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Theoretical and legal problems of implementing the principles of mediation

The relevance of the study is due to the issues of the operation of the principles of mediation as one of the alternative ways to resolve disputes in the Republic of Kazakhstan. In this regard, the purpose of the work is to identify problems with the operation of the principles during the mediation procedure. When writing a research paper, the methods of logical analysis, dogmatic, formal legal, deductive, synthesis and other methods were used. The article discusses the features of the concept of mediation as an alternative method of resolving disputes in the works of legal scholars. The guiding norms of law that determine the content and directions of legal regulation are considered, i.e., the principles of intermediary services are explained and their types are considered. Although mediation has not developed rapidly in the Republic of Kazakhstan over the past decade, it should be noted that it is developing in many areas of society as an alternative method of dispute resolution. Since mediation is a procedure based only on certain principles, there should be no problems in the functioning of the principles. In accordance with this, the opinions of scientists are analyzed, a review of international acts is carried out, the principles of the current law "On Mediation" in the Republic of Kazakhstan are differentiated, and some recommendations are given on their application in practice. The practical value of the results obtained lies in providing ways to resolve problematic aspects that will have an impact on improving efficiency in law enforcement practice.

Keywords: principles, institution of mediation, mediation, mediator, disputes, voluntariness, confidentiality.

Introduction

Relevance. It is known that the most mature, effective, universal and rational form of protection and dispute of violated rights and legitimate interests is, of course, through the court. However, in the conditions of continuous development of modern society, it is quite natural that the complication of Public Relations is, accordingly, the conflict of interests of its participants, the complication of legal disputes. The number, volume and complexity of disputes has increased so much that the judicial system cannot objectively ensure their proper resolution. By reforming the judicial system, it is possible to solve the problems of judicial

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proceedings only at a certain level. However, the needs of reform require the search for other ways. With the transformation of the judicial system, the need for mechanisms that function in parallel with it is undeniable. The experience of many countries shows the successful practice of using non-state procedures in the settlement of legal disputes. This, in turn, received the name of alternative methods for resolving legal disputes in Anglo-American practice. Among these methods, the method of mediation introduced in our country, namely its concept and principles, are the issues that our article will consider. The main goals of mediation are to achieve an optimal solution in resolving legal disputes between the parties involved in mediation, to reduce the level of dispute between the parties involved.

Problem. In general, mediation is on the agenda today, with many gaps and weaknesses. It is obvious that first of all it is possible to reveal the nature of the concept of mediation, to analyze the definitions and opinions given by many scientists. At the same time, mediation is a special procedure that is carried out based on certain principles. In this regard, there are certain problems and contradictions in the functioning of the principles.

Purpose. To reveal the nature, basics and features of mediation and its rules in the Republic of Kazakhstan, identify shortcomings in the activities of the rules and make their proposals.

Methods and Materials

The article discusses the problem of the concept of mediation in general and the features of its principles. As an alternative method of resolving disputes, a theoretical and legal analysis of the nature of mediation, the features of its principles is carried out. A review of the scientific works of theoretical scientists studying the legal institution of mediation was carried out and a comparative analysis was carried out. Some articles of the law of the Republic of Kazakhstan on mediation are commented on and recommendations of the authors are given.

The methodological basis of the article is logical analysis, dogmatic, formal-legal, deductive, synthesis and many other methods.

Rresults and Discussion

There are significant differences in the definitions of the concept of “mediation”, which are found in various legal texts and publications, and they cannot fully reveal the mediation process and the personality of the mediator within the corresponding legal system (within the framework of a voluntary, systematized process, the mediator helps the disputing parties to build relationships [1].

Mediation is considered to be the resolution of a dispute in an uncompetitive manner. The main role of the mediator is to ensure interaction between the parties, pay close attention to specific aspects of the dispute and offer them options for resolving the issue that meet the interests and needs of the parties. It acts as a bridge between the parties, helping to smooth out the bumps that affect the decisions of the parties. It is important to note that mediation is not a substitute for legal consultation. Anil Xavier is of the opinion that mediation can also be considered as a procedure that provides communication with the other party, as well as organizing a person's thoughts on a dispute and his attitude towards it in the direction in which it should be [2].

