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Problems and Prospects of the Mediation Development in the Republic of Kazakhstan

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Abstract

The aim of the study is to investigate problems and prospects of the mediation development in the republic of Kazakhstan via comparative qualitative research methods. As a result, an analysis of world experience shows that the notariate, which is a body of indisputable jurisdiction, is fully capable of taking on certain functions aimed at reducing conflict in at least civil and family relations. In conclusion, the bodies of inquiry and investigation are extremely reluctant to accept agreements on settlement of a legal dispute (conflict) already existing in the case through mediation.

Keywords: Civil, criminal, mediation, law, compensation.

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Problemas y perspectivas del desarrollo de la mediación en la República de Kazajstán

Resumen

El objetivo del estudio es investigar los problemas y las perspectivas del desarrollo de la mediación en la República de Kazajstán a través de métodos de investigación cualitativa comparativa. Como resultado, un análisis de la experiencia mundial muestra que el notariado, que es un órgano de jurisdicción indiscutible, es completamente capaz de asumir ciertas funciones destinadas a reducir el conflicto en al menos las relaciones civiles y familiares. En conclusión, los cuerpos de investigación e investigación son extremadamente reacios a aceptar acuerdos sobre la solución de una disputa legal (conflicto) ya existente en el caso a través de la mediación.

Palabras clave: civil, penal, mediación, derecho, indemnización.

1. INTRODUCTION

Today, it is generally accepted that mediation, as an alternative to judicial resolution of a legal dispute, is most effective. This is due to many factors that have been repeatedly described in the literature: this is its relative accessibility, time consuming, voluntary, but perhaps the most public, which gives special attention to mediation, is that this procedure is aimed at resolving a dispute based on the interests of the disputing parties, and not from the stated initial positions, and also, of course, this is what the procedure is confidential. But, as correctly noted, at present, a clearer and more systematic development of the regulatory framework, as well as a more specific and more detailed approach to the procedure and its subjects, is needed. The study of problems and prospects for the

development of mediation has been studied by many foreign and Kazakhstan authors: Nosyreva (2009), Gräfinvonschlieffen (2005), Riskin (1994), Sander (1990), Cheremnykh (2007), Davydenko (2005), Suleimenov (2009), Idrysheva (2012), Medvedev (2003), Schennikova (2002) and others.

The main objectives of the study are to analyze the problems and prospects for the development of mediation in the Republic of Kazakhstan. Today in Kazakhstan, court proceedings and other jurisdictional mechanisms for the consideration and resolution of civil (in a broad sense) cases are the main ways of protecting violated rights, freedoms and legitimate interests. However, it cannot be denied that in the modern conditions of the formation and dynamic development of civil society, they often turn out to be insufficiently effective. If some time ago the courts, mediators, executive bodies were engaged in nothing more than the popularization of the procedure, today, against the background of recent changes in the legislation (the entry into force of the Criminal Code, the Code of Criminal Procedure of the Republic of Kazakhstan, the Civil Procedure Code of the Republic of Kazakhstan) nature, which, of course, require its permission.

2. METHODOLOGY

The term mediation comes from the Latin adjective medius (neutral) - to occupy the middle between two points of view or parties, to offer a middle path, to keep neutral, impartial. In the Russian legal theory

and practice, there is an interchangeable use of two terms to denote an alternative procedure, which is carried out with the help of an intermediary: interposal and mediation. The first is native Russian. In the direct interpretation of the Russian language, the mediator is the third elected by the two parties for an agreement; to mediate - to be consciously a mediator, to bother between two parties, agreeing them (Nosyreva, 2009, Dewi & Ahamat, 2018).

Today, the most perfect, effective, universal and optimal is the judicial form of protection of violated or disputed rights and legitimate interests. However, in modern conditions of intensive development of all spheres of social life, there is a complication of social relations, resulting in an increase in collisions of interests of participants in these relations and the qualitative complexity of legal disputes. The number, complexity and scale of disputes increase so much that the judicial system is objectively unable to ensure their proper resolution (Kim, 2011; Kuatova, 2014). In Kazakhstan, such an alternative to court sessions as mediation, the solution of civil disputes without trial, is still very underdeveloped. However, many advanced citizens are fighting for her supremacy over standard Themis (Lavrinenko, 2010; Frolov, 2010). Mediation for Kazakhstan is a historically established institution and centuries-old law enforcement experience. In the process of historical development, mediation as a procedure for resolving a dispute has undergone many changes, up to what it is at present (Raeva & Kairova, 2017).

Resolution of tribal disputes and conflicts according to the unwritten law has traditionally been inherent in Kazakh society (Oskinbaev & Kairova, 2017). The procedure, later called mediation, has

long been used to resolve conflicts without the use of force and the help of a third party. Researchers see the essence of mediation in a combination of two seemingly opposite elements - a high degree of autonomy of the parties and significant guarantees for developing a common position and achieving a mutually beneficial result (Gräfinvonschlieffen, 2005). The modern concept of mediation took shape in the framework of the movement for the development of alternative dispute resolution methods, which began in the United States in 1960-1970, spread in Australia in the 1980s and in most European countries - in the 90s of the 20thcentury. It is based on the Harvard method of negotiation, developed by professors R. Fisher and W. Urey. Scientists have formulated the basic rules of the negotiation process (Riskin, 1994), following which the parties are in most cases able to reach a reasonable agreement.

