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Условия и предпосылки внедрения внесудебных способов разрешения споров в инвестиционно-строительной сфере

ЛАРИСА ИГОРЕВНА ЗАЙЦЕВА, **кандидат юридических наук, доцент кафедры инвестиционно-строительного бизнеса**

Российская академия народного хозяйства и государственной службы при Президенте Российской Федерации (119571, Российская Федерация, г. Москва, проспект Вернадского, 82). E-mail: mcua3@yandex.ru

Аннотация: Использование более гибких и наименее конфликтных способов урегулирования разногласий в процессе реализации государственных проектов, в особенности в государственном секторе, обусловлено систематическим увеличением количества экономических споров, а также инициированных процедур банкротства строительных компаний при отсутствии перспективы финансового оздоровления. Масштаб проблем, которыми характеризуется инвестиционно-строительная деятельность, диктует необходимость принятия более жестких мер государственного управления, в том числе в области законодательной инициативы. Кроме того, развитие медиации в традиционном ее понимании также не является достаточным в современных условиях. Подтверждением данных тезисов является опыт зарубежных государств, также столкнувшихся с кризисом в строительной отрасли и принявших специальные законодательные нормы, нацеленные на поддержку малых и средних строительных компаний и внедрение таких способов разрешения споров как деятельность специализированных комиссий, которые создаются на начальном этапе и курируют проект, выполняя, в том числе, превентивную функцию. Особая фокусировка на инвестиционно-строительной деятельности объясняется ее существенными отличительными признаками: повышенными рисками, невысоким коэффициентом прибыли, систематически возникающими разногласиями разного диапазона, вовлеченностью публично-правового элемента, высокой вероятностью конфликта интересов. Для разработки концепции внесудебных механизмов урегулирования разногласий, возникающих в процессе реализации проекта, в статье исследованы следующие аспекты: компетенция и особая квалификация лиц, участвующих в соответствующих процедурах, выходящая за пределы медиативных практик, организационная форма специализированного органа, занимающегося разрешением споров, и характер законодательных норм.

Ключевые слова: внесудебные способы разрешения споров, инвестиционно-строительная деятельность, медиация, Комиссия по разрешению споров, отраслевая направленность

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CONDITIONS AND BACKGROUND FOR THE INTRODUCTION OF NON-JUDICIAL DISPUTE RESOLUTION METHODS IN THE INVESTMENT AND CONSTRUCTION SPHERE

LARISA I. ZAITSEVA, **Cand. Sci. (Law), Associate Professor of the Department of Investment and Construction Business Russian Presidential Academy of National Economy and Public Administration (82, prospekt Vernadskogo, Moscow, Russian Federation, 119571). E-mail: mcua3@yandex.ru**

Abstract: The use of more compliant and least conflicting ways to resolve differences in the implementation of state projects, especially in the public sector, is due to a systematic increase in the number of economic disputes, as well as initiated bankruptcy procedures for construction companies in the absence of prospects for financial recovery. The scale of the problems that characterize the investment and construction activity dictates the need for stricter government measures, including in the area of legislative initiative. In addition to that, the development of mediation, in its traditional sense, is also not sufficient in current conditions. In this context, we should take into account the experience of foreign countries. They also faced a crisis in the construction industry and adopted special legislation aimed at supporting small and medium-sized construction companies; they introduced such dispute resolution methods as an institution of specialized Commissions that are created at the initial stage and supervise the project performing a preventive function. The specific focus on investment and construction activity is explained by its significant distinctive features: increased riskiness, low-profit income, systematic disagreements of different ranges, the involvement of the public law element, high probability of conflict of interest. In order to develop the concept of non-judicial dispute resolution mechanisms, arising in the course of project implementation, the article explores the following aspects: competence and special qualifications of persons involved in relevant procedures (beyond the scope of mediation practices), organization of a specialized body dealing with dispute resolution, and conception of legislation.

