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## **Concept and classification of alternative ways of civil law disputes resolution**

This article studies the types of alternative dispute resolution. The aim of the research is a comprehensive analysis of theoretical regulations and problems of law enforcement practice of an alternative dispute resolution institute and thus, the development of proposals aimed at improving the domestic law in this area. The study includes general scientific and special research methods: analysis, synthesis, abstraction, induction, deduction, logical and comparative legal method. The author has analyzed practical activity of the Karaganda regional court on «The pre-action dispute (conflict) resolution for certain categories of cases by way of mediation» and «The conciliation procedures in court» pilot projects implementation in the court № 3 of the Karaganda Oktyabrskiy Court. These pilot projects were developed taking into account the Singapore's experience, where there is a special category of judges whose task is to reconcile the parties directly when a case goes to court, both before its initiation and at all stages of legal proceedings. Conclusions, aimed at improving the institution of alternative dispute resolution with a view to its further expansion and popularization in the Republic of Kazakhstan were made, based on the study.

*Keywords:* alternative dispute resolution, civil case, extrajudicial procedure of dispute resolution, mediation, negotiations, participative agreement, arbitration court, arbitration.

### *Introduction*

The transition to a market economy and the intensive development of all spheres of life in society brought a complication of relations. Legal regulation of social relations, based of national legislation, gives opportunities for using other dispute resolution forms than trial. The number of disputes has increased so much that its participants were more interested in the operational dispute resolution forms, but not in a long and costly court procedure. Positive foreign experience, for example, the experience of the United States, has shown the effectiveness and demand for using various forms and methods of protecting the rights and interests of parties to a legal relationship. They are considered as an alternative to justice and therefore are called Alternative Dispute Resolution (ADR).

The aim of this research is to study the institution of alternative dispute resolution, to disclose its classifications, to analyze the advantages and disadvantages of the most common of them and to demonstrate its popularization.

Alternative dispute resolution is a combination of ways and methods for resolving disputes between dispute participants outside the court system of the Republic of Kazakhstan.

### *Methods and materials*

The methodological basis of the study consistsof: at first, general scientific methods (formally logical, systematic, statistical, structural and functional, certain, etc.) and formally logical methods (analysis and synthesis, induction, analogy, etc.). Secondly, the study included specific legal methods (comparative legal analysis, specification, interpretation, etc.).

When studying the article' stoic, analytical data of the Karaganda regional court on implementing «The pre-action dispute (conflict) resolution for certain categories of cases by way of mediation» and «The conciliation procedures in court» pilot projects in the court № 3 of the Karaganda Oktyabrskiy Court were used.

### *Results*

Nowadays, the judicial system as a whole is doing an enormous work on the implementation and realization of this Law, but fieldwork reveals some disadvantages as follows:

1. Low public awareness of alternative dispute resolution. In this regard, it is proposed to involve such local executive bodies as Nur Otan and Maslihat to the awareness-raising activities.

2. Non-professional mediator institute is not properly implemented, as «non-professional mediator» concept questions the level of services, provided by the mediator and pushes away a potential client. There is no activity incentive due to the gratuitousness of their activity as wellassemi - illiteracy of non-professional

mediators, a low level of their learning, the absence of a statutory requirement for the adoption of a non-professional mediator code. In general, mediators' activity is spontaneous and fragmented.

The practice of using alternative dispute resolution methods shows the insufficiency of work being done in this direction, since the mediators themselves are inactive and the competitive environment does not give the expected result. Therefore, there is a need to centralize the work of mediators. At present, it is impossible to trace and assess the quality of mediator services provided as the quality of services suffers. In this regard, the level of citizens' trust in alternative dispute resolution methods decreases.

Currently, there are various classifications of alternative dispute resolution methods. They are traditionally divided into main and combined.

The main alternative methods include:

- negotiations that mean dispute resolution directly by the parties without the participation of other persons;
- mediation that means dispute resolution with the help of an independent and neutral mediator who assists the parties in reaching an agreement;
- arbitration that means dispute resolution with the help of an independent and neutral person, that is, an arbitrator (or a group of arbitrators) who is authorized to make a binding decision for the parties [1].