It has historically been established that mediation is often used in the resolution of family and labor disputes. Currently, mediation is used in many areas, since the stable, flexible and effective nature of this procedure allows you to resolve a wide range of disputes, from disputes related to consumer rights to disputes in the public sphere.

Mediation is a voluntary, special, non-coercive, flexible and closed mechanism to reduce the risk of uncertainty and risk between the parties to the dispute and, if possible, resolve the dispute [3].

According to A. Jerami, a special feature of the mediation procedure as a dispute resolution procedure is its purpose, that is, the achievement of a voluntary and agreed result, as well as the absence of the authority of the mediator to oblige the parties to implement the resolution of the dispute. The mediation procedure is confidentiality, a creative and flexible procedure that allows the parties to the dispute to participate directly in its resolution, as well as their control over the process [4].

R. Ridley-Duff and A. Bennett believe that mediation is a procedure that takes place with the help of a neutral third party, which decides in what way the dispute can be resolved [5].

In the mediation procedure, the parties to the dispute themselves determine the terms of the agreement reached, and not the mediator. Mediation refers to the non-past future behavior of the parties [6].

Mediation is a procedure that facilitates interaction between the parties to the dispute in order to create conditions for the parties to resolve an intermediary dispute that does not have the competence of a judicial authority. An additional characteristic of mediation also includes the confidentiality and impartiality of the mediator. The result of judicial consideration of a dispute is a formal process that has mandatory force, and mediation is a convenient method in which all aspects of the dispute are subject to consideration, regardless of their legal significance [7].

In the understanding of the concept of mediation, there are also points of view that imply the intervention of a third party with limited competence in dispute resolution, decision-making, believing that it is a method of influence, assistance during negotiations. Thanks to such views, mediation has a long history in various cultural contexts, in informal use and is currently a field of professional activity. It turns out that in accordance with the point of view presented in this way, mediation can also include the procedures for reaching an agreement, in which intermediaries participate.

However, there is currently a widespread view. According to it, mediation is not a procedure or process of reaching an agreement that pleases both parties or is advised by a third party to the parties to the dispute for the purpose of reaching a decision. At the same time, mediation does not include arbitration, which is defined as the process by which a neutral third party, after listening to both parties to the dispute, makes a final and, as a rule, binding decision [4]. The main point at the heart of the concept of mediation is that a dispute is a normal phenomenon, and it is dangerous to leave this problem unresolved [8].

The decision on which of the alternative forms of dispute resolution to apply in each specific case depends on the type of dispute, its level and what specific solution is required. The parties to the dispute are given the burden of drawing up a plan and reaching an agreement to achieve a favorable outcome in the mediation procedure, as opposed to reaching an agreement and arbitration. The mediation procedure can be used at any stage [4].

In order to resolve a dispute, such as mediation, the main elements of peaceful forms of intervention of the other party are the nature and level of agreement, as well as the level of coercion necessary for reaching an agreement [3]. During the mediation procedure, the mediator enters the role of a neutral third party, which facilitates communication between the parties to the dispute and affects the achievement of a mutually acceptable solution [5].

To prevent the escalation of the dispute and to resolve the issue, mediation aims to achieve a result that pleases both parties, using an equal attitude on both sides and a way to make them feel that they can get enough attention and time, talk, prepare, and more. The mediator is morally neutral within the ethical boundaries, i.e. the mediator is interested in the mediation procedure, but is not interested in its final outcome [9].

Professional mediati e ser ices, as a rule, rely on an approach in which the main and ultimate goal is to find a solution to the problem. This type of mediation practice is based on several main ideas: first, the idea of a mediator who is a neutral mediator who is interested only in the process itself, not in the essence of the dispute; second, the idea that the different positions of the parties to the dispute are determined by the main interests and needs of the parties; third, the idea that dispute resolution is more effective if the focus is on the personal interests of the persons who are parties to the dispute; and the most recent idea that the purpose of mediation should be negotiations on a favorable resolution of the dispute in the form of reaching an agreement [3].