Keywords: non-judicial dispute resolution, investment and construction activities, mediation, Dispute Resolution Commission, sectoral focus

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Introduction

At present, the need to use more compliant and less conflicting dispute resolution methods is becoming increasingly apparent. The judicial system of the Russian Federation has a number of advantages and is developing reasonably stably (low percentage of violation of procedural deadlines,[1] systematic measures to ensure uniformity of judicial practice, the presence of "comfortable" forms of legal proceedings: simplified and mandative, electronic justice service, the "Arbitration File" information resource, the possibility of remote participation in court hearings, etc.), however, is not capable of serving as a universal means for settling disputes.

If we look at the statistical data, we can ascertain the systematic increase in economic disputes: in 2018 their growth amounted to 160 000 (more than 9%), rising from 2015 – 24%. In the Moscow region the comparison with 2017 – 13%, and compared to 2015 – 33%. As for disputes with foreign investments, since 2014, their number has increased by more than 5 times; moreover, judicial cases in favor of a foreign investor have also increased significantly, from 60% to 92%[2].

Also, it is necessary to emphasize the extreme burden on judges: the average number is 106 cases per month; the absolute champions are the courts of Moscow with 250 and the Moscow region with 212 of cases per month[3]. Such an extreme workload does not allow to thoroughly understand the specifics of each case.

In recent years, the state has achieved success in bringing to court a number of disputes, which have generic character, such as tax disputes. Similar measures concerning insurance and pension fund disputes are currently being taken.

At the same time, international community has come to understanding that specific non-judicial methods should be applied not only in the designated categories of disputes but also in complex, particularly sensitive areas, such as investment and construction activities. Additionally, the concept of "sustainable construction", which is of particular relevance in developed countries, involves minimizing the number of disputes that significantly inhibit the implementation of projects and destabilize the construction industry as a whole [Zaitseva, 2018].

Investment and construction

Particular focus on investment and construction activities is due to their specific distinctive features:

Higher risk and dependence of processes on a wide range of unforeseen circumstances, which may create a potential threat of bankruptcy. Over the past three years, according to the situation with the property developers, the number of bankruptcy proceedings has quadrupled.[4]

Low-profit ratio and unprofitability. According to Rosstat, as of November 1, 2018, the share of unprofitable construction organizations amounted to 34,6% (33,4% in October 2017), the amount of loss of these enterprises was 50 billion rubles [Report…, 2019].

Large number of systematically arising differences of a peculiar nature (each project is unique), in which involved a wide range of subjects, such as professional participants (co-investors, developers, contractors, subcontractors, landowners, credit organizations), and less protected individuals subjects (shared construction participants). That is the reason, why it is so difficult to conclude a settlement agreement in the bankruptcy proceedings of a construction company: it is almost impossible to take into account the interests of such a wide range of people.

Involvement of the public law element, which implies a lot of procedures for coordination and interaction with government agencies, and it can lead to the violation of the terms outlined in the contracts. The increased complexity of cooperation process must be considered while planning possible disagreements.

High probability of conflict of interest and abusive practice by large developers concerning contractors, as well as contractors to subcontractors.

Non-judicial dispute resolution methods allow to neutralize these negative aspects, provide an incentive to project participants and, in general, promote to the peaceful dispute resolution. But the introduction of these methods in the Russian Federation requires a thoughtful and intelligent strategy. In this case, the most significant issues that require additional analysis are:

the need for special qualification of persons involved in relevant procedures beyond the limits of mediation practices;

the organizational form of a specialized body, the competence of which could include the settlement of disputes in the framework of implementation of investment and construction projects;

the adoption of legislative norms governing the creation and functioning of commissions (councils) for settling disputes.

The first important aspect is the specialization of dispute resolution persons. In this regard, the opinions of experts and practicing mediators differ. Mediators believe that having extensive experience in the sphere in which a dispute arose does not affect the positive result of the conflict solving procedure. D. Richbell, in his practical recommendations, points out the effectiveness of involving a skilled mediator, and not a mediator with specialized knowledge, since the latter will pay attention to specific details and technical aspects instead of focusing on possibilities for further cooperation and relations of participants in general [Richbell, 2009].

