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## Implementation issues of mediation as a legal institution in the Republic of Kazakhstan

*Annotation. The article considers the issues and prospects of development of mediation institution in the Republic of Kazakhstan. Consideration of the effectiveness of the implementation of the institution of mediation and its problems is one of the most highlighted topics in science, law enforcement practice and educational literature. The author believes that the number, complexity and the scope of the disputes is increasing so much that the judicial system is no more capable to provide objectively their proper solution, while successful implementation of mediation in judicial procedure can be regarded as more improved, effective, universal and adjusted judicial form of protection of violated or contested rights and legitimate interests.*

*Key words: mediation, mediator, violated rights, disputed rights, restorative justice.*

Mediation is one of the technologies of alternative dispute resolution (ADR) involving third neutral, unbiased, not interested in this conflict side presented by a mediator, who helps the parties to develop a certain agreement on the dispute, while the parties fully control the process of taking a decision on the settlement of a dispute and the conditions for its resolution. Consideration of the effectiveness of the implementation of the institution of mediation and its problems is one of the most highlighted topics in science, law enforcement practice and educational literature. At present, the process of Kazakhstan's integration into the world community directly touches upon the issue of the main mechanisms for the implementation and application of international humanitarian and legal standards in the current legal system.

To date, the most perfect, effective, universal and optimal is the judicial form of protection of violated or challenged rights and legitimate interests. However, in the current conditions of intensive development of all spheres of society's life, there is a growing complication in social relations, the result of which is an increase in the clashes of interests of participants in these relations and the qualitative complexity of legal disputes. The number, complexity and scope of disputes are so great that the judicial system is objectively incapable of ensuring their proper resolution. In Kazakhstan, such an alternative to court sessions as mediation — the solution of civil disputes without trial and investigation — is still very little developed. However, many «advanced» citizens advocate for its supremacy over the «standard Themis».

In the light of the implementation of the Concept of the Legal Policy of the Republic of Kazakhstan for 2010–2020, the issue of introducing elements of restorative justice into the procedural legislation and law enforcement practice (mediation, extrajudicial settlement of offenses) is being updated. The need for its solution is conditioned both by the humanization of the criminal policy and by the need to optimize the procedural procedures. Speaking about the prospects for the introduction of mediation, it is necessary, first of all, to bear in mind that restorative justice is a special direction for the development of justice. Currently, this term implies and the emerging practice, and ideological position, and the world movement.

The problem of introducing elements of restorative justice is a complex, complex problem, therefore its solution should be, in our opinion, weighted. First of all, it is necessary to determine the scale of the implementation of the very paradigm of restorative justice. Reconciliation varies in different ways in the justice system, which depends on the legal and cultural traditions of a particular state. For example, in a number of countries, religious as well as community justice has contributed to the introduction of mediation.

Kazakhstan historically had a form of justice, containing elements of mediation, - courts of biys. However, the subsequent development of the forms of judicial proceedings took place in such a way that one of the basic principles of justice in criminal cases was the principle of the

inevitability of criminal punishment. It is necessary to conceptually define the legal basis for mediation. In order to avoid excessive regulation of mediation and considering the existence of various approaches to it, the recommendations of the Council of Europe do not invite states to necessarily reflect mediation programs at the legislative level. However, the possibility of mediation should, in our opinion, be officially fixed, as the legislation should promote the use and development of mediation. In recent years, the idea of applying mediation in the criminal and civil proceedings has been actively disseminated.

In the criminal process, mediation is seen as the reconciliation of the victim of crime and justice and has become widespread in the West as «restorative» justice, mainly for juvenile offenders [i]. In the civil process, mediation is viewed as conciliatory procedures between the parties and is basically reduced to an amicable settlement.

On the settlement agreement in the Civil Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the «CPC»), it is said quite modestly. It is mentioned in Article 193 of the CPC (on the approval of the settlement agreement, the court issues a ruling that simultaneously terminates the proceedings) and in Article 247 of the CPC (the settlement agreement as the basis for the termination of proceedings in the case).

