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Mediation as a tool for the settlement of civil legal disputes

The general types of alternative methods of regulation of civil disputes are considered in the article. The authors, giving examples of types of civil disputes among natural persons and legal entities in particular, consider on conciliation procedure of mediation. The sphere of application of the mediation in foreign countries, its positive aspects are given and outstanding moments of the domestic legislation are considered. New approaches to the research of this problem are expressed by the authors in the formulated theoretical positions, also in the proposals to improvement of the legislation.

Key words: mediation, civil dispute, alternative, arbitration, international arbitration, mediation, meditative agreement, mediator, corporate dispute, property dispute, negotiations.

Referring to the new history, it should be noted that the widespread use of mediation procedures emerged in the late 70s — early 80s. the last century. At that time, there was confidence in the universality of the procedure, which is based on the assumption and possibly accurate. That a competent mediator may conduct the mediation process in a variety of fields. Is it true or not, but we can talk about creating a «house industry». In addition, the process of «localization» of mediation («balkanization») for dozens of application areas, each of which has its own culture, organization, qualification requirements, performance standards, the specifics of the market, etc.

According to Jim Melamed, a renowned expert in the field of mediation, the potential of mediation and conciliation procedures in the future the next few years will increase, and an appeal to the mediation will be massive. He writes: «We help people solve problems, and we do it faster, better and cheaper (compared with the court) beyond doubt. A quiet revolution has taken place. Policy, in fact, give preference to double mediation, no doubt. Our culture has changed. We changed. Our time has come» [1; 24].

In fact, the term «commercial conciliation» should be interpreted broadly to cover matters arising from all relationships of a commercial nature, whether contractual or non-contractual [2]. Relationships of a commercial nature include:

- any trade transaction for the supply of goods or services or the exchange of goods or services;
- distribution agreements;
- commercial representation or agency;
- factoring;
- Leasing;
- construction of industrial facilities;
- Advisory services;
- Engineering;
- licensing;
- investing;
- funding;
- banking;
- Insurance;
- exploitation agreement or concession;
- joint ventures and other forms of industrial or business cooperation;
- carriage of goods or passengers by air, sea, rail or road.

Disputes relating to the divorce, family mediation, as well as the attitudes of parents with children is very difficult to bring a legal resolution [3], especially in a crowded ships. In this case, we believe it is more appropriate to speak of «suppression» of such disputes, and not allowing them on the merits. Alas, not in the best position are service custody and guardianship, as well as the courts of other countries, when faced with a conflict between the spouses — of different nationalities. Note that the overall settlement of the family, as well as organizational disputes can hardly be referred to legal services. The first — a family mediation, the relationship of parents with children, conflicts related to inheritance of property; second — labor mediation,

organization of the working space. And then, and another is almost impossible to «resolve» — here it is more appropriate to speak of the «settlement».

Collective labor disputes cannot be resolved in court, in principle — the court may only recognize labor strike illegal, and the decision of labor arbitration is advisory in nature [4]. So, for example, only these two types of conflicts we are convinced of the futility of judicial method «resolve» the dispute — battles continue after court act, is often not satisfied with any of the parties. It resembles a complex corporate dispute, the only way to settle which is the withdrawal of all claims and reaching a settlement agreement [5].

Great demand mediation among school adolescents. In Ukraine, Russia and Moldova are widely known textbook for students and teachers to resolve conflicts Daniel Shapiro. Teenager and school mediation would be an organic complement to the juvenile justice system, focused on education and prevention of deviant behavior. Deviant behavior — doing things that are contrary to the norms of social behavior in a particular community. The main types of deviant behavior are, above all, crime, alcoholism and drug addiction, as well as suicide, prostitution. According to the French sociologist Emile Durkheim, R.D.Benjamin probability of deviations of behavior increases substantially when going on at the level of society weakening regulatory oversight. List of applications of mediation and conciliation procedures can be extended: it is, for example, medical services (in particular, cosmetology), consumer conflicts (especially after the abolition of the mandatory product certification), disputes with banks and insurance companies, conflict behavior of the parties at the stage of pre-contractual disputes (purchase and sale of business, real estate), protection from unfair practices in the negotiations (in particular, the administrative and «corruption» of the resources), etc.