Mediation is an informal procedure adapted to the needs of the parties or the circumstances of the dispute. Although it can be said that each mediation procedure is unique in itself, this procedure has its own stages that take place in each case. for example, before the start of the procedure, the mediator receives a written statement from each party, which summarizes the essence of the dispute. The mediation procedure, as a rule, begins with a joint meeting in which all parties participate. The mediator will explain to the parties about his role, as well as whether this procedure is confidential. Further, the discussion of the issue begins, in which the mediator can allow the parties to communicate directly with each other. The duration of the mediation procedure depends on the complexity of the dispute under consideration [10].

In the early years of the emergence of this procedure, it was relatively easy to define the concept of mediation. however, as soon as the settlement of disputes with the help of mediation went beyond the scope of the experiment and began to be institutionalized, it became difficult to reach a consensus on the question of what mediation is. The fact that the case has reached such a degree can be explained, on the one hand, by the large number of disputes that are resolved with the help of mediation in various new areas, and by the fact that the circle of participation of representatives of various professions in the mediation procedure is increasing [11].

Voluntary approaches to dispute resolution, such as mediation, are effective in many cases, since the parties to the dispute have the opportunity to participate directly in finding ways to resolve the dispute, which in turn increases the chances of satisfying the interests of the parties in comparison with the decision as a result of judicial consideration of the case. Some researchers believe that in addition to changing and satisfying the relationship between the parties, expanding the use of alternative dispute resolution methods may in itself lead to the re-emergence of local communities [12].

Mediators, by talking to each of the parties, explore the issue and participate as a mediator, influencing them to reach an agreement. Mediation will be effective only if the parties understand the need to reach a mutual agreement, without avoiding the settlement of the dispute. The mediation agreement provides for the further conduct of the case between the parties, not limited to resolving the dispute itself. Mediation is ineffective if one of the parties refuses to recognize its responsibility and pay for the provision of services [13]. According to R. Smith, mediators with experience in the field of judicial and arbitration proceedings of a case have priority. Because they can give the parties a reasonable opinion on what decision will be made by the court or arbitrator if they apply to the court to resolve the dispute. Mediators should also have well-developed communication skills. The mediation procedure should be carried out on the territory, in a building that ensures the confidentiality of this process. At the same time, the participants must be seated correctly, for example, in such a way that the parties do not face each other, but create an atmosphere of Alliance [14]. The role of a mediator who helps resolve a dispute is to help the parties make decisions for themselves and assess the situation as a whole. The mediator may or may not understand the dispute at all, which is due to his lack of experience in a serious way. In any case, a good mediator should be very careful to express his opinion about it, if the case is resolved in court, without reaching an agreement between the parties with the mediation procedure, and the mediator in general should never express his own opinion, which is actually fair [10].

The mediator coordinates the meeting of the parties, introduces the parties to each other, explains the rules for conducting the mediation procedure to the parties, to the dispute, approves the rules for conducting the procedure related to a particular dispute, promotes interaction between the parties, tries to gain the trust of the parties, collects information related to the dispute and finds obstacles that complicate the resolution of the dispute, allows the parties to express their feelings and emotions, helps them understand, determine their interests and priorities, and also forms options for resolving the dispute, helps the parties understand the limits of their claims, influences the assessment of dispute resolution options [15].

