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Pre-trial protocol in civil proceedings

In the scientific article the legal nature of the pre-trial protocol in civil proceedings was examined. The institution of judicial evidence was subject to change in connection with the latest reforms of the civil procedure legislation. This has led to the emergence of new institutions and the pre-trial protocol in civil proceedings is such. Until 2022, the Civil Procedure Code of the Republic of Kazakhstan (hereinafter CPC RK) did not have direct legal regulation of this institution, and accordingly, no theoretical studies were conducted on this issue. In civil proceedings, the prototype of the institute of pre-trial protocol was a foreign legal institution, such as the disclosure of evidence and the exchange of arguments, characteristic of English and American procedural law. The practical necessity of many aspects of such a phenomenon as the pre-trial protocol, the incompleteness of theoretical developments and the need to improve legislation determined the relevance of the topic of the scientific article. It should be recognized that the mechanism for drawing up a pre-trial protocol, in fact, designed to ensure the implementation of the principles of competition and equality of the parties, was not sufficiently enshrined in the civil procedural legislation of the Republic of Kazakhstan. At the same time, consistent legislative regulation of the activities of bodies for the disclosure of evidence in civil proceedings is required. The institution of pre-trial protocol in civil proceedings requires regulation and integration at the legislative level, since the mechanism of conclusion in the current CPC of the Republic of Kazakhstan has not been fully investigated.

Keywords: pre-trial protocol, court, disclosure of evidence, civil procedure, adversarial proceedings.

Introduction

The Civil Procedure Code of the Republic of Kazakhstan (hereinafter CPC RK) from January 01, 2022 provides for a previously non-existent institution — pre-trial protocol [1].

In accordance with Article 73 of the CPC of the Republic of Kazakhstan, "*Evidence is presented by the parties and other persons participating in the case to the court of first instance when accepting a claim with their preparation of a pre-trial protocol, which reflects the actions of the parties and other persons participating in the case to disclose, present and exchange evidence, which they intend to refer to as the basis their demands or objections and which they intend to use in the event of a court hearing.*

A person has the right to refer only to the evidence that was disclosed and reflected in the pre-trial protocol during the preparation of the case for trial or during the trial, in the cases established by part one of this article".

Thus, we can draw the following conclusion:

– the parties must draw up a "pre-trial protocol" before filing a claim;

– it should contain only the evidence that the parties intend to disclose in court;

– it should set out the facts of the presentation, disclosure and exchange of evidence;

– participants in the process can refer only to the evidence that is reflected in the pre-trial protocol.

And in this regard, we can agree with the opinion of B. Tukulov, who points out that "the idea of introducing the institute of pre-trial protocol in civil proceedings is quite interesting, but there are still many questions to this institution" [2].

The conceptual and theoretical basis for the implementation of the institute of pre-trial protocols in civil proceedings requires a special approach in modern conditions.

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It should be noted that Kazakhstan has not yet conducted a comprehensive study of the problem under consideration. In civil proceedings, the issue of pre-trial protocols is rarely given attention in scientific articles. B. Tukulov's article "Pre-trial protocol, extraterritorial jurisdiction, exemplary decision and other innovations of the CPC" can be noted [2]. The article by A.B. Sataeva "Pre-trial protocol in the civil procedure of England and Kazakhstan: a comparative analysis" is interesting for study [3]. Practicing judges also paid attention to the pre-trial protocol in civil proceedings, for example, G. Kamzieva considers the pre-trial protocol as one of the ways to reconcile the parties [4]. G. Batkalova considers the pre-trial protocol as the first step in resolving disagreements [5].

