

Participative procedure: one of the types of conciliative procedures in civil procedure

Procedimiento participativo: uno de los tipos de procedimientos de conciliación en el procedimiento civil

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ABSTRACT

The article analysed the concept and objectives of a participatory procedure in civil proceedings; relevant conclusions were made to improve the civil procedural legislation of the Republic of Uzbekistan. From January 1, 2016, the courts of the Republic of Kazakhstan switched to a new format of work within the framework of the ongoing judicial reform. Amendments have been made to the legislation aimed at forming a corps of highly professional judges, modernising the legal system, adopted a new Civil Procedure Code. One of the short stories of the Civil Procedure Code is the possibility of conciliation procedures by lawyers.

Keywords: participatory procedure, dispute, civil procedure, statement, lawyers

RESUMEN

El artículo analizó el concepto y los objetivos de un procedimiento participativo en procedimientos civiles; Se hicieron conclusiones pertinentes para mejorar la legislación procesal civil de la República de Uzbekistán. Desde el 1 de enero de 2016, los tribunales de la República de Kazajstán cambiaron a un nuevo formato de trabajo en el marco de la reforma judicial en curso. Se han realizado enmiendas a la legislación destinada a formar un cuerpo de jueces altamente profesionales, modernizando el sistema legal, adoptaron un nuevo Código de Procedimiento Civil. Una de las historias cortas del Código de Procedimiento Civil es la posibilidad de procedimientos de conciliación por parte de abogados.

Palabras clave: procedimiento participativo, disputa, procedimiento civil, declaración, abogados.

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The term «participative» is translated from French as «participating, able to participate». «Participatory» means engaging in management, that is, directly participating in decision making, in analysing problems (Muzdybaeva, 2017).

In 2010 - 2011 in France, the last major reform of alternative dispute resolution was carried out, which resulted in, among other things, a new alternative dispute resolution method in the French legal system, such a participative procedure. Thus, today the following alternative ways of settling disputes are legally regulated and practised in France: negotiations (some French authors exclude negotiations from alternative procedures due to the fact that the latter is limited only to dispute resolution procedures involving a third independent person) (Jarrosson, 1997); mediation; Conciliation (conciliation); settlement agreement (in the French legal system, settlement is recognized as one of the alternative ways of settling disputes) (Boyer, 1997; Fricero, 2013; Jarrosson, 1997); expertise; arbitration (arbitration court) (in the French legal doctrine there is no consensus on the question of classifying arbitration as alternative dispute resolution. Several authors advocate the view that mediation should be considered an alternative dispute resolution method (Alpa, 1993; Cornu, 1997; Cadiet, 2011). Other lawyers insist that due to institutionalization, «jurisdictionalization» and «judicialization» of the arbitration procedure, today arbitration is more and more close to state justice, rather than to alternative dispute resolution methods (Oppetit, 1995; Oppetit, 1991; Jarrosson, 1997; Beyneix & Lemmet, 2012) and participatory procedure.

The basis for creating a participatory procedure in France was the positive experience of the use of the «collaborative law» in North America and «participatory justice» (justice participative) in Canada (G'sell, 2010; Guinchard, 2008). This alternative method of dispute resolution is legally enshrined in French law only since 2010. For the first time, a proposal to create such a way for settling disputes in France was made in the report of the commission led by Serge Ginshar (Guinchard, 2008). The proposal of the Ginshar Commission was to create a procedure in the French legal system that would facilitate the peaceful settlement of disputes by lawyers participating in the procedure, and if the dispute was not resolved, this procedure would involve a simplified transition to a trial and expedited consideration and resolution of the case.

The Code of Civil Procedure of France (from now on referred to as the Code of Civil Procedure) contains the following provisions relating to the use of this type of alternative dispute resolution:

- General rules (Articles 1542, 1543);
- the guiding principles and the procedure for conducting a participatory procedure for seeking the consent of the parties in the settlement of a dispute (the conventional procedure) (Articles 1544 - 1546);
- issues of attracting a specialist (expert) in the course of the parties participation in the procedure (Articles 1547 - 1554);
- The results of the parties conducting a participatory dispute settlement procedure (Art. 1555);
- the procedure of judicial approval of the agreement reached on the basis of the participatory procedure, which fully resolved the differences of the parties (Article 1557);
- the procedure for judicial approval of the agreement reached on the basis of the participatory procedure, which partially settled the differences of the parties and the procedure for judicial review and resolution of the dispute regarding unresolved disputes (Art. 1558 - 1564). Provisions governing the conditions, procedure and consequences of concluding an agreement on conducting a participatory procedure are contained in Art. 2062, 2068 of the Civil Code of France (hereinafter – the Civil Code).