More developed is the procedure for a settlement agreement in arbitration (arbitration) legislation. Article 27 of the Law of the Republic of Kazakhstan of December 28, 2004 «On International Commercial Arbitration» stipulates:

«1. If the parties settle the dispute during the arbitration proceedings, the arbitration shall terminate the proceedings and, at the request of the parties, fix this settlement in the form of an arbitral award on agreed terms.

2. The award on agreed terms shall be made in accordance with the provisions of Article 28 of the given Law (the form and content of the award). Such an award shall be enforceable in the same way as any other award on the merits of the dispute».

A similar norm is fixed in the Law of the Republic of Kazakhstan of December 28, 2004 «On Arbitration Courts» (Clause 3, Article 34).

In Russia the situation is better, although in the textbooks on the civil and arbitration process of Russia, the amicable agreement is also usually only mentioned as the reason for the termination of proceedings in the case. Nevertheless, this topic is beginning to be discussed in the academic and scientific literature, there are theses on this topic [ii, iii, iv], and scientific papers, although they are not very numerous [v], are mostly scientific and practical articles [vi].

In science and in practice, an amicable agreement is valued equally. It is seen as a means of protecting the rights, two (many) third-party transaction (contract), voluntary refusal from a public procedure - litigation or executive procedure, the legal fact of civil law is a transaction as a result of a conciliation procedure [vii].

It should be noted that the settlement agreement is not regarded as a conciliatory procedure, much less as mediation. How correct is the use of the term «conciliation procedures (mediation)» and consideration of the settlement agreement in the context of alternative dispute resolution? To answer this question, it is necessary to determine the correlation of concepts: «amicable agreement», «conciliatory procedures», «mediation». We believe that the concepts of a peace agreement and conciliatory procedures should not be identified with the notion of mediation. Despite the fact that there is a connection between them, of course, the meanings of these concepts vary significantly.

An amicable settlement is not mediation, and not a conciliatory procedure. This is the result of a variety of procedures. An amicable settlement can be concluded as a result of negotiations. Hence, we have this kind of dispute settlement, like negotiation. The amicable settlement can be the result of conciliation procedures, which, according to the CPC, will be imposed by the court. Accordingly, we obtain a kind of dispute settlement like reconciliation. The judge or the parties themselves can involve a mediator to reach a settlement agreement. Then there will be a kind of dispute settlement like mediation.

Thus, mediation is an effective and profitable procedure in many aspects, it gradually takes its place in the sphere of dispute resolution. There is a need for a more precise and systematic development of the regulatory framework, as well as a concretization and a more detailed approach to the procedure and its subjects. Mediation in Kazakhstan is a necessary institution, since our modern state is actively developing in all existing spheres, and mediation, in its turn, as a modern method of settling disputes will help citizens to improve their quality of life.


**ТҮЙІН**

Мақалада Қазақстан Республикасының медиация институтының жүзеге асыру мәселелері қарастырылады. Автор даулардың күрделігі мен көлемдігінің ұлғаюы — сот жүйесі оларды дұрыс шешуде толық қамтамасыз ете алмайды, ал сот өндірісіндегі медиацияның сәтті имплементациясы заңдық мүдделер мен бұзылған құқықтарды қорғауда тиімді, әмбебап және оңтайлы сот формасын қарастыруы мүмкін деп болжайды.

**РЕЗЮМЕ**

В статье рассматриваются актуальные вопросы имплементации института медиации в Республике Казахстан. Автор полагает, что число, сложность и масштабность споров увеличивается настолько, что судебная система объективно не способна обеспечить их надлежащее разрешение, а успешная имплементация медиации в судопроизводстве может рассматриваться как наиболее совершенная, эффективная, универсальная и оптимальная судебная форма защиты нарушенных или оспариваемых прав и законных интересов.


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