Methods and Materials

For the purposes of the scientific article, methods of analysis, generalization, systematization, induction and abstraction were used, and the role of pre-trial protocols in the process of warring parties was also considered. In the process of writing a scientific article, general methodological principles and general and special cognitive methods were used, which made it possible to conduct a comprehensive analysis of the problems considered in the article and achieve the goals set. A common method used in this article is the dialectical method of scientific cognition. The following methods of scientific cognition were also used in writing scientific work: formal logical methods; methods of analysis, synthesis; methods of structural systems; methods of legal comparison; methods of ascent from the abstract to the concrete; logical methods; methods of generalization and others.

The comparative legal method made it possible to conduct a comparative analysis of the studied theoretical provisions and norms governing the procedure for the application of pre-trial protocols in civil proceedings. The legal analysis of the studied area was carried out using formal legal methods.

Empirical observations and statistical methods were used to study the relationship between norms and practice.

Thus, using a combination of these methods made it possible to conduct a comprehensive study and formulate theoretical conclusions and practical recommendations.

The normative basis of the study was the Civil Procedure Code of the Republic of Kazakhstan, the legislation of the Republic of Kazakhstan and other normative legal acts.

The empirical basis of this study was the actual domestic and foreign legal materials, materials of judicial practice.

Results

As a result of the research, the following results can be achieved.

The CPC of the Republic of Kazakhstan contains only one article containing the procedure for presenting evidence with the preparation by the parties and other persons involved in the case with the preparation of a pre-trial protocol by them (Article 73 of the CPC of the Republic of Kazakhstan).

The current legislation does not contain requirements for the content of pre-trial protocols and only indicates to the court the need to check for signs of formal compliance with pre-trial dispute settlement procedures. At the same time, the content of this document plays an important role in dispute resolution. In our opinion, the legislator should clearly formulate the requirements for the content of the pre-trial protocol, leaving the claim without consideration due to their non-compliance. Such provisions will protect against abuse of rights by the parties.

The pre-trial protocol aimed at unloading the court is currently unlikely to achieve this goal. On the contrary, courts often must spend time discussing issues related to compliance with pre-trial proceedings, instead of considering the merits of the dispute.

Discussion

In accordance with Article 4 of the CPC of the Republic of Kazakhstan, the tasks of civil proceedings are "protection and restoration of violated or disputed rights, freedoms and legitimate interests of citizens, the state and legal entities, observance of the rule of law in civil turnover, ensuring full, timely, fair consideration and resolution of the case, assistance to the peaceful settlement of a dispute, prevention of offenses and the formation of a respectful society relations to the law and the court".

According to article 15 of the CPC of the Republic of Kazakhstan, civil proceedings are conducted based on competition and equality of the parties. The development of adversarial civil proceedings is a complex and contradictory process against the background of an increase in the number of civil cases coming to

court, the dynamic development of legislation in all areas of law, the emergence of many new categories of disputes in court and the tendency to complicate them.

Competition is an integral part of civil procedure law [6; 35]. The principle of competition is one of the guarantees of justice, which at the same time serves as a tool for protecting the individual [7].

In Kazakhstan, much attention is paid to the issues of competition in civil proceedings. Another important step towards the reform of judicial proceedings in the Republic of Kazakhstan was the introduction of procedural actions by a judge to conduct a conciliation procedure and a pre-trial protocol, defined by the Law "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan to improve civil procedural legislation and the development of institutions for out-of-court and pre-trial dispute settlement", signed by the Head of State Kassym-Jomart Tokayev 20 December 2021 [8].

Based on these changes, the Institute of English procedural law was introduced into the CPC of the Republic of Kazakhstan — a pre-trial protocol, which in England is referred to as the protocol of preliminary action. In some cases, the institutions of the English process are also known to Kazakh law, but the specifics of regulation seem very unusual.

The main purpose of the English mechanism of "pre-trial protocols" is to facilitate the early receipt of information and the conclusion of a settlement agreement to avoid the costs and inconveniences associated with the trial [9; 57].

In fact, both the protocol of the preliminary action of England and the pre-trial protocol of Kazakhstan represents the disclosure of evidence by the parties.

