

UDC 343.347

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Mediation as an alternative form of dispute resolution and Litigation

In article the analysis of foreign and Kazakhstan legal practice of application of alternative ways of the solution of the conflicts is given. It is necessary to distinguish mediation from possible ways of settlement of disputes. The author opens concept and essence of mediation, the principles of carrying out mediation, analyzing the law of the Republic of Kazakhstan «About mediation», of January 28, 2011. In article are noted both advantages, and arising difficulties when carrying out pre-judicial settlement of disputes by means of mediation mechanisms. Questions of applicability of mechanisms of mediation according to the legislation of the Republic of Kazakhstan are investigated.

Key words: legal practice, mediation, particular mediations, civil society, disputes, judicial authorities, rehabilitation, judicial system.

The analysis of foreign legal practice shows that judicial proceedings exist for pronouncement of the decision which is considered unique from the point of view of law, thus personal interests and desires of each of the parties on circumstances of past tense are considered. Applications of mediation are those circumstances in which the main ones are not legal disputes, connecting them with the past, but the interests of both sides, which are important for their future and the preservation of normal relations.

It is fair to note that similar disputes of permission of criminal and legal disputes were provided also by a common law of Kazakhs. And in difference from the European law it had a number of advantages. First of all the common law of Kazakhs accurately defined the subject of a crime — it could be the person only.

Secondly it was more humane — it was not allowed to kill a man, even if he was caught as red-handed while stealing [1].

For disclosure of this subject it is necessary to open the definition «mediation». Mediation is understood as the dispute settlement procedure (conflict) between the parties with the assistance of a mediator in order to achieve a mutually solution, implemented by voluntary agreement of the parties [2].

Mediation can be applied on the disputes arising from civil, labor, family and other legal relationships with participation of natural and (or) legal entities, and also during criminal legal proceedings on cases of crimes of small and average weight.

The president of the Republic of Kazakhstan N.A.Nazarbayev in his article «Social modernization of Kazakhstan: twenty steps to society of general work», pays attention to the need of forming of the effective multilevel mechanism of the regulation of contradictions in the sphere of labor, civil, family and other legal relationships» [3].

Mediation in his modern understanding found reflection in the directive of the Council of Europe which came into force in May, 2008 [4]. The directive is important for mediation development in the world in general. It is approved by 27 members of EU and it means that the most part of the western countries is recognized it as a reference point. In all countries process of mediation has a lot of similar, but it has also a lot of distinctions, features and one of important aspects in it is a formation of the legal base.

It is possible to track a universal tendency: more and more states create a legislative base for alternative ways of settlement of disputes, in particular mediations.

Who is a mediator? Mediator is an intermediary promoting the parties in settlement of disputes. It is not an arbitration court. He induces the parties to statements. At the same time he is also a psychologist, that is the sociologist who doesn't dictate the decision but gives the chance to the parties to state the look on a bet and the conflict.

Mediation organizes access to justice, increases its efficiency. Mediation cannot be included in the trial, where the results of mediation are taken into account. The definite role in mediation is played by the organizations of civil society. Organizations of civil society play a definite role in the mediation. All this contributes to raising the legal culture and the country's withdrawal on the qualitative level of development.

The principles of mediation include:

1. Voluntariness.
2. Equality of the parties of mediation.
3. Confidentiality.
4. Independence and impartiality of a mediator.
5. Inadmissibility of intervention into mediation procedure.

Questions of procedure of mediation alternative to judicial proceedings are very actual during reforming of judicial system and law enforcement agencies, a humanization criminally — legal policy of the state [5].

While speaking at the 5th congress of the Union of Judges of the Republic of Kazakhstan the President N.A.Nazarbayev told that it is necessary to carry out the work directed on reduction of number of disputes, subject to consideration in a judicial order. He noted the importance of introduction of alternative ways of settlement of disputes, including conciliatory procedures and mediation.

In confirmation of the abovementioned law «About mediation» has been developed and adopted, which was signed by the President of the Republic of Kazakhstan Nursultan Nazarbayev, 28 January 2011, as well as the concomitant of the Law «Amendments and additions to some legislative acts of Kazakhstan on issues of mediation» thus, the legislation is intended to introduce the country's alternative form of conflict resolution and litigation. With adoption of this law the state provided to participants of a civil turn the additional tool for settlement of dispute [6].

The interesting moment in the specified law at present are the provisions specified in item 5 and 6 of Art. 27 of the law «About Mediation». It is fixed there that at achievement of the agreement on dispute settlement during civil process the state tax is subject to be returned to the payer. Such a law will certainly push trainees to use of procedure of mediation [7; 27–29].