1 Only 3,5% of all cases were considered in violation of the deadlines in 2018.

2 The question arises: with such statistics, is it profitable for an investor to use other means than litigation?

3 According to official website of the Judicial Department at the Supreme Court of the Russian Federation // http://www.cdep.ru/index.php?id=79

4 Initiators of bankruptcies of construction companies are often banks.

Alternative methods for dispute resolution

Alternative methods that can be used in the implementation of construction projects are not limited only by mediation. It implies a wide range of methods: arbitration-mediation, early neutral assessment, expertise (both technical and complex), Dispute Resolution Councils (DRC) [Gaydarenko Sher, 2015], specially created dispute resolution commissions, etc. As applied to particularly sensitive areas, such as shared construction, an open space technology allows involving broad range industry representatives in resolving disputes, bringing to the discussion topics of interest to all participants and reducing the escalation of conflict. It is worth saying that commissions can be created to resolve a particular dispute (for example, regarding the final cost of work or the terms of contract), or to support the project at all stages of its implementation. In the latter case, a full understanding of the activities' specifics is required by experts. In addition to complex legal or technical aspects, the expert may be regularly present at the construction site and deal with the settlement of different kinds of contradictions (for example, convey an explanatory dialogue with tenants in case of complaints).

As for the functions of the Dispute Resolution Commissions / Councils, they range from making recommendations and conducting an independent examination to making a decision that is mandatory for all participants. The possibility of its appeal depends on the specifics of the accepted method and may be limited to a period of time, and it also can be carried out only after the end of the project implementation [Yaskova, Zaitseva, 2017]. Moreover, the development of regulations and provisions of contracts providing for ADR in construction is carried out by specialized bodies and institutions of this particular industry, such as the International Federation of Consulting Engineers (FIDIC), the Institute of Civil Engineers of Great Britain, the Non-Profit Organization "Adjudication", the Royal Society of Certified Specialists in Real Estate (RICS - international independent self-regulatory organization), etc.

The commissions and councils can act in several stages: first, confine themselves to preventive conversation and oral conclusion, and if the negotiations between the participants do not deliver results again, written conclusion is made.

It is also important to note the preventive function, with which such commissions are endued. This function was noted in the new edition of the 2017 FIDIC Yellow Book – the main goal is to prevent disagreement. This function acquires particular significance at the initial stage – project evaluation, which includes, in addition to cost analysis, the study of aspects of sustainable development, social significance for a particular region, competitive advantages and, of course, possible risks. So, for each potentially risky situation, special procedures may be envisaged [Conditions of contract, 2017].

Besides, the experts in charge of the project may determine the potential risks of the counterparty's bankruptcy. In this case, the expert's main task is to offer all possible ways out of current situation to the client.

Thus, a wide range of functions and systematic work within specific project (in fact, monitoring its implementation) requires specialized competencies, which cannot be exhausted only by conflictology and psychology.

Organizational and legislative state regulation

Concerning *the organizational form*, the most controversial aspect is the participation of the state in the implementation of related procedures. So, a specialized center can be created based on a state body or have the status of a state institution. But some experts[5] question the state intervention in the sphere of investment and construction since it can lead to the formal and non-authoritative provision of mediation services. Besides, such a body will not differ significantly from the court due to a specific element of coercion. At the same time, such organizational and legal form will allow persons, involved in the resolution of disputes, to have considerable powers, including, among other things, ensuring the recommendations made.

In this regard, the experience of cooperation between specialized institutes and authorized bodies, available in world practice, as well as the adoption of special programs, including at the regional level, is very interesting. Government bodies promote the use of ADR, but their authority power is limited. For example, the Florida Department of Transportation is successfully fulfilling the Program for the construction projects implementation. According to the Department, the riskiness of projects, in which ADRs are used (commissions and dispute resolution bodies), is significantly reduced. As one of the most successful examples among developing countries, Belarus is worth mentioning: in 2015, the Cooperation Agreement between the Ministry of Architecture and Construction and the "Mediation and Law" Center was signed. The goal of the agreement is to promote the development of the construction industry through the use of modern methods.