The draft law on conciliation, we can say a few «overripe». Without waiting for the legal framework and government support domestic mediators have long been working in the field of conflict resolution, as demand far outstrips supply. On state mediators can not speak. More alarming: in order to «organize» activities mediators each specialist intermediary will have to be accredited to be included in the list of specialists for specific court a particular area or to work as an assistant referee (assistant mediator) for three years, or consist in self-intermediary organizations, including not less than one hundred members, the payment of contributions hundred thousand commercials, with compulsory insurance professional naturalness somewhere million for three, etc. And all this is done, of course, in order to «weed out random people». If such a «streamlining» of the market will begin mediation, the judicial corruption in in the Republic of Kazakhstan will not be defeated, and the economy will continue to throw a trillion rubles annually on civil disputes, with the index of confidence in the justice one of the five, and even worse. Economy in which to properly collect the debt and to protect property rights is necessary to «make friends» with the judge and the bailiff, and along with the authorities and would be nice — with criminals — has no future, and this country is doomed to stagnation.

In the United States of America there is a government program to stabilize the market residential real estate. Over the past two years Congress and the Legislature of California (California Legislature) passed laws aimed at the extension of the foreclosure on the mortgage and to encourage lenders to restructure the loan, in order to develop milder conditions (Mortgage Foreclosure Crisis). In the «authoritarian» China 20 % of disputes resolved using mediation procedures [6].

As for the domestic market, the worldwide «industry-house» by virtue of homegrown Kazakhstan citizens and the language barrier while «do not notice.» Quality services at the appropriate dispute resolution (ADR (Alternative Dispute Resolutilon — alternative dispute resolution, as they jokingly called «Appropriate Dispute Resolution» — «proper» Dispute Resolution) is very small. Pure Harvard method of principled negotiation does not work.

For example, a party may shy away from dialogue, to use psychological pressure and other unfair practices, prevent the application of objective criteria, or to insist on the criteria that are not satisfied with your opponent. In addition, in the Republic of Kazakhstan is still lacking many institutions within the market economy.

Register unfair partners is far from reality, and membership in the SRO (Self-regulating organization) does not mean anything. Some ratings during the crisis simply paradoxical, and ethics in business trying to replace certificates and diplomas (for example, a professional accountant: see. Example below). Marshals Service can be a law-abiding citizen with a gun and did not recover in time paid a fine of 5000 tenge, and at the same time to put «under the carpet» writ of half a million tenge against the firm-by-night (or «friendly» companies). Arbitration practice is often at odds with the practice of courts of general jurisdiction. One example — the consequences of termination and non-performance of the obligation secured earnest money. The arbitral tribunal shall recover from the debtor two deposit and the total — only one, because of «doubts

as to whether the amount earnest money» — it is called «advance», even if the debtor used the word «deposit» in the contract and the receipt a few times.

In the Russian Federation reviewed annually approximately 10 million cases in civil proceedings. These cases are not connected with the relations of power and subordination, tax, administrative or criminal legal relations or complaints against officers — and therefore, these conflicts can be resolved by means of extrajudicial (pre-trial) procedures and alternative methods. About 500 thousand Russians annually participate in labor disputes in the past two years [7].

How much is the dispute in a court? At least 10 thousand tenges — in the form of payment of a Representative or loss of working time to the conflict. This is in the case of individual disputes. If there was a conflict between the organizations involved in a whole team of lawyers and managers. Total courts, there are three, plus the ability to appeal to the Supreme Arbitration Court of the Republic of Kazakhstan. Often files are returned for re-examination. The cost of a corporate dispute resolution may be millions of Tenges. In our opinion, we can start from a conservative estimate of 60 thousand Tenges on each side for all the courts to resolve the «average» of the conflict.