Combined methods are formed on the basis of mixing the main types. For example:

- mediation — an arbitration court that means dispute resolution with the help of a mediator-arbitrator, who is authorized to resolve an arbitration dispute if the parties fail to reach an agreement;
- «mini-court» or «mini-trial» is a widely used method of commercial dispute resolution, which has got its name from external similarity with the judicial procedure and is dispute resolution with the participation of corporate executives, lawyers and a third independent head of the case;
- an independent examination on finding facts of the case — the procedure for the parties to reach an agreement based on the conclusion of a qualified specialist who has studied the case from the set of facts viewpoint;
- ombudsman–dispute resolution by an officially authorized person who investigates the case study according to interested parties' complaints, related to deficiencies in government agencies and private organizations;
- a private judicial system or a «hire» judge providing dispute resolution with the help of retired judges for a fairly high fee, who have the authority both to reconcile the parties and deliver a judgement, mandatory for them [1].

Let us consider the main types of alternative dispute resolution methods in detail.

**Negotiations.** The most used conciliation procedure which is aimed at direct negotiations without involving a third party. This is a process in which the parties voluntarily develop a mutually beneficial dispute resolution.

As E.I. Nosyreva noted, in the USA «the majority of civil law disputes, including commercial disputes, are resolved with the help of it». They are used not only to resolve the dispute, but also any disagreements and they can be direct (directly between the parties to the conflict) or indirect (with the help of representatives). In a special literature, negotiations are defined as the process of coming to an agreement between people by reconciling their interests. Negotiation is an informal process of communication between two or more parties in order to resolve conflicts or disputes. Negotiations are a good example of alternative dispute resolution procedures by their nature, because they are conducted voluntarily by the parties. Negotiations are also a voluntary and non-binding procedure, as no one can force the parties to conduct them [2; 123].

As a rule, the agreement reached during the negotiations, is made in writing and subsequently regarded as a treaty law institute and the refusal to execute it can be heard in court. Efficiency is the advantage of this procedure. The negotiations are possible in cases where the confrontation of the parties has not become an open conflict.

The legislation of some countries may oblige the parties to dispute to negotiate before appealing to a court. For example, according to Article 402 of the Civil Code of the Republic of Kazakhstan, a claim to amend or terminate a contract may be filed to the court by the party only after receiving a refusal by the other party to the proposal in amending or terminating the contract or not receiving a response within the time specified in the proposal or established by law or the agreement or, within thirty days if it is not [3]. That is, the party, before terminating or changing the terms of the contract, is obliged to negotiate with the opposite party and only after refusing or not receiving a response, has the right to take such a claim to court. However,

many organizations do not attach much importance to the pre-action dispute resolution, because they consider it optional. Meanwhile, the court dismisses a claim without prejudice if the pre-action procedure is violated.

Summarizing the above, it should be noted that the lawyers pay insufficient attention to this conciliation procedure in Kazakhstan. Real experience in the knowledge of this conciliation procedure should be provided by foreign experience, in particular, by the USA. Thus, the negotiations in the United States are considered as the main form of human communication in order to resolve conflicts. In the future, it is proposed to develop a comprehensive study of negotiations in various branches, such as psychology and conflict resolution.

The most common alternative dispute resolution method is **mediation**.

The term «mediation» is derived from the Latin word «mediate», which means «to mediate». Mediation is one of the alternative dispute resolution technologies involving a third neutral, impartial, non-interested party in a conflict, that is, a mediator who helps the parties to negotiate a specific dispute agreement, and at the same time, the parties fully control the dispute resolution process and the terms of dispute resolution [4].

Mediation in Kazakhstan is regulated by the Law of the Republic of Kazakhstan «On Mediation», according to which mediation is a dispute (conflict) resolution procedure between the parties with the assistance of a mediator(s) in order to achieve a mutually acceptable solution, implemented by voluntary consent of the parties (p. 5 of Art. 2 of the Law of the Republic of Kazakhstan «On Mediation») [5].