The essence of this method is that when settling a dispute, the parties jointly resolve a common problem, guided, on the one hand, by objective standards, and on the other, by their own interests and actual needs. Mediation in its modern form uses this approach. So, in classical mediation (Riskin, 1994), the main task of the mediator is to assist the parties who do not possess perfect negotiating competences in building communication according to the Harvard method. Today, it is generally accepted that mediation, as an alternative to judicial resolution of a legal dispute, is most effective (Boulle & Nesic, 2001). Also interesting is the position of Sander, who, on the basis of the fact that the alternative means the possibility of choosing one option out of many existing ones, suggests using the term alternative dispute resolution common for all procedures, including the trial (Sander, 1990). This is due to many factors that have been repeatedly described in the literature: this is its relative accessibility,

time consuming, voluntary, but perhaps the most public, which gives special attention to mediation, is that this procedure is aimed at resolving a dispute based on the interests of the disputing parties, and not from the stated initial positions, and also, of course, this is what the procedure is confidential.

But, as correctly noted, at present, a clearer and more systematic development of the regulatory framework, as well as a more specific and more detailed approach to the procedure and its subjects, is needed. If some time ago the courts, mediators, executive bodies were engaged in nothing more than the popularization of the procedure, today, against the background of recent changes in the legislation (the entry into force of the Criminal Code, the Criminal Procedure Code, the Civil Procedure Code, the Enterprise Code) which undoubtedly require their permission.

3. RESULTS AND DISCUSSION

For convenience of analysis, we conditionally divide our work into five parts:

- Proposals in the field of popularization of the mediation procedure among the population;

- Organizational problems in the development of mediation in the Republic of Kazakhstan;

- Problems of pre-trial or extrajudicial mediation;

- Problems of the use of mediation in civil proceedings;

- Problems of mediation in criminal proceedings.

3.1. Based on East Kazakhstan State University named after S. Amanzholov was conducted a sociological survey among the population of Ust-Kamenogorsk, aimed at identifying the level of public awareness about mediation.

The survey showed the following: out of 100 students, only 20% to the question of whether they know anything about mediation - answered yes, out of 100 random respondents interviewed, 26% heard earlier about mediation. However, after the interviewers clarified the essence of mediation, 75% of all respondents answered that they would use the services of mediators in resolving legal disputes. From this, we can conclude that the population is not sufficiently informed about the mediation procedure, despite the work that has already been done to promote the mediation procedure among the population. The following work can be cited as a positive experience, which was carried out as part of the work on the popularization of the mediation procedure in the East Kazakhstan region for the period from 2013 to 2016:

(1In almost all the courts of the region, videos about mediation are shown in waiting rooms, information about mediation is posted on the informational stands;

(2Jointly with courts and local executive bodies, meetings are organized with the population of cities, where professional mediators explain the essence of the mediation procedure, how it differs from the judicial process, and what efficiency is explained (an example is a meeting with the population, which was organized by the Chairman of the Ridder City Court, Ridder City Akimat (city administration) and the Representative Office for the East Kazakhstan Region of the Public Association Single Center for Mediation and Peacemaking Mediation;(

(3A number of television shows were conducted, mainly on the local regional television;

(4A number of reports were made in periodicals, on information sites;

(5Organizations of mediators lead their websites, have pages in social networks, where some organizations have the number of subscribers up to several thousand (for example, the East-Kazakhstan Center for Mediation and Law Alternative can serve;(

(6Holding round tables, seminars on the development of mediation in the region (held mainly in the courts, with the prosecutor's office, at universities). The work is necessary, however, at such events there is a narrow circle of people who not only know about mediation, but also work in this area, therefore, such round tables and seminars are interesting, as a rule, to experts in the field of legal dispute resolution, but not to a wide range of people;

(7Organizations of mediators lead training as professional mediators;

(8Distribution of promotional products (advertising in transport, placing banners, placing ads in the running line, on billboards, distribution of business cards, flyers on the streets.(

However, judging by the data of a sociological survey, the work being done is not enough. In order to develop work in the field of popularization it is necessary to do the following:

(1To attract local executive bodies for the manufacture and further placement of banners with information about the mediation procedure in cities and regional centers;

(2To prepare non-professional mediators within the framework of the Mediation Centers of the Assembly of the People of Kazakhstan. Today, in the Akimat (city administration) registries, there are persons who at least have little idea what exactly they need to do, and in some cases, these individuals do not at all comply with the requirements of the law imposed on mediators. Professional mediators are concentrated in cities, they are not in the regions, and according to this in the regions, and the main burden of work in the field of mediation should lie on the shoulders of non-professional mediators. It is for this reason that within the framework of the work of the Mediation Schools at the Houses of Friendship - centers of social harmony, it is proposed to prepare non-

professional mediators, partly entrusting them with the mission of promoting mediation in the regions;

(3In order to ensure unhindered access to information about the mediators working in the city, district, form a unified register of mediators on the website of the Ministry of Justice of the Republic of Kazakhstan;

(4To use for the demonstration of videos about the mediation procedure not only waiting rooms in the courthouses, but also those halls where there is an electronic queue and waiting rooms (banks, Service Centre, State Center for Pension Payments, Kazpost, Kazaktelecom, etc;(.