When choosing a participatory procedure, parties whose dispute has not yet been submitted to the court or arbitration court (arbitration) enter into a participatory agreement, under which they undertake to work together in good faith and on the peaceful settlement of the dispute. To the form and content of the agreement under consideration, the legislator imposes special requirements enshrined in Art. 2063 of the Civil Code and Art. 1545 GIC FR.

Thus, the agreement should contain a condition on the duration of the participatory procedure, the subject of the dispute, documents and information necessary to resolve the dispute, and the procedure for their exchange. Some French authors see in the presence of these conditions guarantee the “integrity of the parties and the trusting nature of the discussions” (G'sell, 2010).

In addition, the agreement must necessarily include such information as the name, surname, address of the parties

and their lawyers. The participatory contract is concluded for a certain time period during which the parties are not allowed to go to court for a resolution of the dispute (art. 2062, 2065 of the Civil Code of the Federal Republic of Belarus). However, non-fulfillment of an agreement on the conduct of a participatory procedure by one of the parties gives the other party the right to apply to the court for resolution of the dispute before the expiration of the agreement.

A participatory procedure is possible for the settlement of disputes in the framework of public relations, allowing free disposal of the rights of the subjects of the relationship. However, it should be emphasized that the rules governing the holding of a participatory procedure in France expressly prohibit the use of this alternative dispute resolution method for settling labor disputes (article 2065 of the RF Civil Code), but allow for the conclusion of an agreement on a participatory procedure in order to reach a divorce agreement and the division of jointly acquired property (article 2067 of the Civil Code of the Federal Republic of Russia).

In accordance with the provisions of Art. 1543 Code of Civil Procedure, the participatory procedure consists of the convention procedure itself, aimed at reaching agreement by the parties on a possible dispute resolution option, and, if necessary, following a procedure of proceeding following the convention procedure, aimed at approving the dispute settlement agreement reached by the parties and (or) of the dispute or its part if the parties fail to reach an agreement on the basis of the participatory procedure (or reach an agreement on only STI dispute).

The essence of the participatory procedure is to negotiate the parties to resolve the dispute with the mandatory assistance of lawyers of each of the parties. In particular, the exchange of any documents between the parties is carried out only through their lawyers with the compilation of an inventory of the documents transmitted as they are transferred (Article 1545 of the Code of Civil Procedure of the Federal Republic of the Federal Republic of Belarus). Participatory procedure does not imply participation of a third independent, disinterested, impartial person in it.

However, the parties may provide for an appeal to a specialist (expert) in the course of the participation procedure in order to resolve the dispute. In this case, the specific specialist is determined by agreement of the parties, who also set the tasks of the involved specialist (art. 1547 GIC FR). The specialist must meet the requirements of independence and carry out his functions in good faith, quickly and impartially, in compliance with the principle of adversarial parties (Art. 1549 GIC FR).

If necessary, any third parties may take part in the activities carried out by the selected specialist, with the consent of the parties to the dispute and the specialist himself (Article 1552 of the Code of Civil Procedure of the Federal Republic of Russia). Upon completion of the implementation of a specialist of his activities, he shall provide the parties and third parties with his opinion in writing. At the request of the parties or third parties involved in the procedure, the specialist includes in his opinion their comments and demands and also indicates the results of the consideration of the latter. This written opinion of a specialist can later be used in court (Art. 1553, 1554 GIC FR).

The conventional procedure ends (Art. 1555 GIC FR):

- with the expiration of the procedure, established by agreement of the parties on the participation procedure;
- termination by the parties of an agreement to conduct a participatory procedure by drawing up an agreement on termination in writing;
- the parties reach an agreement to settle the dispute or draw up a protocol fixing the continued existence of the dispute or part of it.