Nobody can force someone to enter mediation process, to participate in this process, to conclude any agreements and then to follow these to agreements, as the appeal to mediation is a voluntary phenomenon.

The law «About Mediation» establishes a ban on mediation application on disputes if they infringe or can infringe on interests of the third parties who aren't participating in procedure of mediation, the persons recognized by court incapacitated, in cases when one of the parties is the government body, and also on criminal cases about corruption crimes and other crimes against interests of public service and public administration.

Mediation in the Republic of Kazakhstan can be applied in the following cases:

1. At settlement of disputes (conflicts) arising from civil, labor, family and other legal relationships with participation of natural and (or) legal entities. Thus paid state tax is subject to be returned to the payer partially or completely in case of conclusion of agreement about dispute settlement as mediation (item 3 of Art. 106 of the Code of civil procedure of the Republic of Kazakhstan) [8; 55].

2. At the settlement of disputes, considered during criminal legal proceedings, for small and average weight. On achieving the agreement of conflict settlements which is concluded in a mediation order in criminal trial that finally serves as the circumstance excluding or allowing not to carry out criminal prosecution.

As a result of successful mediation, according to art. 27, the parties come to the agreement on settlement of dispute (conflict) which is made out in writing and is subscribed by the parties. Such an agreement has to contain the data of the mediations given about the parties, a subject of dispute (conflict), a mediator, and also the conditions of the agreement coordinated by the parties, ways and terms of their execution and a consequence of their non-execution or inadequate execution.

Agreements on settlement of dispute (conflict) are treated as public — the legal transaction which is subject to execution by the parties in a voluntary order; responsibility for non-execution of such transaction comes according to the legislation of the Republic of Kazakhstan.

What is possible to carry to primary characteristics of mediation are the following:

1. Confidentiality (in permission of collecting obligatory participation of witnesses isn't required).
2. If judicial proceedings are based on respecting the rule of law and on collected proofs (for example, they are based on already perfect facts), mediation is directed to the future, that is, it is focused on subjective interests of the parties.
3. Achievement of the compromise solution which will be mutually advantageous to the parties.

4. Mediation assumes accommodation of interests of the parties with participation of the third disinterested party.

Despite a number of advantages, there are also difficulties in carrying out pre-judicial settlement of disputes by means of mediation mechanisms.

First of all, it is a process of preparation for mediation. Need to discuss, solving a difficult situation where there has to be a place to various points of view, often incompatible view of events or options of a get-out and it is the most difficult in preparatory process to carry out mediation.

Everything in mediation is extremely voluntary. It should be noted that not always the parties correctly understand each other. Often the parties are ready to make a compromise, but some moral installations, such as personal, national and others prevent to apprehend arguments of the opposite side. It is in that case quite possible to address to the specialist in permission of the ways where the main objective would be overcoming of such installations and orientation arguing on search of mutually advantageous permission of the arisen problem.

The concrete agreement becomes result of successful mediation reached on the basis of discussion and the arrangement. The principle of self-determination of the parties remains decisive during the whole mediation. Decisions get force only if each separately taken participant recognizes them that. Having studied the history of emergence of mediation, analyzing their development at the present stage, the authors have come to conclusions and defined some problems of realization of institute of mediation in the Republic of Kazakhstan.

- Capacity of institute of mediation is used not fully, despite that the law was adopted. As Z.H.Baymoldina — candidate of juridical sciences, professor, the deputy minister of justice of the Republic of Kazakhstan, notes among factors which constrain development and further distribution of institute of mediation, it is possible to call a lack of visibility of the population of opportunities and advantages of alternative settlement of disputes [9].
- The mentality of people is focused more on the judgment of questions, than on alternative permission of the legal conflicts.
- Imperfection of the legislation on mediation which came to light for such a short period of its realization is observed.
- There is no close interaction in the field of permission of the legal conflicts between government bodies and institutes of civil society that is shown in insufficient support of institute of mediation from the state.
- There is no financial support of the state. It would be desirable to support mediation institute by means of such mechanisms, as granting soft loans with low interest rates for those organizations which begin the activity in this sphere, and also their release from taxes.
- There is no due assistance and the information help with advance of procedures of mediation from government bodies (vessels, judicial authorities).
- The following factor constraining development of mediation is availability at a price of services as doctor of juridical sciences, professor S.G. Pen notes: «Possibility of granting the mediation of services on a free basis for participants of criminal trial at the expense of means of the republican budget» [10] has to become one of the major priorities in the sphere of criminal legal proceedings.