(5Remove the cycle of programs on mediation with the demonstration on the central channels;

(6Use the education system of the Republic of Kazakhstan in the development of mediation by organizing training seminars for schoolchildren, students, teachers, parents. First, the school, student environment is an environment where information spreads quite quickly among students, parents and teachers; secondly, the school environment - this environment, where there is a large number of conflicts, which often end very badly. In our opinion, everyone should have the skills of meditative conflict resolution: pupils, teachers and parents. Of course, literacy in the field of conflict management will lead to their decline in society, and consequently, this will have a very positive effect on many areas of life, and, most importantly, will help reduce the level of conflict in society and the development of social harmony;

(7Continue training in mediation, conflict resolution skills in the health care system;

(8To involve the Atameken National Chamber of Entrepreneurs in the development of mediation in order to spread information about mediation among entrepreneurs, because entrepreneurs often need to quickly and effectively resolve disputes, but today they simply do not have the knowledge about the opportunities that may submit a mediation procedure. Of course, long protracted disputes in court affect the economic component of the business, and, as a result, the state;

9) On the basis of the Centers of Excellence at universities, academies to organize refresher courses on the use of conciliation procedures for notaries, lawyers, employees of government agencies, as well as commercial organizations.

3.2. Analysis of the institute of mediation in the Republic of Kazakhstan showed certain groups of organizational problems.

And one of them is related to the implementation of the principles of mediation. Thus, the principle of non-interference in the mediation procedure has limitations, but these limitations are not explicitly indicated in the law, which creates prospects for an expansive interpretation of the possibilities of intervention in the future, which in turn limits the principle of confidentiality. The principle of confidentiality itself, in our opinion, is not sufficiently protected, since for violation of this principle

administrative responsibility is provided in the form of a fine of up to 20 monthly calculation indicators by article 85 of the Administrative Offenses Code. While the damage from the disclosure of information that has become known to the parties, may be much more significant both materially and morally. In our opinion, the responsibility of both the mediator and the participants in mediation should be tightened in this regard.

We would like to show further organizational problems in comparison with the Law on Mediation of the Republic of Moldova. Since an analysis of the legislation governing the mediation procedure in the post-Soviet space showed that it is the Law of the Republic of Moldova that is the most elaborate. So, as for the organization of the activity of mediators, the Law of the Republic of Kazakhstan On mediation, in contrast to, for example, the Law of the Republic of Moldova On mediation, provides for the possibility of the activity of a mediator only within the framework of the organization of mediators, without regulating the possibility of individual work. To create an organization of mediators in the form of a public association, 10 founders are needed who are already professional mediators, and if in Almaty, Astana, in regional centers it is not a problem, then for regional centers the task is unrealistic, which hinders the development of mediation in the regions.

Nor by the Law of the Republic of Kazakhstan On Mediation, by any other regulatory act, with the exception of the Code of Administrative Violations regarding responsibility for disclosing information that became known during the mediation process (Article 85), as well as the Criminal Code of the Republic of Kazakhstan regarding the use of its powers by the

mediator objectives of its activities and in order to derive benefits and advantages for oneself or other persons or organizations, or to cause harm to other persons or organizations, if this act has caused substantial harm to rights and legitimate interest m of citizens or organizations or legally protected interests of society or the state (Article 251) are not regulated by the base and the types of questions the mediator responsibility. At the same time, the requirement of the conditions, scope and grounds for the responsibility of the mediator, as the essential terms of the mediation contract, is put forward in Article 8 of Part 2 of Art. 21 of the Law on Mediation. In turn, Article 393 of the Civil Code of the Republic of Kazakhstan determines that a contract is considered to be concluded when an agreement has been reached between the parties, in the form required in the applicable cases, on all its essential terms.

At the same time, the conditions on the subject matter of the contract, the conditions that are recognized as essential by law or necessary for contracts of this type, as well as all those conditions regarding which, according to one of the parties, an agreement must be reached, are essential. Currently, in almost all mediation agreements, this standard is tried to be circumvented by the phrase that the conditions, scope and basis of responsibility of the mediator are determined by law, but as we have already noted, any other direct responsibility of the mediator, except for liability for violation of the principle of confidentiality and the abuse of their powers, which caused significant substantial harm, is not provided by the legislation. In our opinion, Clause 8, Part 2 of Article 21 of the Law of the Republic of Kazakhstan On Mediation should be either excluded as a material condition of the

mediation agreement, or it should be specified what responsibility the legislator means and what its grounds are.