At the same time, the procedure for disclosure of evidence in England is legally provided for in the Rules of Civil Procedure of England (Civil Procedure Rules) 1998 [10].

The disclosure of evidence in England has developed over the centuries, and its roots go back to the activities of the ecclesiastical courts. In 1873–1875, when significant changes were made to the British judicial system, the evidence disclosure system began to acquire modern features. The demonstration project on the reform of civil procedure and information disclosure in the late 20th and early 21st century (2019–2021) marked a change in the historical tradition of understanding information disclosure in connection with the spread of electronic recording, processing and storage technologies. At the present stage, the institute under study is an institute for the disclosure of documents.

The current modernization of the document disclosure system in the UK has two goals: firstly, to help preserve the attractiveness of the economy for foreign investors by maintaining the role of English courts on the world stage (which will lead not only to the self-sufficiency of the judicial system, but also to a positive entry into the UK market); secondly, to restore real access to justice for individuals [11; 8].

The procedural institution of "disclosure of evidence" is becoming particularly relevant in the light of changes being made to the current civil procedural legislation.

Proving the circumstances referred to by the parties as the grounds for their claims and objections is, on the one hand, a right (Article 46 of the CPC of the Republic of Kazakhstan), on the other hand, the obligation of the parties (Article 72 of the CPC of the Republic of Kazakhstan).

The law consists of the obligation of those who participated in the trial to disclose evidence to other persons who participated in the trial before the court session, and the right to refer only to evidence disclosed before the court session. Disclosure of pre-trial evidence helps to assess the parties' chances of success in court proceedings and resolve disputes in a pre-trial manner. This will lead to the fact that some disputes will not arise in court, and an agreement on some of them will be reached [4].

The pre-trial protocol provides the parties with the possibility of mutual disclosure of evidence, which allows them to assess the likelihood of a trial. The undoubted advantages are saving time and effort, the absence of material costs and the return of state duties. And, as a result, the conclusion of a settlement agreement and the preservation of opportunities for further cooperation by the parties to the dispute.

The exchange of adversarial documents and the disclosure of evidence are the basis of the evidence base. As N.G. Eliseev points out, this procedural institution is considered an integral part of the adversarial process, which is an important situation for the main start of civil proceedings, the proper exercise of the right to defense in court and the right to be heard at meetings. This helps to establish the factual circumstances of the case and reduces the time to consider the dispute; contributes to the accurate and timely resolution of issues of relevance, admissibility and reliability of the evidence presented; eliminates the need for dispute resolution and resolution procedure in court, favoring dispute resolution; eliminates situations where one of the parties is unable to adequately respond to evidence [12; 39].

Given the positive trend in terms of the stated goals of this procedural institution in civil procedural legislation, the difficulties that law enforcement practice may face are obvious. It cannot be denied that at present this institution of civil procedure has several shortcomings that can only aggravate judicial practice. For example, in the civil procedure legislation there is no legal definition of the concept of "pre-trial protocol", and there is also no mechanism for its conclusion. The pre-trial protocol must contain the disclosure of evidence in the case. In this regard, we consider it necessary to note the opposite trend emerging in foreign legislation.

As A.D. Lozovickaja notes, "the institute of disclosure of evidence, historically being an institution of the Anglo-Saxon system of law, is regulated in English civil procedure in sufficient detail and has its own goals and objectives, subject, boundaries, subjects of disclosure, procedure, stages and types of disclosure, as well as sanctions for failure to fulfill disclosure obligations" [13; 33].

It should be noted that, theoretically, there is no unambiguous understanding of this procedural institution. For example, some authors define this institution as "familiarization of other persons who take part in the case with the content of evidence" [14; 46] or as "the obligation to send copies of documents in order to familiarize other participants in the civil process" [15; 207].