In the event that the parties to the dispute reach an agreement on the settlement of the whole or part of the dispute, such an agreement shall be drawn up by the parties in writing with the assistance of the parties' advocates and include a detailed description of the circumstances that allowed the parties to reach an agreement.

After the completion of the conventional procedure, the parties (or one of the parties to the dispute) may apply to the court for approval of the agreement reached on the entire dispute in order to give the agreement executive force; or to approve an agreement on the settlement of a part of a dispute and to resolve a court of disputes in the remaining part not regulated by the parties; or for consideration and resolution of a dispute between the parties in the event that during the period of the participation agreement the parties failed to reach a mutually beneficial settlement of the dispute (Art. 2066 of the Civil Code of the Federal Republic of Belarus, 1556 of the Code of Civil Procedure of the Federal Republic of Russia). An agreement on holding a participatory procedure must be attached to the application of the parties to the court, otherwise the judge will refuse to accept such a statement.

The simplified nature of submitting a dispute to a court for resolution after a participatory procedure consists in the existence of a number of «preferential» conditions for the parties, in which a reduced set of legal facts is sufficient for a transition to legal proceedings of a dispute. For example, the parties are not required to go through a procedure of facilitation or mediation before submitting a dispute to a court in cases when these procedures are mandatory by virtue of the law (Art. 2066 of the Civil Code).

Also, French lawyers point out that, in the absence of an agreement by the parties on the basis of the participatory procedure, the convention stage of the latter can be viewed as preparation of a case for a civil trial in court, allowing later to speed up the consideration of the case by the court (Soraya, 2011).

It is presumed that the facilitated nature of submitting a dispute to a court of law guarantees the equal status of economically unequal subjects during negotiations during the conventional procedure, since the economically weaker party of negotiations, whose position is legally justified, is aware of his ability to win a case in court if the second party acts unfairly. of negotiations (G'sell, 2010).

According to the Code of Civil Procedure of the Republic of Kazakhstan, the parties have the right, prior to the removal of the court to the deliberation room according to the rules provided for by Article 179 of the Code of Civil Procedure of the Republic of Kazakhstan, to file a petition for settlement of the dispute in a participatory procedure.

Participatory procedure is carried out without the participation of a judge through negotiations between the parties with the assistance of the settlement of the dispute by lawyers of both parties. The exchange of documents between the parties is carried out by them, their attorneys without the participation of a third independent arbitrator. The parties propose options for resolving the dispute and submit to the court an agreement concluded in the manner of a participatory procedure, signed by the parties and attorneys. Simultaneous change of the subject or basis of the claim is not allowed. Facilitating the reconciliation of the parties in accordance with the Law of the Republic of Kazakhstan «On Advocacy» is the task of lawyers. Acting as a representative in court, a lawyer is competent to conduct conciliation procedures in accordance with procedural law.

It is assumed that if lawyers are successfully conducting a participatory procedure, professional representation at the trial stage in the court of first instance will be more often demanded by citizens.

In the courts of first or appeal instance for this reason, it is possible to postpone the case for ten days or to suspend the proceedings for the same period. In the court of cassation, such a petition may be filed with the simultaneous submission of an agreement concluded in the order of a participatory procedure, since the adjournment of the proceedings in the case or suspension of the proceedings is not provided for by the Code of Civil Procedure of the Republic of Kazakhstan.

According to the U.A. Suleymanova, if a lawyer conducts a conciliation procedure on the one hand, and a lawyer (and a representative) on the other hand, calling the agreement concluded in a participatory procedure, the agreement should be evaluated as a settlement agreement, since one party will not be represented by a lawyer. These circumstances will not be unconditional grounds for the cancellation of a court ruling in the courts of appeal or cassation, since the agreement was voluntarily signed by the parties and their representatives (Suleymanova, 2016).

The agreement concluded in the framework of the participatory procedure provides for the participation of not only the parties, but also lawyers, for this reason the agreement must also be signed by them.

The judge (composition of the court), in which the case is located, checks the content of the agreement on settlement of the dispute in the order of the participatory procedure and makes a decision on its approval and termination of the proceedings in accordance with Article 177 of the Code of Civil Procedure of the Republic of Kazakhstan.