Certain problems exist in the field of preparation, certification and maintenance of registers of mediators. Currently in Kazakhstan several dozens of organizations of mediators are preparing mediators, but nobody can say exactly at what qualitative level such training is conducted. First, in our opinion, training within the framework of courses in the amount of 50 hours is not enough. This should be either a separate specialty (and this, in turn, will be one of the impetuses for the development of mediation), or the creation of specialization in the preparation of bachelors and masters of law or psychology. An interesting system of training and certification of mediators in the Republic of Moldova. Thus, Article 13 of the Law of the Republic of Moldova On Mediation states: A person who wants to mediate in a professional manner must complete the initial training of mediators and must be certified by the Mediation Board. A person who has obtained the status of a mediator abroad and who wants to mediate in a professional manner in the Republic of Moldova is exempt from the obligation to undergo initial training, but is subject to certification.

In accordance with Article 14 of the Law, the initial and continuous training of mediators is provided by higher education institutions and the National Institute of Justice. Article 15 regulates the certification of mediators. Persons who have completed the initial training courses for mediators may apply for certification. The certification of mediators is carried out by the Mediation Council of the Ministry of Justice in accordance with the Regulation on certification of mediators approved by

it. The status of the mediator is confirmed by a certificate giving the right to exercise the professional activity of the mediator, issued on the basis of an order of the Minister of Justice. The sample certificate is approved by the Minister of Justice. In our opinion, a similar certification procedure is necessary for the practice of the Republic of Kazakhstan. State and public control in such an important area are simply necessary. However, we propose the creation of Certification Councils at the Mediation Centers of the Assembly of the People of Kazakhstan. In accordance with the legislation of the Republic of Moldova, a certified mediator can carry out its activities through an individual mediator bureau or a joint mediator bureau.

In the individual bureau of the mediator, one certified mediator (the founder of the bureau) carries out professional activities. The individual bureau of the mediator functions and acts in legal relations as an individual. The joint bureau of mediators is created by two or more certified mediators (founders of the bureau) who carry out professional activities independently. The Joint Bureau of Mediators has the status of a legal entity. This rule is also, in our opinion, positive, because it implies the choice of a mediator individually for him to work or in an organization, in accordance with Kazakhstan legislation, a mediator can work only within the framework of the organization of mediators. According to Article 17 of the Law of the Republic of Moldova On Mediation, certified mediators are included in the List of Mediators compiled and updated by the Mediation Council. The list of mediators and changes made to it are approved by the Minister of Justice. The list of mediators is posted on the web page of the Ministry of Justice and is periodically updated by it. At the same time, the Ministry of Justice

ensures the annual publication of the List of mediators in the Official Monitor of the Republic of Moldova no later than December 25th.

We believe that the maintenance of the register of mediators by the Ministry of Justice is also a positive practice. In Kazakhstan today, in accordance with the current legislation, the register of mediators, and each organization of mediators maintain independently, in connection with which information about mediators is scattered, in most cases unknown to a wide circle of society. The Law of the Republic of Moldova On Mediation regulates in detail the payment for the activity of a mediator. Thus, the mediator may request for his activity a fee, as well as reimbursement of costs associated with the implementation of mediation, in the amount established by the agreement with both parties. The amount of the mediator's fee does not depend on the results of the mediation. Also, unlike the Law of the Republic of Kazakhstan On mediation, the law of the Republic of Moldova regulates the responsibility of the mediator. Thus, Article 19 establishes the grounds and scope of disciplinary responsibility of the mediator. We believe that in order to develop a mediation institution in the Republic of Kazakhstan, positive foreign experience should be analyzed with a view to its implementation in Kazakhstan in terms of solving organizational problems.

3.3. Problems and prospects for the development of pre-trial mediation in the Republic of Kazakhstan.

With the implementation of the Law on Mediation in Kazakhstan, the Supreme Court of the Republic of Kazakhstan has become the main

engine for the development of mediation in the state. From this came some, in our opinion, distortions in the field of application of mediation. In particular, the analysis of the norms of civil procedural law, as well as the rules governing the mediation procedure, shows that judicial mediation is much more detailed and takes precedence over pre-trial or extrajudicial mediation. The procedure of extrajudicial mediation is regulated only by the Law of the Republic of Kazakhstan On mediation, and also since part 4 of Article 27 of the Law of the Republic of Kazakhstan On mediation stipulates that a dispute settlement agreement concluded before a civil case is considered in court, amendment or termination of civil rights and obligations of the parties, the provisions of civil law regarding the regulation of transactions apply to this agreement. It should be understood that a mediation settlement agreement is not just a deal, it is a deal that resolves a legal dispute. And if there is such a deal, how much can a person who has entered into such a deal again go to court to hear the case on the merits? Clauses 2 and 4 of Article 277 of the Civil Procedure Code of the Republic of Kazakhstan establish the grounds for termination of proceedings in the case:

(1There is entered into legal force, made in a dispute between the same parties, on the same subject and on the same grounds a court decision or a court decision to discontinue the proceedings in connection with the claimant's refusal of the claim or approval of the amicable agreement of the parties on the settlement of a dispute (conflict) in the order of mediation, an agreement on the settlement of a dispute in the order of a participatory procedure;

(2The parties entered into an agreement on the settlement of a dispute (conflict) in the order of mediation, an agreement on the settlement of a dispute in the order of a participatory procedure, and they were approved by the court.