Distinctive features of mediation include the following:

- 1) aimed at resolving dispute and making a mutually beneficial solution by the parties themselves with the participation of a third party (mediator);
- 2) appointment of a mediator who assists in dispute resolution;
- 3) voluntary participation of the parties in the mediation process and terminating it accordingly;
- 4) equality of participants in expressing their opinion, setting the negotiations agenda, assessing the acceptability of proposals and the agreement terms;
- 5) confidentiality. The mediator has no right to tell one of the parties the information that he got from the other party in an individual conversation process without special permission [6].

Law on mediation establishes the procedure for its implementation. Thus, this procedure cannot be taken if such disputes (conflicts) affect or may affect the interests of third parties not participating in the mediation procedure, and persons adjudged incapable or partially incapacitated, if one of the parties is a government body and according to criminal cases regarding corruption crimes and other crimes against the interests of the civil service and public administration (Article 2 of the Law of the Republic of Kazakhstan «On mediation»).

To date, some experience of using mediation has been gained in resolving various disputes, which deserves a careful study. The following can be distinguished in the practical application of mediation. Such pilot projects as «The pre-action dispute (conflict) resolution for certain categories of cases by way of mediation» and «The conciliation procedures in court» have been implemented in the district courts of the Republic [7].

The goal of these projects is to implement the Law of the Republic of Kazakhstan «On Mediation» in civil society with the assistance of a mediator, professional and non-professional mediator.

The implementation of the pilot project «The conciliation procedures through the pre-trial process» in Karaganda region has been carried out on the basis of the district court № 3 of Karaganda Oktyabrsky district since May 2018.

The mediator has managed to mediate 55 % of court cases since this project's implementation. The majority of cases on reconciling disputing parties related to marriage and family disputes.

Within the pretrial stages of proceedings, since claim to the listing for trial, the regional courts have concluded mediation agreements on 641 civil cases or 2 % of the total number of completed cases, the participatory procedure was concluded on 4 cases (0.01 %), settlement agreement was concluded on 117 cases or 0.3 % (within the pretrial stages of proceedings mediation agreements were concluded on 420 cases (1.4 %), settlement agreement on 90 cases (0.3 %), participatory procedure on 5 cases (0.02 %) for 12 months of 2017).

The Court of Appeal has concluded the mediation agreements on 16 civil cases within this pilot project's implementation.

Thus, as of December 13, 2018, out of the total number of completed cases, excluding cases of mandatory and simplified proceedings (34092), 2409 cases were terminated as a result of conciliation procedures,

of which the number of completed mediation cases consisted of 1900 cases or 5.6 %, participatory procedure included 22 cases or 0.06 % and settlement agreement consisted of 487 cases or 1.4 % [8].

There are two Centers for pre-action dispute resolution and conciliation procedures at the Assembly of Nations of Kazakhstan and in the House of the Federation of Trade Unions in the region, where the city court judges conduct mediation free of charge along with professional mediators, according to a schedule approved by the regional court.

Currently, the Centers provided services for 194 appeals from citizens, and subsequently, 47 mediation agreements were concluded, more than 50 reconciliations have been reached without concluding agreements with the acceptance of applications [8].

The regional courts constantly hold events on explaining the alternative ways of resolving the dispute, focusing on the fact that the parties can turn to a professional and non-professional mediator.

The regional courts have developed projects on using virtual mediation within the implementation and introduction of innovative technologies, by means of which the parties of the case have an opportunity to come to reconciliation through video link, without appearing at the court with the use of portable mobile gadgets.

At the same time, the parties have the opportunity to conclude a ready mediation agreement as well as to conduct the mediation procedure. This innovation is convenient for parties who are outside the state and territory of the region.

When implementing the Law of the Republic of Kazakhstan «On Mediation», it became necessary to conduct mediation in the evening at the request of the parties.

The use of conciliation procedures is held in the evening if parties have no opportunity doing it in the daytime.

As of December 13, 2018, mediation agreements were concluded on 12 cases in the evening and on 5 cases virtually [8].

The survey results showed that pilot project participants assess the conduct of the conciliation procedure by judges positively, approve the projects and give preference to the conciliators rather than the mediators when concluding agreements.