The agreement on the settlement of the dispute in the order of a participatory procedure, the definition of approval of the agreement must comply with the requirements of Articles 176 and 177 of the Code of Civil Procedure of the Republic of Kazakhstan.

If the parties have not reached an agreement in the order of a participatory procedure or the terms of the agreement have not been approved by the court, the proceedings are conducted in a general manner.

The objectives of the participatory procedure are:

- achieving a mutually acceptable solution by the parties;

- prompt resolution of the dispute;
- the cessation of differences through mutual concessions, the avoidance of the material costs of the parties;
- reducing the level of conflict of the parties.

The main principles of the participatory procedure are:

- voluntary participation of the parties; equality of the parties in the settlement of a dispute through negotiations;
- the inadmissibility of intervention in the participatory procedure.

The condition for participation in the participatory procedure is the mutual voluntary will of the parties, expressed in a written statement of the party to the court in which the proceedings are a civil case. The parties to the participatory procedure are entitled to refuse to negotiate at any stage, notifying the court in writing. The parties are free to choose questions to discuss options for a mutually acceptable agreement.

The parties to the participatory procedure enjoy equal rights when choosing lawyers, their position in it, methods and means of protection, obtaining information, bear equal rights and duties. A lawyer conducts negotiations in the framework of a participatory procedure in the interests of his client and is independent of the parties, state bodies, other legal, official and natural persons.

If there are circumstances that prevent a lawyer from negotiating, he must notify his principal. Interference is not allowed in the activities of a lawyer during the negotiations as part of a participatory procedure. When conducting a participatory procedure, lawyers must:

- Comply with the Code of Professional Ethics of lawyers, provide advice to the parties on the settlement of the dispute;
- act only in the interests of the principal;
- explain to the parties the legal consequences of concluding an agreement, as well as their rights and obligations.

The parties within the framework of the participatory procedure are entitled to:

- choose their own lawyers to participate in it;
- refuse an attorney involved in the procedure; refuse to participate in it;
- to participate in the participation procedure personally or through representatives, at their own discretion, agree on the place, date, time of the participation procedure, in case of non-execution or improper execution of the agreement on settlement of the dispute in the procedure of participation in the procedure, apply to the court.

In the case of an agreement between the parties, it should be drawn up in the language in which civil proceedings are conducted. Upon termination of the participatory procedure conducted in the framework of civil proceedings, the parties are obliged to send to the court in charge of the civil case: a signed agreement on the settlement of a dispute or a written statement on the appointment of the day on the merits due to the impossibility of concluding an agreement.

Participatory procedure is terminated in the following cases:

- signing by the parties of an agreement on the settlement of a dispute;
- becoming a lawyer of circumstances precluding the possibility of resolving a dispute through negotiations in a participatory procedure;
- written refusal of the parties from the participatory procedure;
- the expiration of the participation procedure.

The agreement should reflect data on the parties to the participatory procedure, the subject of the dispute, the lawyers involved in the negotiations, as well as the terms of the agreement agreed by the parties, the methods and deadlines for their execution, the consequences of their non-performance or improper performance. The agreement on the settlement of the dispute is subject to execution by the parties of the participatory procedure voluntarily in the manner and within the time provided for by this agreement (Muzdybaeva, 2017).

In contrast to the procedural legislation of France in the legislation of the Republic of Kazakhstan, the execution of an agreement on the settlement of a dispute in a participatory procedure, approved by the court, is carried out according to the rules of enforcement of a settlement agreement under compulsory procedure established by Article 178 of the Code of Civil Procedure of the Republic of Kazakhstan.

Thus, the participatory procedure is an independent alternative method for settling disputes without the participation of a third independent, impartial person, consisting in the parties carrying out with the assistance of their lawyers and during a predetermined period of time negotiations aimed at the peaceful settlement of the dispute suggesting a facilitated transition to a trial of a dispute or a part of a dispute not settled by the parties.

Independent resolution of controversial issues that have been the subject of litigation through negotiations is becoming the most preferred way to resolve differences between the parties to the controversial relationship. The use of the institution of participatory procedure as an effective tool for resolving a dispute is dictated by the needs of judicial practice and society.

Compared to legal proceedings that end in a decision that may not satisfy one or both of the parties in a legal process, a participatory agreement implies a mutually beneficial compromise to which both parties voluntarily agree.

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