That is, the case may be terminated if a court ruling was previously issued to approve the agreement of the parties on the settlement of the dispute (conflict) in mediation, or in this process the parties entered into an agreement to resolve the dispute (conflict) in the order of mediation, and it was approved by the court. It should be noted here that part 2 of Article 153 of the previous Code of Civil Procedure on the grounds for refusing to accept the statement of claim contained the following: there is a court decision that has entered into force in a dispute between the same parties on the same subject and on the same grounds or a court ruling on termination of proceedings in connection with the claimant's refusal of a claim or on the approval of a settlement agreement of the parties or an agreement on the settlement of a dispute (conflict) in mediation. From the sense of the norm it follows that the refusal to accept the claim could follow if there is an agreement on the settlement of the dispute (conflict) in the order of mediation. Now this rule is abolished. Part 1 of article 151 of the current Code of Civil Procedure states the following as grounds for refusing to accept a claim:

(1The application is not subject to review and resolution in civil proceedings;

(2There is a court decision that has entered into legal force or a court decision to terminate proceedings on a case on the grounds provided

for in this Code, rendered in a dispute between the same parties, on the same subject and on the same grounds;

(3There is a decision of the arbitration made on the dispute between the same parties, on the same subject and on the same grounds, and the court has become aware of this.

For whatever reason, the legislator has withdrawn the agreement on the settlement of a dispute (conflict) in the mediation procedure from the grounds for refusing to accept the statement of claim it is not clear. Many opponents from the judicial system declare that the Constitution of the Republic of Kazakhstan by part 2 of Article 13 guarantees everyone the right to judicial protection of their rights and freedoms. But in our opinion, when concluding an agreement on the settlement of a dispute (conflict) in the manner of mediation without the right of further appeal to the court on the merits of the case, the right of a person to judicial protection does not diminish. Indeed, as already mentioned, according to the Law of the Republic of Kazakhstan On Mediation, an agreement on the settlement of a dispute, concluded before the consideration of a civil case in court, is a deal. But absolutely certain requirements are made to this transaction, and most important of them is the requirement of legality. That is, if the agreement is illegal, it can always be challenged in court, thereby exercising its right to judicial protection of its rights and freedoms.

In view of this diminishing of extrajudicial mediation, a paradoxical situation arises. The parties enter into an agreement on a legal dispute, but they still have the right to once more resolve this dispute in court. For example, when resolving a legal dispute under a loan

agreement, the parties come to a mutual decision that the debtor will pay the debt monthly for a certain amount of money; despite this agreement, the lender may apply to the court, presenting claims for the recovery of the amount of the debt at the same time under the loan agreement. At the same time, the debtor may at the same time apply to the court in simplified (written) proceedings for the execution of the specified agreement on the settlement of a dispute (conflict) in the order of mediation (in such agreements, if the debtor undertakes to pay a certain amount each month, then the creditor's obligation is established take this amount and not shy away from it). It turns out that these two processes can go on in parallel and, as a result, different mutually exclusive decisions can be taken.

And at the same time, if a similar agreement on the settlement of a dispute (conflict) in the mediation procedure had been adopted in court and accordingly approved, none of the parties could have appealed to the court to resolve the dispute on the merits. But the most important thing is not this. The most important thing is that the main goal of the development of mediation in the Republic of Kazakhstan is to reduce the level of conflict in society and improve the quality of administration of justice by reducing the burden on the courts. But how can this be achieved if we diminish the importance of extra-judicial mediation? It turns out, if the parties want to achieve a truly legally strong agreement, they will be forced to go to court, because an agreement concluded out of the court of such legal force as an agreement concluded in court, unfortunately, does not have. We insist that an agreement on the settlement of a legal dispute (conflict) concluded in an out-of-court mediation procedure should be the same in meaning with an agreement on the settlement of a dispute

(conflict) in a mediation procedure concluded in court and approved by the court.

Another problem in the field of extra-judicial mediation is related to the implementation of notarial activities. In particular, the Law of the Republic of Kazakhstan of October 31, 2015 No. 378-V of the ZRK On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Improving the System of Administration of Justice that, from now on, notaries, according to paragraph 8 of Article 17, have the right to conduct conciliation procedures. The phrase conducts conciliation procedures are the only change made to this part. It is known that the activity of a notary is clearly regulated down to the amounts charged by the notary for their services. Today, it is unclear what the status of the notary as a mediator is (does he comply with the Law of the Republic of Kazakhstan on mediation when conducting a mediator's activity? Does he need to train as a professional mediator?) Many questions remain about the agreement on reconciliation and the registration of such agreements as a notarial deed, their legal validity, etc. Due to the unsettled nature of this issue, the rate remains dead.