According to Carol J. Brown, from the classical point of view, a mediator must make decisions and express his opinion on the specific circumstances and their possible outcomes, using the criteria for evaluating arguments with the evidence presented by the parties. In conducting the mediation procedure, the task of the mediator from the point of view of evaluation is to search for evidence by correctly evaluating the evidence, that is, assessing their persuasiveness, distribution of the burden of proof, identification and application of relevant regulations, rules and customs, and the formation of an opinion. In summary, the evaluation approach affects the positioning of the parties and their own becoming one side, which in turn is the opposite of the purpose of mediation. An approach based on the protection of rights implies an emphasis on the legitimate interests of the parties and the desire to come to a decision that meets the relevant legal criteria of the dispute in such a way as to meet the decision taken by the court in similar cases. At the core of the approach based on the interests of the parties there are the basic needs or interests of the parties; such an approach implies a wide range of possible dispute resolution in relation to the main interests, activities of the parties as a result of such an approach, a decision may be made that satisfies all the parties, but does not comply with legal norms [16]. Here we come to the question of a formal definition of the concept of "mediation".

According to Christoph Besemer, mediation is a method of resolving a dispute through the mediation of a neutral third party, recognized by the party [17; 14].

A.A. Arutyunyan considers mediation in criminal proceedings (to resolve criminal law disputes) by an independent and impartial third party-mediator (mediator) — defines as a procedure based on the voluntary liberalization of the parties and may cause legal consequences for the parties to the criminal case proceedings in order to find a mutually beneficial solution to the questions of reconciliation of the parties and compensation for the harm caused between the person who committed the illegal act and the person who was harmed by the illegal act, as well as other questions that may arise in the process of resolving a criminal legal dispute [18; 20].

From the point of view of N.S. Shatikhina, mediation in criminal law is a special mechanism of Criminal Legal Regulation of disputes arising in society as a result of the commission of a crime, carried out in the form of a set of mutually directed actions of the parties that have legal significance through the active intermediary role of state bodies [19; 189].

S.I. Kalashnikova defines mediation as a special approach to the settlement of legal disputes, which implies a specially organized procedure with the participation of an impartial intermediary (mediator), which affects the parties in discussing the requirements for the settlement of a legal dispute and making a mutually beneficial decision [20; 7]. A similar definition is given in the works of E.A. Dobrolyubova [21; 11].

I. Shikhata defines mediation as a procedure for resolving a dispute involving a neutral third party — an intermediary, which affects the parties to the dispute in the desire to settle the dispute through negotiation [22].

S.G. Pen, who conducted a study on the topic of mediation in criminal proceedings of the Republic of Kazakhstan, gives the following definition of mediation: mediation in criminal proceedings is a voluntary and confidential form of reconciliation of the victim and the suspect (accused), which has the necessary potential and features as an independent legal institution with the participation of an impartial third party invited to resolve the dispute arising as a result of committing a crime and ensures the normalization of the violated rights of the victim. The implementation of mediation in criminal proceedings is an acceptable way to effectively implement the institution of reconciliation [23; 86].

Mediation is a procedure in which the parties control, manage both the process and its result, are regulated by an uninteresting party, called an intermediary, which helps the parties in negotiations and contributes to the achievement of a mutually beneficial agreement between them — defines V.T. Konusova [24; 114].

In some publications, May 21, 2008, reiterates the definition of the European Parliament and Council in Paragraph “A” of Article 3 of the EU directive 2008 “on certain aspects of mediation in civil and commercial affairs” [25], so if we cite the same definition:

Mediation is a structured process in which two or more parties to a dispute independently, on a voluntary basis, seek to reach an agreement on the settlement of a dispute with the help of a mediator. Such a process may be initiated by the parties, or represented, or established by the courts, as well as expressed by the right of the member state.

It consists of mediation conducted by a judge who is not responsible for conducting any court proceedings in relation to the dispute in question. This prevents regulatory actions of the court or judge considering the case in relation to the dispute during the trial.

Paragraph “B” of the specified article defines a mediator as any third party that is independent of the profession of this person, as well as any third party proposed to conduct the mediation procedure in an effective, impartial and competent manner, regardless of the circumstances under which the said third party is appointed or proposed to conduct the mediation procedure.

We consider this definition to be much more detailed than what is usually given in scientific papers, but with a number of drawbacks. One of these shortcomings can be noted that mediation is not deepened, giving only the concept of process (it is already known). It is difficult to find in this definition the difference between mediation and court proceedings.