Concerning *the norms of legislative regulation*, researchers also did not come to general opinion. On the one hand, the understanding of the need to develop the concept of ADR is difficult to impose, – it must be the result of a conscious and balanced view. First, it is necessary to change consciousness, and only then adopt legislative acts. On the other hand, if we provide disputing participants with extensive freedom to choose dispute resolution methods, it can significantly complicate the process of ADR implementation, especially in such sensitive areas as investment and construction sphere. Currently, the legislators adhere to the position of precisely soft regulation, allowing dispute participants to determine for themselves, which method is appropriate to apply. The draft of the federal law "On Amendments to Certain Legislative Acts of the Russian Federation concerning the improvement of conciliation procedures" provides for the possibility of judicial mediation (including the "conciliation rooms" operating in some arbitration courts of the Russian Federation), but it is voluntary. If we consider that this type of mediation is now used (the percentage of cases ending

5 For example, C.A. Shamlikashvili.

with a peaceful/mediation agreement is very low), there is no reason to consider the adoption of the proposed law as an incentive for the disputants.

The experience of foreign countries suggests that strict regulation at the initial stage can serve as an effective measure to promote efficient methods. We are talking about the adoption of legislation that obliges participants in the construction activity to use specialized ways to resolve disputes. The United Kingdom is a vivid example: there is a specific procedure called "adjudication", which is in use since 1996[6]. That is why, according to the ARCADIS report, the United Kingdom is the only one among the reviewed countries, in which adjudication is the most common way of settling disputes (in other countries and regions there are two-sided negotiations and mediation)[7]. The introduction of a specific method was also aimed at protecting the rights and interests of small businesses (especially subcontractors) from abuses by large partners who forced contractors to perform work at lower prices (or even free of charge)[8].

Since the adoption of the Law 1996, a large non-profit organization "Adjudication" (Society of Judges and Arbitrators) was created in the UK; it's involved in the resolution of disputes in the construction industry. If we turn to the statistics of requests: since 1999, the number varies from 1300 to 2027 per year, which indicates the need for special procedures. The organization systematically analyzes trends and changes in the construction business, in the course of which factors determining the recession in the industry are identified. As for the arbitrators themselves, they are appointed from specialized centers consisting of experts in the construction industry[9]. An interesting fact is that the jurisprudence (nearly 35%), the engineering cost estimate business (also nearly 35%), and the engineering and construction specialization (10%) are related to the profile specialization of persons involved in resolving the disagreement.

At the same time, it should be noted that in addition to adjudication, there is the Technology and Construction Court, a particular state court in Great Britain with specific competence. The presence of the ADR allowed the Court to have a balanced load and deal with substantive, practice-forming disputes. According to statistical data for 2018, the Court held 61 cases[10].

Conclusion

It should be noted that extensive experience of foreign countries shows the demand for special, non-judicial methods of resolving disputes in the investment and construction sphere. According to the Dispute Resolution Council (Dispute Resolution Board Foundation – a non-profit organization registered in the United States, whose work focuses on prevention and effective resolution of disputes in construction sphere), from 1975 to 2017, more than 2800 projects worldwide have been successfully implemented by using described methods. Among the states are the USA, Canada, New Zealand, India, China, Denmark, South Africa, Australia, Vietnam, Belgium, Brazil, Peru, Turkey, etc. The total cost of projects varies from 1 million to 7,4 billion dollars[11].

At the same time, while developing and implementing these mechanisms, it is important to take into account the realities of each specific state: state priorities in the field of dispute resolution, features and effectiveness of the judicial system (time, accessibility and openness), state support for small and medium businesses, fragmentation and disunity of state bodies and economic entities, business practices and attitude to litigation.

Currently, in the Russian Federation, mediation and the development of its use are actively discussed. But at the same time, the question of introducing other methods with narrow sectoral focus is not developing. Consequently, it is not proposed to train specifically qualified people involved in dispute resolving. It is these trends that should become priorities in the field of further development of non-judicial dispute resolution mechanisms.

6 Housing Grants, Construction and Regeneration Act 1996: http://www.legislation.gov.uk

7 Practices of Continental Europe, North America, the Middle East, and the UK have been investigated.

8 Global Construction Disputes Report. Arcadis. 2018: https://www.arcadis.com

9 Royal Institution of Chartered Surveyors, Chartered Institute of Arbitrators, Construction Industry Council, etc.

10 Information from the official website of the Technology and Construction Court: http://www.bailii.org/ew/cases/EWHC/TCC/2018/

11 Report of the Dispute Resolution Council Foundation: http://www.drb.org/publications-data/drb-database/

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