolution, which, on the one hand, will allow settling disagreements at an early stage, on the other hand it will reduce the caseload of courts, which does not allow to ensure the proper level of administration of justice. It is also important to take into account that specialized methods of dispute resolution will allow experts in a particular field to be involved in the process (unlike judges who, as a rule, do not have specialization and because of a huge caseload they do not have the opportunity to thoroughly analyze the essence of disputes). Particularly, such an opportunity is relevant for the implementation of construction projects, in which the parties need more flexible ways to settle disputes. First of all, it will allow reducing reputational and time expenses and preserve long-term partnership.

2. Analytical part
Specifics of the construction sphere are the presence of a wide range of subjects, both professional participants of this activity and less protected subjects (individuals - participants in shared-equity construction). In addition, it is necessary to go through a number of procedures during the process of implementing construction projects to coordinate and interact with authorities, which can lead to a breach of the terms, that are fixed in the contracts. In other words, the involvement of a public element complicates the process of cooperation to a certain extent, which must be taken into account when possible disagreements are considered.

It should be also emphasized that the contracts, that are concluded in this field, such as an investment contract, co-investing contract, equity construction, represent complex legal structure. In the case of initiating disputes between co-investors, in most cases, the rights of owners of residential premises are involved, which are brought by the court as third parties. Consideration of such cases by virtue of a big number of participants (each of them must be notified about the tome of proceedings and their applications should be taken into account by court) lasts for two or three years. Moreover, disputes involving Federal Service for State Registration, Cadastre and Cartography often occur, related to the registration of rights to real estate and making records in the Unified State Register of Real Estate Rights and Transactions in addition to disagreements between the parties to the relevant contracts. A striking example is the proceedings relating to the distribution of residential areas in the residential complex "Kredo", which is located in the Luberetskiy district. One of the co-investors initiated four disputes (the proceedings lasted over 3 years in total), none of which led to a real settlement of the disagreements. So, the first case concerned the claim to the defendant about the obligation to sign and execute the act of implementing the investment project in relation to the plaintiff. Another dispute concerned the signing of the protocol for the allocation of housing space under the co-investment agreement. The subject of consideration in the third case was exclusively a procedural matter of jurisdiction. In addition, the plaintiff filed an application to declare illegal actions of the Federal Service for State Registration in the Moscow Region (interested party) on registration of the property rights and encumbrances (mortgage).

An illustrative example is also disputes arising from investment contracts, the specifics of which are the availability of the condition for the application of novation in the event of the occurrence of certain circumstances: the conclusion of a contract of participation in shared-equity construction and the settlement of legal relations in accordance with the Federal Law No. 214-FZ. So in one of the cases, the parties applied novation three times and carried out a certain algorithm of actions for coordinating the areas of premises and concluding contracts for participation in shared-equity construction. That is, there were certain features of cooperation that lasted more than 5 years. But, nevertheless, after the occurrence of the next disagreements, one of the parties filed a suit in the state arbitration court demanding the defendant to transfer to the plaintiff all the rights and obligations of the participant in the shared-equity construction with respect to the residential premises by signing and concluding the protocol of the distribution of living space between the plaintiff and the defendant as well as agreement on novation and a contract of participation in shared-equity construction. In other words, despite the established
practice of interaction and implementation of the treaty, the parties failed to resolve the dispute independently and make mutual concessions.

Therefore, the question arises, what are the methods out of court settlement that can be claimed in the field of implementation of construction projects. First of all, let us consider mediation and conciliation as possible options.

It is necessary to remind that the role of a mediator is pretty passive, the goal of his activity is to build a constructive dialogue between conflicting parties. Consequently, the result of applying this method in some cases can be brought down only to the resumption of negotiations. Conciliation as a method of ADR presupposes a more active role of an intermediary, which not only facilitates the dispute resolution, but also gives legal assessment of the dispute, makes specific suggestions for its resolution, can draft a mediation agreement and assess the prospects for settling the dispute in court [1]. It should be noted that, a third person is not a specialist in a particular field within the meaning of the Mediation Act. The issue of the need for the specialization of mediators is controversial, nevertheless, specialization is considered extremely useful in the sphere of construction, as in the settlement process, in any case, purely professional issues arise, moreover, with the participation of co-investors, a mediator (conciliator) will have to carry out an informative and an explanatory function. Therefore, it is hard to agree with the opinion of a number of researchers, as well as practicing mediators on the absence of this need [2].