In accordance with our author's theoretical legal approach, mediation is an alternative form of settlement, settlement of a court/extrajudicial or non — procedural dispute (as well as providing a complex of technologies with its mechanisms, the process of implementation) along with the conflicting parties (the presence of a neutral mediator third party), conducted within the framework of a structured procedure, arbitrarily appointed by the parties or appointed by the authorized body, with the goal of reaching a common dispute agreement. In other words, the task of the mediator is to prevent or reduce the re-occurrence of the dispute, increase the effectiveness of dispute resolution, refuse to consider the dispute in court proceedings or terminate the proceedings that have already begun, by mutual consent of the conflicting parties or on behalf of the disputing parties determined by the authorized body for them, but are invited to assist in a fair resolution/settlement of the dispute, so that the parties can establish a permanent dialogue and, as a result, satisfy the parties, contribute to a mutual compromise.

The institution of mediation is a systematic set of functionally attractive elements based on the mediative paradigm.

The legal institution of mediation is a comprehensive intersectoral institution of legal regulation of mediation.

Mediative organizations, their employees and individual mediators, persons providing their activities may include complexes of mediative mechanisms for resolving disputes in various spheres of public relations (civil, arbitration process, criminal, administrative processes, international, family, labor disputes, World justice, etc.), a complex of intersectoral institutions of legal support for mediation, a complex of non-legal regulatory installations of self-regulatory mediative organizations.

Principles of mediation

Mediation is a flexible process, and different disputes require their resolution in different ways. For example, in the UK, the mediation process is based on the following principles:

- Volunteering;
- Privacy;

Non-binding nature of dispute resolution and measures for its implementation [16].

According to the first of the listed principles, that is, to resort to mediation, decision-making is voluntary. In turn, it also implies the possibility that the parties may terminate the mediation procedure or withdraw from it at any time. At the same time, if the parties decide to resort to such a method to resolve the dispute, the final result will also be their own, that is, the decision made by the judge or the Ombudsman will not be charged with execution. Accordingly, they show personal and sometimes financial interest in achieving successful results.

A feature of alternative dispute resolution methods, as well as the basis for their effectiveness, is their voluntariness [16].

The confidentiality nature of the mediation procedure can be very important in resolving disputes arising in the field of Family Law of the parties, commercial disputes. When an agreement is reached, the parties decide for themselves whether or not the Oi will remain a secret. In exceptional cases, the mediator is obliged to report information related to the parties during the mediation procedure if the mediator believes that confidential negotiations threaten to cause serious harm to any person or constitute a criminal offense. Also, information on the finances provided during the mediation procedure for family disputes may be disclosed at the following court sessions [16].

Mediation theory provides two foundations for understanding confidentiality in said procedure. Firstly, confidentiality is used to ensure that the information provided by the parties in the process of conducting the mediation procedure is not used against them in the future. This aspect of confidentiality ensures that the parties feel that they are conducting negotiations in an open, honest and safe environment, as well as that they can disclose information that they cannot otherwise disclose [26].

Such transparency is important for the mediator, as it is very important to provide effective assistance in identifying the specific position, gaps and interests of the parties.

The second is in the value of confidentiality in the mediation procedure. The parties can be sure that this information will be kept in secret when they hold confidential meetings with the mediator and convey to him information that they do not want to hear to the other party, which in turn is very important for the parties' trust in the mediator [16].

Mediation does not imply restrictions on the rights of participants, that is, the information expressed during the procedure cannot be used as evidence in further court proceedings. Such a feature allows the parties to express their will on the options for the agreement. The parties can offer new creative ways to find a compromise without depriving themselves of the opportunity to apply to the judiciary in case of failure to reach an agreement. In mediation in civil disputes, if the parties reach an agreement, then this agreement is drawn up as a document that completes the legal resolution of the dispute, the execution of which is mandatory. In this case, the parties lose the opportunity to apply to the court for further settlement of the dispute, even if the other party does not comply with the agreement. When resolving disputes arising in other areas, the agreement does not have binding legal force and does not deprive the parties to the dispute of the right to apply to the court [16].