I believe that this reaction of citizens is the result of judicial pilot project implementation, which are intended to explain the essence of the Law «On Mediation» and are not aimed at the Mediation Institute raiding as such.

The judicial system is interested in conducting mediation outside the court. This will not only significantly reduce the number of litigations, but also avoid long litigation for the parties to the conflict and save time and money.

**Participative procedure.** With the adoption of the new Civil Procedure Code of the Republic of Kazakhstan dated from October 31, 2015, a new concept as a «participative procedure» was introduced. Participative procedure is the dispute resolution without a judge by means of negotiations between the parties with the lawyers' assistance of both parties [9].

This innovation is a significant addition to the objectives on promoting a peaceful dispute resolution.

**The arbitration court** is a court elected by the parties themselves to resolve property and other disputes.

The main characteristics of arbitration are:

- 1) its contractual nature — the parties determine their disputes by themselves;
- 2) private nature of the procedure — the decision maker is not a state representative, and the procedures used are not a part of the state judicial system;
- 3) flexibility — the parties agree on the procedures and rules to be applied by themselves;
- 4) binding decision — the decision is final and defines the rights and obligations mandatory for the parties [7].

Types of arbitration: to resolve a certain dispute (ad hoc), as well as permanent arbitration courts.

The arbitration court for the hearing (ad hoc) is one or several individuals — arbitrators elected by the parties for resolving only one economic and legal dispute. In this case, the arbitrators' competence is limited by trial of only one case, after which the judges lose their status and cease their activity. There is no organizational structure, and arbitrators are not staff members, but act as individuals trusted by the parties.

Permanent arbitration courts are the courts established as structural units of various enterprises, institutions, organizations, or as independent legal entities with a permanent staff and arbitrators. The organization

which decides on the creation of the arbitration court, approves the rules of its work, the regulations on arbitration fees and the panel of judges [6].

Regardless of which type of arbitration is used as an ADR, the arbitration mediator or arbitrators are elected not only as neutral persons, but also because they have special knowledge in the dispute area and are able to conduct arbitration in accordance with the requirements of the parties. At the same time, arbitration, as a form of ADR, is closely related to the courts and legislation, since arbitration needs such a connection to ensure the execution of the arbitration decision.

The general advantages of arbitration compared to litigation, are a high level of confidentiality and flexibility of procedures, possibility of choosing an arbitrator with a higher level of special qualification in the dispute than a judge, finality of an arbitral award (which reduces the time of proceedings and costs), although this makes it impossible to correct possible errors. Reduction of terms and costs is also achieved due to the parties' will to cooperate in resolving the dispute. At the same time, the arbitration is complicated because of the case complexity, the need to apply influencing measures to the disputing parties in some cases, as well as the complexity of the arbitration award procedure.

Since 1993, when Kazakhstan became an independent state, arbitration and tribunal courts were established for the first time in accordance with the Model Regulation «On Arbitration Courts to Resolve Economic Disputes», which was approved by the Resolution of the Cabinet of Ministers of the Republic of Kazakhstan № 356, dated from May 4, 1993. The arbitration court was created for resolving one certain dispute or on a permanent basis (in various organizations, chambers of commerce, mercantile and shipping exchange).

On July 13, 1999, the Civil Procedure Code of the Republic of Kazakhstan was adopted, and shortly before this, state arbitration courts were abolished, the Law «On procedure for resolving economic disputes» was repealed, and that is why, the Civil Procedure Code was applied to economic disputes between legal entities. At the same time, the Article providing for the enforcement of arbitral awards has also become invalid. Such rule was not included in the Civil Procedure Code of the Republic of Kazakhstan of 1999.

The enforcement of such awards was implemented in accordance with the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan № 14 of October 19, 2001 «On Court Practice for the Enforcement of Arbitration Courts».

On December 28, 2004, the Laws of the Republic of Kazakhstan «On International Arbitration» [10], «On Arbitration Courts» [11] and «On Amendments to Certain Legislative Acts of the Republic of Kazakhstan on Arbitration and Arbitration Court» were adopted.