Here, incidentally, does not include labor disputes, which in some countries are moving in the mass actions of protest and social costs to the economy is very expensive (as, for example, strikes in Greece).

Now the state judicial system allows 99 % of civil legal conflicts in the society. This state of affairs — a monopoly on justice. Official statistics show that one has to judge about 140 cases in the last month. Whether it is appropriate in this situation, talk about the quality of services to resolve disputes? Not surprisingly, the level of trust the Kazakhstan citizens to justice is very low: in 2006, only one in five citizens expressed confidence in the domestic justice; target indicator in 2007 — one of four.

Unfortunately, in recent years tracked only of costs on the judicial system, but not its efficiency. Well-known methods of sociological research (the questionnaire for respondents parameters, indicators, scales) since 2007 have ceased to apply to assess the effectiveness of this program. Realistic painting — is primarily indicator of public confidence in justice, the proportion of claims of citizens, shall not be considered on the merits, the ratings of specific corruption courts and possibly the judges. All this is easily measurable and scientific research, but not investigated.

On the other hand, described a social problem very poor dispute resolution offers huge opportunities for the professional activities of mediators and professional intermediaries.

How much can earn a mediator? If Republic of Kazakhstan will overtake even China, where the proportion of disputes dealt with «properly» (ie, using ADR), is 20 %, the market neutral intermediary services will be about 20–30 million Tenges per year. We made the assumption that reward professional mediator is only 10 % of the costs of the conflicting parties, the cost of dispute resolution services. Explains that for the calculation of the service market neutral intermediaries (of their remuneration) are taken 10 % of the 20 % share of the company's annual losses as a result of civil disputes.

For comparison, the consulting market in Russian Federation in the pre-crisis 2008 amounted to 65–70 million rubles [8]. Suppose that in the first years after the adoption of the Law «On mediation, conciliation procedures» about ten thousand professionals whose activities are somehow linked to the ADR will satisfy the market demand for this specific market — Or an average of 2,4 million. Rubles revenue for each. If we take the analogy of the work of management consultants, where the share of the wage fund is about 50 % of revenue, the annual salary of an «average» neutral intermediary of 1.2 million rubles or 100 thousand rubles monthly net personal income tax. Of course, in megapolis fee will be higher in the periphery — is below. Of course, «not all brokers are equally successful»: in some cases will be painted for many weeks in advance, while others — calm. Achievement indicators developed capitalist countries the share of disputes governed by «properly» (ie, 70–80 %), offers opportunities for work in the market for ADR (It has been assumed that 80 % of civil disputes submitted to the decision of prof. Intermediaries whose remuneration is approximately 10 % of the price of the conflict, and that the market operates about 100 000 of them professional intermediaries). On average, this amounts to 960 thousand Rubles revenue for each. The number of housing of such specialists will be comparable to the judges, and the quality of their services for the resolution of disputes objectively can only get better, as guaranteed by the voluntary request of a party to the conciliation procedure, selecting the best option of settlement, the ability to terminate the conciliation procedure at any time. Finally, turn on the mechanisms of competition, which, perhaps, will make our «avenging justice.» Introducing one acquittal of one hundred, to turn toward the interests of the conflicting parties. Note that it is assumed that the increase in the number of «players» in the market reduces the revenue of each of them — compare the remuneration of the first «ten-thousand».

The business community and the citizens are willing to pay for quality services. They do not want the verdict to be submitted within six months, and even later, and often are not satisfied with any of the parties to the dispute. Solvent populations are unlikely on their own to the court where there is no wardrobe, rude on the phone, searched at the entrance (this is called «examination»), where on the bench have to sit for hours, waiting for the overloaded judge between the two criminal cases take the time to consider, for example, the division of property of the spouses. Such social groups choose paid, but more economical alternative, allows you to select a mediator to declare him a «challenge» (ie stop conciliation at any time), and to co-own solutions (mediator recommends a hand — selected). Once again, let us explain: Litigation costs include not only the state taxes, but the main thing — the loss of personal time, nerves and energy.