Others believe that disclosure of evidence imposes on the parties a mutual obligation to familiarize themselves with written and other documents confirming their disagreement and demands [16; 17]. A number of researchers understand the disclosure of evidence as "actions carried out in order to notify absolutely all participants in the process of the evidence available to a particular participant in the case, or to notify the person involved in the case of the evidence available to the process, and provide an opportunity for all participants in the process to familiarize themselves with the case materials" [17; 8].

Some researchers note that when disclosing evidence in accordance with the requirements of the judge, both parties are obliged during the interview to inform the other party and the judge about their location or another person's attitude to the evidence that they will present in support of an objection or claim [18; 329].

Conclusion

Judicial reform is currently underway in many countries around the world. They start at different times and take place throughout Kazakhstan, the United States, Great Britain, Canada, Germany, France, Italy, the Russian Federation, Latvia, Lithuania, Estonia. One of the reasons for the procedural and legal reform in each country can be both internal and external or international factors.

The main idea of the reform related to the internal issues of procedural law in each country is the need to introduce modern methods of consideration and resolution of civil cases. This can be done by settling disputes at an early stage of legal proceedings in a simplified form of legal proceedings; the use of temporary measures, including preliminary ones, to ensure the requirements for the execution of court decisions, as well as to ensure the safety of evidence, the use of which is sufficient to even end the conflict, resorting to alternative methods, including organizational negotiations, consultations, arbitration, and the conclusion of friendly agreements [19; 31].

Analyzing the definitions of "disclosure of evidence" presented above, it can be distinguished that, both theoretically and at the level of judicial practice, the following distinctive features of this stage of judicial evidence: informing the court and persons involved in the case about the methods of proof by which a person intends to substantiate his claims and objections, as well as about their content. We believe that the preparation of a pre-trial protocol allows the parties to exchange evidence before initiating civil proceedings, which allows them to predict the expected outcome of disputes, minimize financial, time and moral costs, exhaust conflicts and maintain friendly relations.

At the same time, the limited legal regulation of the pre-trial protocol in the civil process of Kazakhstan does not allow us to talk about its effectiveness and rationality. Nevertheless, a progressive, timely legislative adjustment of the legal regulation of the pre-trial protocol, considering the above recommendations, will ensure the effective functioning of the disclosure of evidence in the civil process of Kazakhstan [3; 275].

The CPC of the Republic of Kazakhstan contains only one article on the presentation of a pre-trial protocol but does not define the mechanism of signing such a protocol, what its content is, in what time frame it should be drawn up, what to do if one of the parties refuses to sign it.

In this regard, we can agree with the proposal of M.A. Akimbekova, who notes that in order to improve the legal practice of pre-trial dispute resolution, it is necessary to issue a regulatory resolution of the Supreme Court of the Republic of Kazakhstan "On some issues of pre-trial dispute settlement considered in

civil and administrative proceedings", which will reflect all methods of pre-trial dispute resolution and the procedure for its execution [20; 46].

In addition, it should be noted that in accordance with Part 1 of Article 150 of the CPC of the Republic of Kazakhstan, when drawing up a pre-trial protocol, the court takes the case into production within 15 working days instead of the usual five. In this case, the court imposes an arrest after taking the case into production.

As a result, it turns out that the plaintiff warns the defendant of the search, sends the pre-trial protocol and all evidence, then waits 15 working days, and the defendant withdraws assets currently. Time will tell how everything will work in practice.

We believe that this "pre-trial protocol" in civil proceedings will contribute not only to the implementation of the principles of competition and equality of the parties, but also to the fulfillment of the tasks of civil proceedings for the correct and timely consideration and resolution of civil cases.

Currently, only certain elements of the pre-trial protocol are fixed at the legislative level. The absence of a single mechanism for regulating the pre-trial protocol in procedural legislation reduces the effectiveness of evidentiary activities and does not contribute to solving the tasks of civil proceedings.