The adoption of laws regulating the arbitration and arbitration courts approved «arbitral procedure» and «arbitration proceedings» concepts by delimitating the contractual subjects to a particular country. Thus, in accordance with Paragraph 4 of Article 6 of the Law of the Republic of Kazakhstan «On International Arbitration», civil law disputes between individuals, commercial and other organizations could be referred to arbitration by mutual consent of the Parties, if at least one of the Parties is a non-resident of the Republic of Kazakhstan. According to the Law of the Republic of Kazakhstan «On Arbitration Courts», arbitration courts resolved disputes only between residents of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan was the only applicable law.

Arbitration courts and international arbitration are not part of the judicial system of the Republic of Kazakhstan and can be formed as permanent institutions or to resolve a specific dispute. These courts allow to resolve disputes more quickly and efficiently, contribute to improving the legal consciousness of the population.

On April 8, 2016, the Law of the Republic of Kazakhstan «On Arbitration» [12] was adopted, which united two previously existing Laws. We can tell about the beginning of a new stage in the development of the arbitration process in Kazakhstan, since the new Law has been put into effect. However, the arbitration was the most developed among them. This form of civil rights protection along with the court, was enshrined in the Civil Code of the Republic of Kazakhstan.

#### *Discussion*

As M.A Romanenko noted: «The US experience in the development of alternative dispute resolution can serve as an example for the development of this institution in our country, since ADR is an excellent means to free an overburdened judicial system from a large number of uncomplicated and minor civil cases. In addition, it is beneficial for the disputing parties from material point of view, because as practice

shows, the case win does not often cover the real costs. The alternative dispute resolution also brings certain costs for the parties, but their amount is almost half the litigation's amount» [1].

The ADR advantages include time saving, as the conflict resolution takes from one day to several months, but not years, as is possible in the judicial system.

Also, the pros include an opportunity of choosing «one's own judge» (arbitrator, mediator, etc.) by whom disagreements will be resolved. This opportunity is provided by various regional, public and private alternative dispute resolution centers, which have lists of such persons with their biography and previous experience. The most distinctive feature of alternative methods is confidentiality.

Unlike court proceedings, which are often open, alternative dispute resolution methods is not kept by recording, and the hearing is held «behind closed doors».

One of the positive aspects of alternative dispute resolution is the opportunity for the parties to control the procedure themselves. When a case is initiated in court, the parties, as a rule, lose control over their emotions and feelings. Also, the further fate of the dispute depends on the parties' evidence, as well as its correct perception by the judge. In the alternative procedures, the parties are actively involved in resolving disputes, as well as in making a final decision on the dispute.

Achieving a mutually beneficial agreement or its failure by the parties is the result of alternative methods. Unlike ADR court proceedings, neither of the parties loses, because a mutually beneficial decision is made.

Despite all the positive characteristics, alternative ways of resolving disputes are certainly not an ideal means. American researchers point to some circumstances that limit the alternative sphere. Thus, it is noted that alternative methods are not appropriate for disputes that include complex legal issues. In addition, alternative methods are ineffective in plurality of parties disputes, because it is difficult to reach an agreement between the two parties and it is almost impossible if they are more. Sometimes a proposal to use alternative methods, coming from one party is considered by the other party as a weak position in dispute, confession of guilt and as avoiding of the state court jurisdiction [1].

As alternative methods are consensual, their use always requires cooperation. On the one hand, this is dignity, on the other, it is a limiting fact. If the parties do not wish to contact each other, the use of alternative methods makes no sense. As a deterrent, they also point to the desire of one of the parties to establish a judicial precedent, to draw public attention to a particular problem or the need for «slow tactics» when the party has a delay in resolving the dispute» E.I. Nosyreva writes [13; 101].

At the same time, the disadvantages mentioned above are minimized and the advantages are increased where alternative methods optimally correspond to the disputable situation and the specific facts of the case. In this regard, the main task is to select an appropriate method from the variety of alternative dispute resolution methods.

### *Conclusion*

Summarizing the results of this study, we can conclude that alternative methods of resolving disputes in the Republic of Kazakhstan are not so long ago. Therefore, the experience of their use is not extensive enough compared to more developed countries.

