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Conciliation as the traditional method of disputes settlement in PRC

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Abstract. The author of the article researches one of the peculiarities of civil disputes settlement in China. This peculiarity is the conciliatory method that is used during disputes settlement. The using of the method is based on Confucianism. The content of the method has been viewed in the article.

Keywords: Conciliation as method of disputes settlement; People's Mediation in PRC.

The system of dispute settlement in the PRC has a joint character. It represents by itself composition of ancient traditions and modern legislation which is based on the ideas of "socialism with the Chinese specific character".

Disputes in the territory of China can be settled in the People's Courts which are state judicial bodies, in the Arbitrations, in the Local People's Government through consultations and resolution, in the State Administrative Commissions, and also in the People's Mediation Commissions.

Among named modes of dispute settlement only the settlement in the people's court is considered to be a judicial mode. By applying it, any dispute between citizens and/or legal persons including foreign can be settled. Despite the fact that more and more Chinese citizens were applying to the courts for settling their disputes at the last 20 years, the people's courts are not the ones to have the leading position in the sphere of dispute settlement. This can be explained by that that at 90s of last century "people were unsatisfied with the quality of legal services, and as the result the image of the Party and the Government was injured"[1]. The reasons of such dissatisfaction among the other factors were the judicial system by itself and the qualification of the judges. During three decades after the PRC formation there was no connection between courts and citizens' day-to-day life. In Chinese society there was no private property and every individual person was considered to be an element of the state machine. Everyone belonged to the state as a public property and any economic activity was considered to be as the state function. The state and the society were unified and the government had the all instruments to show its power. Almost every social contradiction and conflict was settled by administrative measures, the role of the court was insignificant. Applying to the court was disreputable. The person who had an experience of his or her dispute settlement in a court was like 'a black sheep'. Moreover, considering the fact that the courts were the instrument of the proletarian dictatorship and the means of the political aim of the party and the government realization, cadres were chosen not by professional criterion but by political convictions. In the legislation of China there was no demand for a judge to have a high legal education. In the working paper which was being issued every year by the People's Supreme Court for the National People Congress the most important was how the courts applied the central directions of the party and the government.

Dispute settlement in the Chinese courts is influenced by traditions that were formed under Confucianism. According to Confucius: “an education and a conviction should be put on the foreground but not a power and a compulsion” [2]. One of the traditions consists of prevalence of the moral norms under the norms of law in the process of regulating any aspects of social life including the most important ones. Traditions of Chinese society formed the special method (not the mode – author’s note) of dispute settlement, which is moderation.

Displaying of such traditions is a procedure of moderation within the framework of judicial proceedings which is held by courts while handling civil cases, economic cases and holding petty criminal proceedings. To this procedure the chapter 8 of Civil procedure Law of the People's Republic of China (CPL PRC) is devoted [3]. Mediation within judicial proceeding is obligatory for divorce cases, adoption cases, cases in which the claims can be immediately satisfied, and cases that do not require mediation statements. In other civil cases the question about mediation is solved by parties voluntary.

Mediation in the courts is made on the basis of ascertainment of facts and should not be contrary to the law. Besides the courts make “distinguish between right and wrong” (Art. 85 CPL PRC). Mediation can be conduct by a people’s court with a single judge or a collegial bench. A court also may request assistance from relevant units (which will be described below) and individuals. If no agreement is reached through mediation or if one party retracts his reconciliation before the mediation agreement is served, the people's court shall render a judgment without delay.

People’s courts of the PRC handling any cases about disputes between legal persons of the PRC and/or citizens of the PRC, and also cases with participation of foreign legal persons and citizens if they concern foreign trade relations in which parties have not reached an arbitration agreement. At the same time foreign nationals, foreign enterprises, or organizations, which initiate or respond to lawsuits in people's courts, shall have the same litigation rights and obligations as the citizens, legal persons, or other organizations of the People's Republic of China. (Art. 5 CPL PRC).

If there is an arbitration agreement between foreign and Chinese person then all the disputes arising are giving to arbitration for their settlement. Arbitrations are courts of referees that are settling disputes and that consist of arbitrators who are specialists in a sphere of the dispute. The activity of the arbitrators in the territory of the mainland china is regulated by the Arbitration Law of the PRC (adopted on August 31, 1994).[4] In the territory of China the most authority of the arbitrations are the Maritime Arbitration Commission and the China International Economic and Trade Arbitration Commission under the International Trade Assistant Committee. The important particularity of these arbitrations functioning is joining arbitration dispute settlement with mediation of the parties.

Arbitrations developed a tendency of mediation during settlement of the disputes, which are including foreign element, according to the tasks they have. The methods of their functioning are different from those that are existing abroad. In foreign countries arbitration and mediation procedures are deeply and automatically separated. It means that first the mediation will be held if it ends successful then the case will be closed. If the mediation was completed unsuccessfully then arbitration takes place. Both procedures have no relation with each other. Chinese arbitration can hold both procedures separately or can consolidate them. First it can handle a mediation procedure and if the mediation will be successful then end the settlement. If the mediation has an unsuccessful end then the arbitration starts all over again. However Chinese arbitration in a process of arbitration settlement in any time before making the final decision can hold mediation thus organically join handling of both procedures.

During the last years arbitration with foreign organs worked out a new mode of mediation named “mutual settlement”. It applies in a case of a dispute between foreign and

Chinese entrepreneurs which apply separately to the arbitration of his/her country for dispute settlement. Arbitration organs of each country after receiving the petition appoint a person who will hold mediation. This new mode attracted attention of arbitrators and persons executed foreign trade all over the world.