The need to develop this institute is explained not only by theoretical, but also by practical interest. The lack of clear legislative regulation of the pre-trial protocol in civil proceedings leads to the fact that it is judicial practice that develops the main criteria, the procedure for registration of the pre-trial protocol and the consequences of non-fulfillment or improper fulfillment of procedural duties.

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Азаматтық процестегі сотқа дейінгі хаттама

Мақалада азаматтық процестегі сотқа дейінгі хаттаманың құқықтық табиғаты қарастырылған. Сот дәлелдемелері институты азаматтық іс жүргізу заңнамасының соңғы реформаларына байланысты өзгерістерге ұшырады. Бұл жаңа институттардың пайда болуына әкелді және азаматтық сот ісін жүргізуде сотқа дейінгі хаттама осындай. 2022 жылға дейін Қазақстан Республикасының Азаматтық процестік кодексінде (бұдан әрі — ҚР АПК) бұл институтта тікелей құқықтық реттеу болмаған, тиісінше осы мәселе бойынша қандай да бір теориялық зерттеулер жүргізілген жоқ. Азаматтық сот ісін жүргізуде сотқа дейінгі хаттама институтының прототипі ағылшын және американдық процессуалдық құқыққа тән дәлелдемелерді ашу және дәлелдермен алмасу сияқты шетелдік құқықтық институт болды. Сотқа дейінгі хаттама, теориялық әзірлемелердің аяқталмауы және заңнаманы жетілдіру қажеттілігі сияқты құбылыстың көптеген аспектілерінің практикалық қажеттілігі ғылыми мақала тақырыбының өзектілігін анықтайды. Тараптардың бәсекелестігі мен теңдігі қағидаттарын іске асыруды қамтамасыз етуге арналған сотқа дейінгі хаттаманы жасау тетігі Қазақстан Республикасының Азаматтық іс жүргізу заңнамасында жеткілікті дәрежеде бекітілмегенін мойындау керек. Сонымен бірге, азаматтық сот ісін жүргізуде дәлелдемелерді ашу жөніндегі органдардың қызметін дәйекті заңнамалық реттеу талап етіледі. Азаматтық сот ісін жүргізудегі сотқа дейінгі хаттама институты заңнамалық деңгейде реттеу мен интеграциялауды талап етеді, өйткені ҚР қолданыстағы АПК-де қорытынды жасау тетігі толық зерттелмеген.

Кілт сөздер: сотқа дейінгі хаттама, сот, дәлелдемелерді ашу, азаматтық процесс, бәсекелестік.

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Досудебный протокол в гражданском процессе

В статье рассмотрена правовая природа Досудебного протокола в гражданском процессе. Институт судебного доказывания в связи с последними реформами гражданского процессуального законодательства подлежал изменению. Это привело к появлению новых институтов и досудебный протокол в гражданском процессе является таковым. До 2022 года Гражданский процессуальный кодекс Республики Казахстан (далее — ГПК РК) не имел прямого правового регулирования данного института, и, соответственно, по данному вопросу не проводились какие-либо теоретические исследования. В гражданском судопроизводстве прототипом института досудебного протокола послужил иностранный правовой институт, такой как раскрытие доказательств и обмен аргументами, характерный для английского и американского процессуального права. Практическая необходимость многих аспектов такого явления, как досудебный протокол, незавершенность теоретических разработок и необходимость совершенствования законодательства, определили актуальность темы научной статьи. Следует признать, что механизм составления досудебного протокола, по сути, призванный обеспечить реализацию принципов состязательности и равенства сторон, не был в достаточной мере закреплен в гражданском процессуальном законодательстве Республики Казахстан. В то же время требуется последовательное законодательное регулирование деятельности органов по раскрытию доказательств в гражданском судопроизводстве. Институт досудебного протокола в гражданском судопроизводстве требует регулирования и интеграции на законодательном уровне, поскольку механизм заключения в действующем ГПК РК до конца не исследован.

Ключевые слова: досудебный протокол, суд, раскрытие доказательств, гражданский процесс, состязательность.

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