Ideally, from the court of general jurisdiction of the arbitral tribunal shall withdraw completely civil disputes (for this and created an alternative in the form of professional intermediaries.) Courts will be able to better focus on the consideration of administrative, antitrust, tax, criminal cases. This will remove the seriousness of the problem of judicial corruption.

As for the poor, give aware that in most cases justice for them simply is not available. Even if they find the money to pay the state tax, which has risen about twice, it will be unable to make a claim, does not overcome the obstacles in the form of «form and content» claim will not understand «ciphers» that evading court determinations. Even if they are lucky enough to pass these «filters» of domestic justice, the «test» before a judge for knowledge «judicial ceremony» — a special vocabulary and symbols of behavior that distinguishes the from «alien» in the courts, they have clearly failed. If the citizen begins to cry and express all of the judgment that «boiling», it will be fined for contempt of court and will withdraw from the hall.

Some readers may object, saying that how some ordinary citizens and reach to the Constitutional Court, and to the European? Reasonable question. These people were defending the best lawyers and attorneys who worked pro bona (for the benefit of society) — free of charge or for a nominal fee, that is primarily for reasons of image, self-promotion or professional motivation. In any case, to reach the highest courts of the unit, and requires assistance to millions. And while in the Republic of Kazakhstan conditions are created for non-profit organizations that provide professional assistance to the poor, will not allocate funds to pay good lawyers and lawyers, you can forget about access to justice for citizens insolvent. At best, their choice is not rich: Call to free (usually novice) lawyers who give the poor 'tied'; seek legal advice where they work student interns (the result will be no better than a novice lawyer); Finally, you can declare a hunger strike right in court — sometimes helps. This is not cynicism, and a huge social problem, and it is hardly fair to blame the mediators that their services are not available to everyone.

However, even the mediators work pro bona, helping the poor to a limited extent — also for reasons of professional motivation or desire to resolve the «beautiful conflict.» However, before they should think about the business acquisition of solvent clientele: after all, no rent, no communication services, no furniture to office equipment they will not provide one free of charge, as opposed to those same judges — is the question of equal starting conditions.

That situation is no alternative promotes judicial corruption. The best alternative if a negotiated agreement (NEA) becomes the formation of the coalition parties to the dispute with the judge, whether it makes sense to negotiate? Bulkiness of procedural rules, their unacceptably slow reform, consideration of the allotment to a judge himself, contrary to the principle of Roman law «nemo iudex in causa sua» (no one can be judge in his own case), the emphasis on paper work in the courts, when a higher court quietly returns appellant in cassation decision, indicating the absence of the required solutions (so-called «art of making a determination of abandonment of the case without the motion based on inconsistencies in form and substance of the claim» the whole is a complex of obstacles and barriers makes it easy to hide the most egregious violations of the law under the beautiful «ceremonial», only simulating justice. most important thing — the entrepreneurs and citizens almost no choice: only about 1 % of the cases dealt with in the arbitration courts and using alternative dispute resolution methods. Such a low figure can be attributed to measurement error. If your opponent is tight «friends» with the judge, police officer, prosecutor, and along with the authorities and management, as well as criminals, you will agree, short courses mediation and knowledge gained from their Western colleagues mediators is of little help in this situation. International Certificate of mediator in the Kazakh reality can be put on the shelf next to the other shelf-ware (from the English. Shelf-ware — Literature for «far shelf» or long box, similar to the soft-ware — software, hardware — «iron»). But there is a way out — it is to attack fraud opponent.

It is easy to teach mediation, beautiful classical principles, about which so much has already been said. Difficult to prepare practitioners (we call them «professional intermediaries»). They are not neutral, their

task — to protect the weak side of the conflict, they have a good command of the arsenal to counter «dirty tricks.» As soon as the dialogue, the role of a professional mediator is transformed into the role of a neutral mediator — the mediator, because the deal worked out by the parties voluntarily and without coercion will be stronger.