An analysis of world experience shows that the notariate, which is a body of indisputable jurisdiction, is fully capable of taking on certain functions aimed at reducing conflict in at least civil and family relations. The solution of this issue is presented in the formation of a system of comprehensive legal assistance, including, along with already known forms of notarial activity and new technologies, allowing notaries to both reduce the flow of legal disputes going to court and ensure the fullest implementation of the tasks of notarial activities. Such technologies

include mediation - a conciliation procedure that allows dispute participants to resolve their differences with the help of a neutral person and reach a mutually acceptable agreement. The notariate of developed countries in recent decades has been actively introducing the use of conciliation procedures carried out by notaries. The participation of a notary in a conciliation procedure in one form or another allows the legislation of many European countries.

In the Latin notary countries, the notary should help the parties to work out an agreement, reconciling, as far as possible, the positions of the parties where they diverge, ensuring the balance of the agreement means its fairness, ensuring that the parties to the transaction due to their lack of experience and competencies were not at a disadvantage. Mediation is an alternative way to resolve a conflict, with which a third, impartial and disinterested person (in this case, a notary) helps the parties to find the best solution to their differences. Therefore, in some developed countries, the notary in practice performs the functions of a mediator at the stage preceding the appeal of the parties to the court for the resolution of a dispute on the law. In addition, the notary is often referred to as an arbitrator in those areas in which he is a specialist. As Cheremnykh says, in notarial practice there are sometimes cases when the parties, when appealing to a notary, have not yet reached a consensus on the specific terms of the transaction or due to legal ignorance they did not know about the need to resolve any issue. And here the parties have to negotiate in the notary's office and with it. Due to the public nature of its activities, the notary cannot give preference to any of the parties and must observe and ensure a balance of interests not only of the parties themselves, but also of third parties (Cheremnykh, 2007).

The fundamental principles of mediation are voluntariness; good faith and impartiality of the mediator; full control of the parties over the results of the procedure; non-confrontational nature of the procedure; confidentiality; a wide range of possible mutually acceptable solutions to the dispute (Davydenko, 2005). These principles and such characteristic features of mediation and mediator as respecting absolute neutrality and impartiality, independence from other persons, increased responsibility for their actions, are inherent in notarial activities. The function of the representative of the parties clearly distinguishes the function of the notary to reconcile opposing interests of the doctrine of French notarial law. So, before the terms of the act are fully established and approved by the parties, the notary brings together points of view, prompts the fairest and appropriate decision of each participant. He seeks to harmonize the will of the parties, which is further embodied in the notarial deed. Unfortunately, the notarial community of Kazakhstan at this stage is not ready to implement mediation and there is no reason to talk about the specific problems of notarial mediation in Kazakhstan, in our opinion. According to Suleimenov, mediation in Kazakhstan is currently virtually absent (Suleimenov, 2009). Therefore, we can only talk about the prospects for the introduction of mediation in the field of notaries.

The public nature of the activity of notaries, their specific functions in ensuring the legal security of private agreements and taking public interest into account allow notaries to participate fruitfully in the conflict resolution stages as a special kind of legal mediator. A notary who, by virtue of his professional duties, must often lead the various interests of the parties to the same denominator, can effectively participate in conciliation procedures. His possible participation is all the more

preferable, given that notary publicizing the results of agreements reached gives them additional stability and indisputability, while ensuring the necessary confidentiality of out-of-court contacts of the parties (Idrysheva, 2012). The advantages of a notary as a mediator. The most varied aspects of mediation show that all characteristic features of mediation and mediator as respect for absolute neutrality and impartiality, independence from other persons, increased responsibility for their actions, and many others are inherent in notarial activities. In this regard, the decisions of the XXIII Congress of the International Union of Latin Notaries rightly noted that the notary, who by virtue of his professional duties must often lead to different interests of the parties to the same denominator, is more than other legal professions intended to be a mediator (Medvedev, 2003) .

At present, the interest of the notarial community in the increase of mandatory notarial transactions has a clear property character, and this is alarming, as evidenced by well-known scientists, for example, Shchennikova. As an opposite positive example, the experience of France is given, where only a few transactions are provided in a mandatory notarial form, but notaries do not fight to expand their list, but help citizens create any contract, and besides certifying transactions, French notaries are assigned advisory functions to the parties, mediation, negotiation, etc. Due to this, they receive income (Schennikova, 2002). The notaries of the East Kazakhstan region, for the most part, passed the General Mediation Course in accordance with the Decree of the Government of the Republic of Kazakhstan dated July 3, 2011 No. 770 On Approving the Rules of Training for a Mediators Training Program, but cannot yet apply their knowledge in practice. In our opinion, professional training in the field of application of conciliation procedures should be

received by anyone who is going to do this on a professional basis, whether it be a notary or a conciliating judge. Of course, both the notary and the judge have profound professional knowledge in the field of jurisprudence and law, but also, as a rule, in a narrowly specialized field, while the conciliator must have knowledge in the field of conflictology, in the field of negotiation, verbal and non-verbal communication and many other purely professional knowledge and skills, with which neither the judge nor the notary, without proper professional training, unfortunately, do not possess.