David A. Hoffman cites the following ethical principles that are formed in the concept of mediation and, accordingly, are reflected in various materials:

1) the principle of inadmissibility of conflict of interest (mediators should refrain from participating in the settlement of disputes in which they are directly personally, professionally or financially interested); the application of this principle is extremely complex even if the mediator is indirectly interested in resolving the dispute.

2) mediators must know the limits of their capabilities, that is, they must not start resolving a dispute that does not have sufficient knowledge, as well as be able to openly tell the parties about their knowledge

and experience. This, in turn, allows the parties to the dispute to turn to another mediator who has the skills and experience to resolve the dispute in a particular area.

3) impartiality of mediators from the beginning to the end of the mediation process.

4) the principle of volunteerism. Even if it is mandatory for the parties to the dispute to resort to mediation, they must have the right to withdraw at any moment. In other words, even in mandatory mediation, the obligation of the parties is to participate on a voluntary basis and make every effort to reach an agreement on a solution.

5) the principle of confidentiality. According to the author, this principle has two important aspects: firstly, mediators are obliged to ensure the confidentiality of the mediation procedure in relation to third parties, and secondly, when the mediator meets with each of the parties for discussion in a dispute, he is obliged to ensure that the information voiced in the individual discussion is kept in secret. At the same time, the mediator also has the duty to convey to the parties the presence of information that limits the confidentiality of information. For example, extremely cruel treatment of children or planning the commission of a crime.

6) the principle of non-harm is also attributed to the principles of mediation ethics (for example, some people are emotionally unstable, which in turn makes the mediation procedure psychologically dangerous; and some are psychologically unprepared to resolve the dispute; mediators should take such factors into account when carrying out the mediation procedure).

7) the principle of independence. One of the foundations of the mediation procedure is to support and assist the parties to the dispute in making their decisions without imposing their opinions on anyone.

8) the principle of Information Science Agreement. This principle is explained by the independent resolution of the dispute in their interests only when there is a conscious choice of the parties. In principle, the mediator does not participate as a source of information, he must ensure that the parties have sufficient data, and if there is not enough data, the mediator must inform them about how to obtain information.

9) the task of the mediator is to ensure that the proposed option for resolving the dispute does not harm third parties.

10) honesty, sincerity of mediators, that is, their qualifications and work experience, as well as truthful information on aspects of the mediation procedure [27].

Similar principles can be seen in the works of A.A. Arutyunyan. In addition, he gives the following principles:

- Agreements reached as a result of the mediation procedure should consist only of reasonable requirements;

- Re - prosecution is not allowed if a restitutional procedure is used to resolve the dispute and the parties have reached an agreement within the framework of such a procedure;

- In case of failure to reach a settlement agreement, the case cannot be considered as a confession of guilt in production [18; 15].

Some authors cite principles that are much smaller than the above as significant ones. For Example, Carol J. Brown believes that the mediation procedure is based on only two principles:

1) the principle of independence of the parties in relation to dispute resolution;

2) a neutral third party, facilitating the interaction of the parties, affects the understanding of emerging questions, draws the attention of the parties to their own interests and affects the creative resolution of the dispute [26].

Kalashnikova S.I. divides the principles of mediation into organizational principles (voluntariness and impartiality) and procedural principles (autonomy of the parties, confidentiality, cooperation and equality) in their functional essence [20; 8].

Article 4 of the law of the Republic of Kazakhstan on mediation specifies the following principles of mediation: voluntariness, equality of the parties to mediation, independence and impartiality of the mediator, inadmissibility of interference in the mediation procedure and confidentiality.

Accordingly, mediation is conducted in secret, participation in which is voluntary and the parties have equal rights, and the intermediary activity is neutral and independent. The listed principles should be considered in detail.