Besides two methods of dispute settlement mentioned above during settling disputes with a participation of the foreigners in China the method of consultation and resolution is often used. The advantages of this method are economy of time, costs and also reservation of confidentiality. In 1987 the Dispute Settlement Center under Chinese International Chamber of Commerce which is under the China International Economic and Trade Arbitration Commission was established. At the present moment there are 55 branches of the Center that are embraced the whole territory of China [5].

Not the least of the role in providing social order Local People's Governments play. According to the Article 110 of the China's Constitution adopted on December 4th, 1982 (with amendments of 14 March, 2004) [6] they are state administrative organs under the unified leadership of the State Council and are subordinate to it. They have authority of settling common disputes between citizens and also some special civil cases, economical disputes or labor disputes according to laws regulations [7]. The main method of such dispute settlement is a mediation of disputing parties.

In China the method of mediation which going through all modes of dispute settlement the most clearly can be seen during dispute settlement in the People's Mediation Commissions which are specific organs of the PRC for citizen's dispute settlement. These commissions are established according to the Article 111 of the China's Constitution by the residents committees and villagers committees which are the lowest mass organizations of self-government established among urban and rural residents. That is why people's mediation commission can be considered as a manifestation of people's democratic self-government which has the Chinese characteristics. If it is necessary people's mediation commissions can be established in the enterprises and in the companies for labor and other dispute settlement.

According to the Article 16 CPL PRC the People's Mediation Commissions are the organizations for mass to mediate civil disputes derived from private citizens. For those who are for the mediation commissions they represent themselves an ideal model of justice in the communist society. Despite who among scholars accepts or denies mediation system it's common that being alternative to the state law, commissions seriously influence the order of Chinese society. At the present moment in China there are about millions of such commissions which settle about 90% of civil disputes between Chinese citizens[8]. Unlike court and administrative organs of dispute settlement People's Mediation Commissions don't have authority to apply any compulsory administrative measures or other legal measures.

Functioning of the People's Mediation Commissions in a different periods of time were regulated by the Provisional Rules of People's Mediation Commissions Organization March 22, 1954 [9], Regulations about People's Mediation Commissions Organization May 05, 1989.[10] At the present time their organization and functioning is ruled by People's Mediation Law of the People's Republic of China adopted on 28 August, 2010 that came into force on 1st January, 2011.[11] The main purpose of establishing people's mediation commissions are opportune dispute settlement, maintenance social harmony and stability.

The guidance of the commissions is made by the Local People's Governments and the Grassroots People's Courts. The Local People Government establishes the Institute of Judicial and Administrative Work Assistants for concrete guidance of the people's mediation work. Their main commitment is to help People's Mediation Commissions in organized and ideological formation and professional establishment. In general the Grassroots People's Courts exercise professional guidance over people's mediation commissions through the involvement to the dispute settlement in court mediation, the presence of members of the commission without a decisive and consultative voice in court

during dispute settlement, the guidance of cases analyses, the generalization of practice and experience exchange.

A People's Mediation Commission is composed of 3 up to 9 members, one of which is a director. Director can have one director and, if necessary, two or more deputy directors. A people's mediation commission shall have female members and, as in an area of multiethnic population, have members from ethnic minorities. The members of the people's mediation commission shall be selected at the meeting.

Conciliation in terms of people's mediation is not a conciliation of any mode. It should be done on the basis of the principals of free will and equality of the parties. Besides, mediation must be abided by laws, regulations and policies of the state.

The aim of the conciliation by means of people's mediation is reaching a mediation agreement which can have written or oral form.

Thus, it is clear that all modes of dispute settlement described above (judicial and non-judicial) have one particular method that is mediation. The content of the method is described in Article 2 of People's Mediation Law of the People's Republic of China and it consists of persuasion the parties concerned to a dispute into reaching a mediation agreement. Applying of this method makes a mediation to be the unique instrument of dispute settlement and maintenance law and order in the state.

Mediation as a method of dispute settlement assumes influence on the feelings of disputants, exposure the real reasons of the happened, reporting true information, acquaintance dispute parties with the current legislation, persuasion to valuate norms of morality. During the implementation of mediation the appropriate organ should establish facts on the basis of differentiation true and false, give all arguments, patiently find out, eliminate the lack of understanding, and help parties to reach an agreement. Mediation should be registered and recorded. The purpose of the mediation as a method of dispute settlement is not conciliation disputants only through inertia. The main importance is given to ensure that instead of the dispute the agreement between parties is reached, to display activity for preventing and minimizing disputes, to prevent escalation of disputes between people.

This as it seems to be non-legal method of dispute settlement is existing in the scope of law. Firstly law defines possibility of using this method during the dispute settlement; secondly law defines methods of dispute settlement in the scope of which this method is applied; thirdly law defined frames of using this method.[12]

The method of conciliation is a natural manifestation of Chinese nation mentality which was formed under the great influence of Confucianism. According to Confucius' ideas a man should insist on his morals as the duty of everyone is to tend to harmony and forget about himself for all [13]. According to Chinese hands-on experience every dispute settlement should be responded fair and humane feelings and not being squeezed in the frames defined by legislation juristic scheme.

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Примирение как традиционный способ разрешения споров в КНР

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Аннотация. Автор статьи рассматривает одну из особенностей разрешения гражданско-правовых споров в КНР. Одной из особенностей разрешения споров в КНР является использование метода примирения спорящих сторон при разрешении споров одним из законных способов (судебных и внесудебных). Использование этого метода обусловлено правовой культурой Китая, сформированной на протяжении столетий под влиянием конфуцианства. В статье также раскрывается содержание метода примирения, используемого в КНР.

Ключевые слова: примирение как метод разрешения споров; народная медиация в КНР.