3.4. Problems of mediation in civil proceedings.

Today, the main problem of mediation in civil proceedings is the low level of its use in resolving legal disputes in courts. Despite the fact that every year the number of cases completed by applying the mediation procedure is growing (and the East Kazakhstan region is among the leaders in this regard), the total number of cases completed by approving an agreement on resolving a legal dispute (conflict) in the order of mediation does not exceed 2 percent. It should be noted that, when the pilot project on the work of the conciliating judge in the East Kazakhstan region was being implemented, professional and non-professional mediators in the courts were practically not involved in the work. During the period when the pilot project ended, and the new Civil Procedure Code of the Republic of Kazakhstan was not yet adopted and did not enter into force (in the period of 2015), professional mediators were invited to the courts. The offices of mediators were opened, where the mediators organized a duty, and were always ready to accept citizens to resolve the legal dispute that arose, both on a fee-based and free basis.

With the entry into force of the new Civil Procedure Code of the Republic of Kazakhstan, with the introduction of the institution of a judge conciliator on a legal basis, professional mediators were no longer invited to the courts, limited only to the activities of conciliatory judges. Of course, people, seeing a demonstration of videos about mediation in the waiting room, reading informational stands on mediation, after the judge's proposal to use mediation with the conciliating judge, associate the mediation procedure only with the court and the conciliating judge. And again, we ask ourselves: how do we unload the courts through the use of mediation, if judges, apart from their direct responsibilities to resolve legal disputes, now additionally act as conciliatory judges? There is also a question regarding the professionalism of judges as conciliators. Of course, the judges have extensive judicial experience, but the experience and knowledge as conciliators of the judges are clearly not enough. The mediation procedure consists of the following stages:

1. Acquaintance with the parties, explanation of the essence and principles of mediation;

2. Determination of the essence of the dispute;

3. Establishing an atmosphere of trust with the parties;

4. Identification of the true (sometimes hidden) interests of the parties;

5. The calculation of the risks of the parties in case of a negative resolution of conflicts;

6. Development of possible solutions;

7. Analysis of the identified options;

8. Analysis of the realism of the developed solution.

If the procedure goes by all the rules, it takes quite a lot of time, which the judges, as we know, especially in civil proceedings, are not enough. Will not the burden on the conciliatory judges entail not only the administration of poor-quality justice, but also the administration of poor-quality mediation procedure? In addition, when calculating the risks of the parties, if the judge, from the standpoint of her judicial experience, knowledge, declares to any of the parties, that she does not have enough evidence to defend her position in court, or not enough reasons, will the party not take it as her notorious defeat, and whether it goes to a deliberately unfavorable decision? Questions, unfortunately, today have no answers. In our opinion, the figure of the conciliator in court is far from superfluous. But this judge, firstly, should deal only with the mediation procedure (that is, should be exempted from the administration of justice), and, of course, should have professional knowledge in the field of conciliation, the use of mediation as a way to resolve a legal dispute (conflict).

4.4. Problems of mediation in criminal proceedings

We believe that the prospects for the development of mediation in the criminal law field are very broad. The use of mediation in criminal matters may be transferred to the implementation of the probation function, the function of the re-socialization of persons held criminally liable. There are already precedents in the practice of mediators when the accused in the course of the mediation undertaken incurred obligations that were not related to compensation for damage caused by a crime or compensation for harm. Thus, in the case of E., the accused made a commitment to treating drug addiction and, soon after his release, for the first time ever, drug addiction voluntarily sought the help of doctors and is currently being treated in one of the rehabilitation centers. In the case of M., the victim in the case of B. offered defendant M. work in his enterprise. The defendant accepted the proposal and is still working in this place. In Kazakhstan legislation, the suspension of the case in the case of the parties applying to mediation is provided only in civil proceedings. In the criminal process, the terms of production, as already mentioned above, are not suspended, and this causes a certain kind of problems against the background of the fact that the Law of the Republic of Kazakhstan On Mediation provides for mediation terms of up to 30 days.

The fact is that at the pretrial stage mediators are rarely addressed. We will describe this below. At the stage of the proceedings in court, they often turn to the final stages of the process, time to resolve the case remains catastrophically short. And it must be said that in the criminal process, mediation requires a particularly thoughtful and serious attitude, because you have to work with the mentality of the accused, the victim, hence the time costs are also serious. The maximum program for a good mediator in the criminal law field is the result of which the damage to the

victim will be compensated, the damage smoothed out, and the defendant realizes the root of his problems and will really take the path of correction without applying criminal penalties to him. In addition, the problem is that, in accordance with Article 68 of the Criminal Code of the Republic of Kazakhstan, the harm must be mitigated and the damage compensated, and only after that the person can be released from criminal responsibility due to the reconciliation of the parties. However, sometimes reconciliation conditions can be long-term. For example, in the case of the aforementioned M. and B., the defendant could have worked out the damage that had done, thereby making amends for the harm done, and the victim was not against it, but the law, unfortunately, does not allow it. The defendant had to look for a loan in order to pay the damage before the court order was issued, and if he did not find what happens quite often, the legislator does not offer any other means of compensation for the damage.