Continuing this idea candidates of juridical sciences D.Amurtaev and G.Bekbasov suggest to provide the mediation of services on a free basis not only for participants of criminal trial, but also for affairs separate to category:

- 1) at compensation of the harm done by death of the supporter, a mutilation or other damage of health connected with work;
- 2) to participants of the Second World War and the persons equated to them, the military personnel of conscription service, disabled people of the 1st and 2nd groups, pensioners on age if the dispute isn't connected with business activity;
- 3) to citizens concerning collecting the alimony, pensions and grants, rehabilitation, receiving the status of the refugee, minor, without parental support [11; 41–43].

- It would be desirable to adjust the corresponding registration and the accounting of the affairs solved in out of a judicial order, for the analysis of practice of pre-judicial settlement of disputes.

We believe that there are considerable prospects of development of institute of mediation in the Republic of Kazakhstan.

1. First of all development of institute of mediation will allow conciliatory procedures in the form of settlement agreements and application, to become the catalyst of reforming of the Kazakhstan judicial system.
2. It is thought that it is necessary to adjust work on informing on mediation institute through mass media that will provide inflow those wishing alternatively to resolve arising disputes and the conflicts.
3. On the whole we believe the development of institute of mediation will allow to raise as well as civil consciousness and promote increase of legal culture of citizens of the Kazakhstani society that «Kazakhstan – 2050» answers the common objectives set by the President of RK in strategy [12].

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Дауларды соттан тыс реттеудің балама түрі ретіндегі делдалдық

Мақалада дау-дамайлы жағдайларды шешудің баламалы тәсілдерін құқықтық тәжірибеде қолдану бойынша қазақстандық және шетелдік тәжірибеге талдау жасалды. Дауларды шешудің ықтимал бір жолы ретінде медиацияға назар аударылған. Авторлар Қазақстан Республикасының 2011 жылғы 28 қаңтарда қабылданған «Медиация туралы» Заңына талдау жасай отырып, медиацияның жалпы ұғымы мен мәнін, оны жүзеге асырудың қағидаларының мазмұнын ашып көрсетті. Медиацияның артықшылықтарымен қатар, дауларды медиация механизмі негізінде сотқа дейін реттеудің қалыптасқан қиыншылықтарын да зерделеді. Сонымен қатар Қазақстан Республикасы заңнамалары негізінде медиация тетігін қолдану мәселелері де жан-жақты зерттелді.

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Посредничество в качестве альтернативной формы разрешения споров и судебных разбирательств

В статье дан анализ зарубежной и казахстанской правовой практики применения альтернативных способов решения конфликтов. Отмечено, что среди возможных способов разрешения споров следует выделить медиацию. Авторами раскрыты понятие и сущность медиации, принципы проведения медиации, проанализирован Закон Республики Казахстан «О медиации» от 28 января 2011 г. В статье отмечены как преимущества, так и возникающие сложности при проведении досудебного урегулирования споров с помощью механизмов медиации. Исследованы вопросы применимости механизмов медиации согласно законодательству Республики Казахстан.

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UDC 342.5 (574)

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The constitutional council of Republic of Kazakhstan in sphere of protection of human rights

The given clause is devoted a role of the Constitutional Council of Republic Kazakhstan in creation of the right of the state. For this purpose authors of the clause analyze such forms of law-making of body of the constitutional justice as Constitution interpretation, check of constitutionality of legal acts. Authors open a question on an active role of the Constitutional Council in sphere of protection of the rights and freedom of citizens of Republic Kazakhstan. In the clause the great value in activity the Constitutional Council of Republic Kazakhstan which the decisions positive impact on evolution of all system of law makes is marked; formulates general principles of the right which should consider state bodies in the decisions; develops recommendations for the legislator; gives direct instructions on necessity of standard settlement of this or that question.

Key words: Constitution, Constitutional Council, legal act, law, solution, the decision, constitutional control, constitutional rights and freedoms of citizens.

Solving the problem of the human rights is not only referred to enlarging of range of human being and citizen rights and freedoms, but also set in the Constitution of the Kazakhstan, or strengthening their guarantees. In fact the problem concerns considerable renovation of the whole concept of human being, citizen rights, duties and the practice of their constitutional realization. It is extremely important in the course of such process to take into account both intergovernmental and international aspects of the problem stipulated by the character of the researched problem.

One of the important legal guarantees in securing human, citizen rights and freedoms in the Republic of Kazakhstan is the Constitutional Council, set up in accordance with the new Constitution and which is an independent state entity to provide acting regime of constitutional legitimacy. In order to carry out its main task the Constitutional Council must defend and secure human, citizen rights and freedoms, set in the Constitution, thus proving constitutional legitimacy regime.

First in its history the newly adopted legislation gives enforcement powers to the Constitution of the Republic of Kazakhstan. It is the very positive fact. Such function is stipulated by the juridical nature of the