And business people and ordinary citizens when they bury «the hatchet» and begin to openly discuss problems become compliant and grateful (this applies even to persons related to the criminals with his peculiar subculture). However, to overcome the unnecessary layers — that is the complexity and art.

As for the upper classes of Kazakh society, they have long been «put an end» to the domestic justice. The inability of the Kazakh substantive and procedural law to the practical needs of the business turnover has led to the fact that entrepreneurs are trying at all costs to avoid the courts. Those who «can choose» establish nonresident legal entities, in order to be able to use English law, which is «soft» in the selection of the design contract, but «hard» in the performance of their obligations. Business is forced to conclude contracts in foreign jurisdictions and there to seek protection in the courts of arbitration.

If we talk about meeting the massive demand of the middle class Kazakhstan citizens to resolve conflicts, the role of the mediator is difficult to overestimate.

In the apt observation of Robert Benjamin (Robert D. Benjamin holds a degree in Social Sciences, a member of The Straus Institute for Conflict Resolution, Pepperdine University School of Law Practitioner mediator and consultant in conflict management since 1979.), many people view art as something a little more scenery, designed to close an empty wall space. Some artists, so serve this market and paint pictures of comfortable, pleasant and peaceful scenes [9]. Like them, some mediators are limited to «pleasant» conflicts that can be resolved by inviting people to the «round table» in an atmosphere of peace and good intentions. However, the greatest art is often made in the resolution of conflicts is complex, and the greatest mediation — to be in their midst. And artists and mediators in conflicts should be knowledgeable and able to consider the vital question with different levels. Both of them rely on the opportunity to feel the nuances, subtleties and ambiguity of the case, both should develop an internal sensitivity and speak in plain language. Any negotiator, mediator or manager conflicts can learn artistic vision of the dispute. Internal reaction to conflict, uninterrupted analysis and presented visually, provide fertile ground for mediators penetrated and learned to think from different perspectives. Plenty of opportunity for creative ways to select the resolution of the conflict often lie in the least expected places. Here is an excerpt from the publication of D. Melamed. He asks the rhetorical question: «Can increase the benefits of mediation in these difficult times? From my direct experience of everyday answer is undoubtedly «Yes!» Mediation has established itself as «the best, fast and economical» alternative, but these market quality are relevant more than ever. «Especially in a time of crisis, when the demand for alternative dispute resolution exceeds supply (Traditional trial), out of court (pre-trial) conflict resolution is not part of the legal services.

The world's biggest corporation («General Electric», «Motorola», «Toyota» and many others) agree that more than 50 percent of disputes resolved through mediation. In the USA there is a National Institute for resolution of disputes, which is developing new methods of mediation, there are both private and public service mediation. Has a great influence American Arbitration Association (American Arbitration Association), which adopted its own rules of arbitration (arbitration) and mediation are used, including the consideration of internal disputes. The conciliation procedure with a neutral mediator is very popular in the UK, there is even a special service — hotline where you can call from any part of the country, characterized by conflict, their preferences for a mediator, and offers a list of professionals that are suitable to your requirements. In terms of the mandatory procedure Britain went on a compromise: if a party waives the proposed court mediation, it shall bear all legal costs, even if won. In Germany, mediation harmoniously integrated into the justice system. For example, mediators are working directly in the courts, significantly reducing the number of potential lawsuits. Today, mediation is integrated in the German courts, not only in family matters, but to the ordinary courts, administrative courts, etc. In most German law schools introduced a permanent course of mediation. That is, everyone who comes to the law school, is undergoing mediation. In India, the agreement reached during the mediation have the same effect on arbitration (arbitration) decisions, regardless of whether the procedure is excited within the already existing legal proceedings or not. Mediation procedure, in particular, mediation as a tool to resolve internal disputes have traditionally has been common in Japan. Commitment to the business community in Japan Alternative dispute resolution has traditionally been associated with the ethical side — the negative attitude to the choice of the state court as a way to resolve the differences [1; 23].