It should be noted that after the entry of the Law of the Republic of Kazakhstan On Mediation, the judicial practice in criminal cases of the Ust-Kamenogorsk city court proceeded to the approval of agreements on the settlement of a legal dispute, the terms of which provided for compensation for the damage caused by installments. Neither the previous criminal legislation, nor the current criminal legislation does not allow this, on the basis of which a number of protests of prosecutors against similar court rulings on exemption from criminal liability were made. But at the same time, it is theoretically possible. For this, it is necessary to change the legislation and allow the parties to agree on the terms of reconciliation, even if the implementation of these conditions will take some time, and a guarantee of the fulfillment of the terms of the agreement can be a review of the fulfillment of the terms of the agreement

within the framework of written simplified proceedings within the civil process (Chapter 13 of the Code of Civil Procedure of the Republic of Kazakhstan) or the abolition of the decision to exempt a person from criminal responsibility in connection with the reconciliation of the parties, which should be made not by a court of higher instance, but by the court authorities at the request of the injured party.

There is a contradiction between the current Criminal Code of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan On Mediation in terms of the use of mediation in the criminal law field. Thus, according to Article 68 of the Criminal Code of the Republic of Kazakhstan, mediation is applied for criminal offenses, crimes of minor and moderate gravity, as well as for serious crimes, if they are not associated with causing death or serious harm to human health and are committed by minors, pregnant women, and women with minors. Children, men bringing up young children alone, women aged fifty-eight and over years, men aged sixty-three and over years who have committed a serious crime for the first time. In addition, paragraph 5 of Article 170 of the Criminal Procedure Code of the Republic of Kazakhstan regulates that following consideration of a civil lawsuit in a criminal case, the court makes one of the following decisions: on approving a settlement agreement or agreement on resolving a dispute in order of mediation on a civil suit and termination over it.

That is, it follows that in terms of the consideration of a civil suit, mediation can be applied to any category of the case, without touching upon the issues of sentencing or exemption from punishment. Comparing the legislation of the Republic of Kazakhstan, in this part in the legislation

of the Republic of Moldova, it must be said that the law of the Republic of Moldova On mediation does not limit the application of the mediation procedure depending on the severity of the crimes. According to the same law, only a certified mediator included in the List of mediators can participate in mediation in criminal cases. The Law of the Republic of Kazakhstan On Mediation does not contain such a restriction, which causes certain difficulties in practice. We are talking about non-professional mediators, who, as a rule, do not know the nuances of mediation, do not have the proper amount of legal knowledge. The law of the Republic of Moldova stipulates that in the case of mediation in criminal cases in which the reconciliation of the parties leads to the elimination of criminal responsibility, the parties have the right to use the services of a mediator paid by the state under the conditions established by the Government.

That is, the Republic of Moldova actually recognizes mediation in the criminal law field of restorative and, realizing that here for the proper qualitative effect it is necessary to subsidize the activities of mediators offering mediator services for free. Indeed, in the criminal law area, not every defendant can afford to pay for mediator services, and in this regard, it would be advisable to subsidize the activities of mediators in the criminal law field in criminal misdemeanors, minor and moderate crimes, as well as in legal disputes involving minors. In criminal proceedings, mediation is possible both at the stage of inquiry, preliminary investigation, and during the trial:

-The suspect/accused has the right to reconcile with the victim in the order of mediation (clause 15, paragraph 9 of article 64 of the Code of Criminal Procedure of the Republic of Kazakhstan).

-The victim, accordingly, has the right to reconcile with the suspect and the accused in mediation (paragraph 8, part 6 of Article 71 of the Criminal Procedure Code).

At the same time, if, in accordance with Article 358 of the Code of Criminal Procedure of the Republic of Kazakhstan, the presiding judge explains to the defendant his rights in the main court proceedings, as provided for by Article 65 of the Code of Criminal Procedure of the Republic of Kazakhstan, as well as the right to conclude a procedural agreement, reconciliation with the victim in the cases provided by law, including mediation, then at the stage of inquiry and preliminary investigation the duty of such an explanation to the person conducting the criminal process is not imputed. Moreover, the investigation and the inquiry are not interested in the fact that the case was terminated under Article 68 of the Criminal Code of the Republic of Kazakhstan due to the reconciliation of the parties, since in this case the statistics on the detection of criminal offenses suffers, and this fact is personally reflected in the investigator or the investigator. Hence, the bodies of inquiry and investigation are extremely reluctant to accept agreements on settlement of a legal dispute (conflict) already existing in the case through mediation, and there is no way to explain to the parties the right to reconciliation with the victim in the cases provided for by law.

4. CONCLUSION

Against this background, in order to develop the use of mediation at pre-trial stages, which will entail budgetary savings, since the work on attracting a person is at the very beginning and it involves a minimum of resources discontinued by reconciliation, including mediation, conditionally attributed these cases to the category of disclosed cases, given that the defendant actually pleads guilty, compensating the victim for damage and smoothing harm.

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