Volunteering. As a rule, parties cannot be forced to participate in an alternative procedure [28; 65]. Even by agreeing to participate in the procedure, the parties may refuse its further continuation at any time, except by agreement of the parties or by law. However, participation does not imply an obligation to reconcile, but only an honest consideration of the options for reconciliation and suspension from going to court for a certain period. This principle can be considered in several aspects:

1) Voluntary consent of the parties to resolve the dispute using the specified procedure;

2) Voluntary participation in the procedure, the ability to refuse to continue the procedure;

3) Voluntary fulfillment of the obligation received because of resolving the dispute.

Privacy. According to the general rules, what is considered in the ceremony is secret from beginning to end [28; 65]. Information collected during negotiations, written materials may not be sent to anyone. Shorthand and electronic subscriptions are not allowed during the hearing. Even the information revealed during the procedure is not subject to publication in other discussions [29; 159]. According to Article 20 of UNCITRAL conciliatory regulations, there is a provision: regardless of whether the parties are involved in the dispute in arbitration or trial as evidence

a) Comments, suggestions on the possibility of resolving the dispute;

B) Confessions of the parties during the conciliation procedure;

C) Offer of the intermediary;

d) The fact of readiness of the other party to accept the proposals made by the mediator to settle the dispute shall not be referred to [30].

The principle of confidentiality combines 3 aspects:

1) Confidentiality of the fact of conducting the mediation procedure;

2) Confidentiality of the content of the mediation procedure. The circumstances that occurred during the ceremony are not disclosed. The implementation of this principle is ensured in the procedure with the participation of only the subjects of the dispute and the mediator;

3) Confidentiality of the agreement reached. Only the part of the content of the agreement that is subject to execution can be disclosed.

The neutrality of the mediator and the independence of his activities. Content of this rule:

1) the mediator is not interested in achieving any results of the procedure in the implementation of his / her activities;

2) the mediator is independent from any party, as well as from other subjects;

3) the mediator does not judge, does not blame, does not advocate any side;

4) interference in the activities of the mediator is not allowed;

5) in accordance with the general rules, the mediator is not obliged to comment before anyone on the procedure carried out; however, the mediator may report to the body in which he serves, indicating the results [28; 65]. Here we are talking about special bodies that serve the mediator.

Conclusion

In general, we believe that there are some issues related to the implementation of the institution of mediation in the Republic of Kazakhstan, including the rules of mediation. In accordance with Article 4 of the law of the Republic of Kazakhstan on Mediation, mediation should be conducted based on the following rules:

- Volunteering;
- Equality of the parties to mediation;
- Independence and impartiality of the mediator;
- Inadmissibility of interference in the mediation procedure;
- Privacy [31].

The principles of mediation represent the starting points to be guided in the discussion and application of the law on mediation. After analyzing the opinions of the above researchers, we give the following recommendations in our opinion:

- To implement the main goals of the law, it is necessary to consider the possibility of referring to the standard law of the UN Commission on international trade law (UNCITRAL), which contains internationally recognized and widely used provisions regulating mediation. The law can directly specify international standards.

-The principle of volunteerism should include a norm that allows the use of mandatory or quasi-mandatory (the parties retain the right to refuse) orientation. In the field of lawmaking, the issue of determining that participation in mediation is voluntary, “unless otherwise provided by law” is often used.

- It is important that Article 8, which enshrines the principle of confidentiality, clearly provides, in our opinion, the scope and limits of protection of this rule. The norms specified in the law do not adequately protect confidentiality. Also, the rule applies only to mediation participants. Other persons who may receive confidential information such as spouses of the parties do not relate to this norm. We are of the opinion that

if the parties do not agree otherwise, or if the disclosure of such information is not required by law, including by an agreement on the settlement of a forced dispute, the norm should be introduced that all information obtained during mediation or all information related to it is confidential.