In this regard, we consider it expedient to develop practical activity on resolving disputes by increasing legal culture of the citizens of Kazakhstan. In addition, the conflict resolution is to be promoted as a science in this process. Fundamental studies of legal conflicts' nature and specifics, the role and importance of law and legislation in resolving them, as well as the reasons for their occurrence, will allow developing the unique technologies for predicting and managing legal conflicts and mitigating their possible adverse effects.

As for practical activities, it is proposed to provide for an obligatory pre-court dispute resolution on mediation categories of cases (on labor disputes, on special lawsuit proceedings, on banking disputes), which will greatly reduce the number of claims brought into court.

It is necessary to organize a single mediation center, which all professional and non-professional mediators will report to. With the help of this center it will be possible to watch the number of disputes resolved with unsettlement agreement, that is, until trial, as well as mediation dispute procedures in courts and many other issues.

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### Азаматтық-құқықтық дауларды шешудің балама тәсілдерінің ұғымы және жіктелуі

Мақалада азаматтық-құқықтық дауларды шешудің балама тәсілдерінің түрлері зерттелген. Зерттеу мақсаты дау-жанжалдарды шешудің балама тәсілдері институтының теоретикалық тұжырымдарына және құқыққолдану тәжірибесінің мәселелеріне кешенді талдау жүргізу, соның негізінде осы саладағы ұлттық заңнаманы жетілдіруге бағытталған ұсыныстарды әзірлеу болып табылады. Жұмыста зерттеудің жалпы ғылыми және арнайы әдістері қолданылады: талдау, синтездеу, абстрактілік, индукциялық, дедукциялық, логикалық және салыстырмалы-құқықтық әдістер. Автор Қарағанды облыстық сотының «Кейбір санаттағы істер бойынша дауларды (жанжалдарды) медиация тәртібімен сотқа дейін реттеу» және «Соттағы келісім тәртібі» атты пилоттық жобаларды Қарағанды қаласы № 3 Октябрь аудандық сотында енгізу бойынша тәжірибелік қызметіне талдау жүргізді. Аталмыш пилоттық жобалар Сингапурдың тәжірибесін зерттей отырып, ондағы сотқа түскен істер бойынша оны қозғауға дейін де, сот ісін жүргізудің барлық сатыларында да тараптарды татуластыру басты міндеті болып табылатын арнайы соттардың қызметіне аса назар аударып отырып, жасалған. Зерттеу жүргізу нәтижесінде Қазақстан Республикасында дауларды балама тәсілмен шешу институтын келешекте одан әрі кеңейту және дәріптеу туралы, одан әрі жетілдіруге бағытталған қорытындылар жасалған.

*Кілт сөздер:* дауларды балама шешу, азаматтық-құқықтық дау, дауларды шешудің соттан тыс тәртібі, медиация, келіссөздер, партисипативтік келісім, аралық сот, төрелік.

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## Понятие и классификация альтернативных способов разрешения гражданско-правовых споров

Целью исследования статьи является комплексный анализ теоретических положений и проблем правоприменительной практики института альтернативного способа разрешения споров и на этой основе выработка предложений, направленных на совершенствование национального законодательства в данной сфере. В работе использованы общенаучные и специальные методы исследования: анализа, синтеза, абстракции, индукции, дедукции, логического и сравнительно-правового метода. Автором проведен анализ практической деятельности Карагандинского областного суда по внедрению пилотных проектов «Досудебное урегулирование споров (конфликтов) по отдельным категориям дел в порядке медиации» и «Примирительные процедуры в суде» в суде № 3 Октябрьского суда города Караганды. Данные пилотные проекты были запущены с учетом изучения опыта Сингапура, где существует специальная категория судей, в задачу которых входит непосредственное примирение сторон при поступлении дела в суд как до его возбуждения, так и на всех стадиях судопроизводства. На основании проведенного исследования сделаны выводы, направленные на совершенствование института альтернативного разрешения споров с перспективой дальнейшего его расширения и популяризации в Республике Казахстан.

*Ключевые слова:* альтернативное разрешение споров, гражданско-правовой спор, внесудебный порядок разрешения споров, медиация, переговоры, партисипативное соглашение, третейский суд, арбитраж.

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