According to the Center for Mediation and Law, special methods have been developed for the implementation of construction projects, namely, CIMA - complex integrated mediation approach, which goal is to introduce mediation mechanisms and skills in the activities of corporations and organizations. That is, it is a matter of promoting the ADR not at the legislative level, but through direct integration into the practical sphere. At the same time, it is unlikely that this method will find wide application in the field of construction projects in the form the mediation is applied in the Russian Federation, because of the need to cover the full range of problems and disputes arising from the concluded contracts. The assistance in finding a constructive dialogue will not be enough. In this regard, the most promising approaches in the field of dispute resolution can be connected with the integrated methods that combine the features of both mediation and arbitration.

Such methods include the specialized Dispute Review Board (DRB), creation of which is initiated within the framework of specific projects, while commissioners should have experience not only in the field of dispute resolution but also in the specifics of the project. Participation of review board is one of the mandatory conditions of a contract (similarly to a mediatory clause), that serves as a certain guarantee for the parties. [3] A distinctive feature of DRB from other methods of ADR is the formation of the body at the early stages of a project, i.e. before a dispute arises. Board members are direct participants of the project, carry out a kind of monitoring over its various stages, prevent the emergence of disagreements and, if contradictions escalate, they directly resolve the dispute.

Referring to the experience of foreign countries, DRB was created for the first time in the process of the Eisenhower Tunnel project implementation in Colorado. Subsequently, practical recommendations on the functioning of DRB were developed within the framework of the World Bank, the International Chamber of Commerce, the International Federation of Consulting Engineers. The lists of potential members of the commissions were approved by the London Court of International Arbitration, the Federation of Specialized Dispute Resolution of Switzerland, the Specialized Dispute Resolution Foundation (North Carolina). The expenses connected with the activities of the commission are distributed equally between the parties to the contract and are pledged in the price of the contract [4]. It is important to emphasize that one of the main functions of the commission is not the resolution of a dispute as its prevention. The presence of a preventive function provides DRB with significant advantages in comparison with other ADR methods.

One special ADR procedure should be also highlighted, which has been applied in the UK in the construction field since 1998. It is called dispute adjudication mechanism. The reason for the introduction of this procedure was the inability of state courts to provide effective opportunities for resolving disputes between contractors and customers, which led to abuses by the latter and, in general,
to a drop in construction volumes and an increase in the number of unfinished facilities [5]. The procedure was to be applied for all the disagreements between all project participants (a customer, a general contractor and subcontractors), the review of decisions could be made by a state court only after the construction was completed, and the enforcement could be carried out by court in a simplified procedure [6]. Similar procedures have been implemented into practice also in Australia, New Zealand, Singapore, Malaysia and Ireland.

3. Discussion
In the process of applying specialized dispute resolution mechanisms in practice, certain difficulties may arise: disagreement with respect to the third member of a review board, a significant increase in the cost of a project, insufficient qualification level among potential commission members to resolve the most difficult disputes [9]. Moreover, if the dispute was caused by systematic violations of one party's obligations, then the only possible option would be a judicial decision, which can be enforced in future. In this case, parties have no reason to maintain business relations, which lead only to losses and unjust enrichment. In other words, a contract provision regulating the settlement of all disputes by review commission makes sense in case of cooperation with a trusted and reliable partner.

4. Conclusions
Thus, taking into account the experience of other countries, the conclusion can be made that the introduction of specific methods to resolve disputes requires not only the mandatory use of these methods provided at the legislative level, and the preparation of practical recommendations, but also the creation of associations bringing together experts in the field of dispute resolution and implementation of construction projects, that will consist of dispute review board potential members. In addition, it is extremely important to bring into effect certain mechanisms in the activities of construction companies that carry out large projects. That is, only systematic development of ADR methods at the legislative and law enforcement levels can solve the problems of low effectiveness of dispute resolution in court and the possibility of acting in bad faith by partners.

References
[1] Poole J 2010 Casebook on Contract Law, 10th edition, (Oxford University Press) 134 p.
[2] Romanovich, R., Vilinskaya, A. 2016 MATEC Web of Conferences, 53, 01052, https://doi.org/10.1051/matecconf/20165301052
[3] Dispute Review Board; [«H.J. Elliot & Associates PTY LTD»]. (data obrashcheniya: 27.06.2017), URL: http://www.elliotts.com.au/drb.html
[4] Elçin Taş and Özge Fırtına. ITU J Faculty Arch (2015) 12(2) 187-204.
[5] Arseniev D G, Rechinskiy A V, Shvetsov K V, Vatin N I and Gamayunova O S 2014 Applied Mechanics and Materials 635-637 2076-80
[6] Latham M. 1994 Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry (HMSO Publications Centre) 267 p.