Mediation in the Republic of Kazakhstan — is a new perspective, new opportunities, it is the humanization of our society. Even discussed the problem of mediation at a meeting of the Council of Legal Policy under the President of the Republic of Kazakhstan in September 2007. It was considered appropriate to develop conciliation procedures in criminal and civil proceedings. Are there any prospects of mediation in Kazakhstan? I hope there is some. This is a global trend and it wanted to be also apparent in Kazakhstan.

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Делдалды келісу азаматтық-құқықтық дауларды шешудің құралы ретінде

Мақалада азаматтық-құқықтық дауларды шешудің кең тараған баламалы тәсілдердің түрлері қарастырылды. Авторлар жеке және заңды тұлғалар арасындағы даулардың түрлеріне мысал келтіре отырып, жаңадан пайда болған делдалдық тәртібіне кенінен тоқталды. Келістіру тәртібінің басқа шетел елдерде қалай қолданылатынына, оның артықшылықтары мен заңда бекітілмеген олқылықтарына талдау жасалды. Авторлардың осы проблеманы жаңа тұрғыдан зерттеуі теориялық тұжырымдарында, сондай-ақ заңнамалық жетілдіру бойынша ұсыныстарында жан-жақты айқындалды.

Ш.Т.Байкенжина, Г.А.Ильясова

Посредничество как инструмент урегулирования гражданско-правовых споров

В статье рассматриваются основные виды альтернативных способов урегулирования гражданско-правовых споров. Авторы, приведя примеры гражданско-правовых споров между физическими и юридическими лицами, в частности, рассматривают примирительную процедуру посредничества. Выделена сфера применения процедуры посредничества в зарубежных странах, приводятся ее положительные стороны, а также неурегулированные пробелы в отечественном законодательстве. Новые подходы к исследованию данной проблемы выражаются в сформулированных авторами теоретических положениях, а также в предложениях по совершенствованию законодательства.

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(E-mail: alua76@mail.ru)***Development of the legislation on consumer protection**

The questions connected with development of the legislation of Kazakhstan on consumer protection are considered in the scientific article. Each statutory act which was carrying out at different times legal regulation of these relations is consistently analyzed. Along with the positive moments also those parties of standard material which didn't answer realities of time are noted and were replaced with new laws. The list of bodies and organizations which are capable to consider and resolve disputes with participation of consumers for their protection is provided in work. All mechanism of consumer protection is considered. The conclusion that in general the legislative base about consumer protection developed becomes a result of work.

Key words: customer satisfaction, protection, interests, liabilities, unscrupulous seller, service, works, goods, buyer, legislation development.

The modern Kazakhstan legislation on consumer protection inherited some lines of the legislation of the Soviet period.

Legal regulation of the relations on satisfaction of material and cultural requirements in the USSR was always carried out by the acts of the civil legislation which were base for a regulation of consumers' rights. These acts established the rights, duties and responsibility of subjects of the contractual relations with participation of citizens. Thus, according to point 1, 3 and 4 Article 77 Bases of the civil legislation (1991) the buyer to whom the thing of improper quality is sold, had the right to demand at the choice if the seller didn't stipulate its shortcomings at sale, replacements of a thing with a thing of appropriate quality, gratuitous removal of defects or compensation of charges of customer for their correction, or proportionate reduction of purchase price. The buyer could also instead of the requirements specified in point 1 of this article of Bases to dissolve the contract and, having returned a thing of improper quality to the seller, to demand from him the return of the sum paid, and if satisfaction of these requirements did not cover his losses, he was right to require their compensation. An important guarantee of consumer protection was the rule about invalidity of conditions of the contracts of household hire and the household order limiting the rights of citizens in comparison with the conditions provided by standard contracts, etc. provided in Kazakh SSR [1].

However along with the positive moments, the civil legislation wasn't specially calculated on regulation of the questions connected only with protection of the rights of citizens. Being the general legal base for the special norms directed towards protection of the rights of citizens, acts of the codified civil legislation are called to give a general character to basic formulations of the agreements given in a division «Obligation