- Paragraph 2 of Article 8 regulates the inadmissibility of disclosure of information and the use of evidence. Article 10 of the UNCITRAL Standard law and Article 7 of the EU directive should be guiding provisions to bring forward mediation as an effective way to resolve a dispute, and should also prevent the disputing parties from remaining a “trap” for information and its subsequent use in court. The law should regulate 2 aspects of inadmissibility: it is necessary to introduce the obligation of the parties not to use the types of evidence, as well as the obligation of courts and arbitration to recognize the inadmissibility of such evidence.

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М.Ж. Калшабаева, С.А. Сартаев, А.И. Горылев

Медиация қағидаларын жүзеге асырудың теориялық және құқықтық мәселелері

Зерттеу жұмысының өзектілігі Қазақстан Республикасындағы дауларды шешудің балама тәсілдерінің бірі ретінде медиация қағидаларының әрекет ету мәселелерінің болуымен негізделеді. Осыған байланысты жұмыстың мақсаты медиативті рәсімнің жүргізілу барысында қағидалардың әрекет ету мәселелерін ашу. Зерттеу жұмысын жазу барысында логикалық талдау, догматикалық, формальды-құқықтық, дедукциялық, синтез және тағы басқа әдістер қолданылды. Зерттеу жұмысында дауларды шешудің балама тәсілі ретінде медиация ұғымын түрлі ғалымдардың еңбектеріндегі талдану ерекшеліктері қарастырылған. Медиация қызметінің басшылыққа алынатын бастамалары, яғни қағидаларына түсінік беріліп, түрлері қарастырылған. Қазақстан Республикасында соңғы онжылдықта медиация қарқынды дамымаса да, дауды шешудің балама тәсілі ретінде қоғамның көптеген салаларында дамып келе жатқанын айта кету керек. Медиация тек белгілі бір қағидаларға сүйене отырып жүргізілетін рәсім болғандықтан қағидалардың қызмет етуінде ешқандай мәселелер болмауы тиіс. Осыған сәйкес түрлі ғалымдардың ой-пікірлері талданып, халықаралық актілерге шолу жасалынып, қазіргі қолданыстағы «Медиация туралы» Қазақстан Республикасының заңында көрініс тапқан қағидалар сараланып, олардың тәжірибеде қолданылу мәселелері бойынша біршама ұсыныстар жасалынған. Алынған нәтижелердің тәжірибелік құндылығы медиативті рәсімдердің құқық қолдану тәжірибесіндегі тиімділігін арттыруға әсер ететін мәселелі аспектілерді шешу жолдарын ұсыну болып табылады.

Кілт сөздер: қағидалар, медиация институты, делдалдық, медиатор, даулар, еріктілік, құпиялылық.

М.Ж. Калшабаева, С.А. Сартаев, А.И. Горылев

Теоретико правовые проблемы реализации принципов медиации

Актуальность исследования обусловлена вопросами действия принципов медиации как одного из альтернативных способов разрешения споров в Республике Казахстан. В связи с этим целью настоящей

работы является выявление проблем действия принципов в ходе процедуры медиации. При написании исследовательской работы использованы методы логического анализа, догматический, формально-юридический, дедуктивный, синтез и другие. Авторами рассмотрены особенности понятия медиации как альтернативного метода разрешения споров в работах ученых-правоведов; руководящие нормы права, определяющие содержание и направления правового регулирования, то есть объясняются принципы посреднических услуг и их виды. Хотя медиация не получила быстрого развития в Республике Казахстан за последнее десятилетие, следует отметить, что она развивается во многих сферах жизни общества как альтернативный метод разрешения споров. Поскольку медиация является процедурой, основанной только на определенных принципах, проблем в функционировании принципов быть не должно. В соответствии с этим проанализированы мнения ученых, проведен обзор международных актов, дифференцированы принципы действующего в настоящее время Закона «О медиации» в Республике Казахстан, а также даны некоторые рекомендации по вопросам их применения на практике. Практическая ценность полученных результатов заключена в предоставлении путей разрешения проблемных аспектов, которые будут оказывать влияние на повышение эффективности в правоприменительной практике.

Ключевые слова: принципы, институт медиации, посредничество, медиатор, споры, добровольность, конфиденциальность.

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