

## **Development Of the Institute of Mediation in The Countries of The Commonwealth of Independent States**

**By**

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### **Abstract**

This article analyzes the process of organizing mediation as a procedure for settling legal disputes in the countries of the Commonwealth of Independent States. Attention is drawn to the fact that some of the states (for example, the Russian Federation, the Republic of Kazakhstan, the Republic of Belarus) have practically already formed the regulatory framework for the activities of mediators. In some countries (Azerbaijan, Uzbekistan), special legislation has been adopted in recent years and has not yet been tested in practice. In Armenia, Tajikistan, there is no special law on mediation, but there are some episodic legal norms in procedural legislation. In conclusion, it was concluded that the legal regulation of mediation in each country should be considered taking into account the influence of international law, including the law of the European Union.

**Keywords:** mediation, alternative dispute resolution, mediation law, pretrial and extrajudicial methods of dispute resolution, conciliation procedures, comparative law.

### **1. Introduction**

Mediation as a procedure for settling disputes with the participation of a mediator in Russia and other countries of the Commonwealth of Independent States has spread relatively recently. At the end of the last century, this topic was touched upon by scientists - legal scholars only fragmentarily, only when conducting comparative legal research. However, at present, almost all post-Soviet states contain in their legislation normative acts providing for the use of mediation in resolving legal disputes.

Initially, mediation as an alternative conciliatory procedure for resolving disputes was used only in the countries of the Anglo-Saxon legal family. However, at the end of the 20th

century, there was a rapid penetration of this idea into civil law countries, in which there was a legislative institutionalization of mediation as a mechanism for resolving disputes. Recently, the idea of widespread out-of-court and pre-trial dispute settlement mechanisms has penetrated into the legal science of post-Soviet countries. In this connection, the development of this legal institution in the member countries of the Commonwealth of Independent States is of interest.

These countries have adopted the experience of legislative regulation of mediation from the countries of the continental legal system. As a rule, the basis for the legal regulation of these relations is an independent federal law. In the Russian Federation, the discussion about the need to settle the mediation procedure for the settlement of legal disputes has been going on since the 90s of the XX century. Ultimately, the relevant normative act was adopted in 2010. The act is called «On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure)» [1]. In order to create a legal basis for citizens and legal entities to choose a method of resolving an arisen dispute (conflict), including without contacting the relevant state bodies, as well as in order to streamline the activities of persons participating in the settlement of conflict situations (mediators) January 28, 2011 year the Act of the Republic of Kazakhstan «On Mediation» was adopted [2].

A special act «On mediation» in the Republic of Belarus was adopted in 2013 [3], in the Republic of Moldova for the first time - in 2007 [4]. In 2015, the second legislative act on mediation was adopted in the Republic of Moldova [5].

In some states, the issue of adopting a special normative act is being actively discussed. Despite the generally similar understanding of the essence of mediation, its advantages and areas of possible application, each country has its own characteristics of this institution, which, in particular, leads to the fact that states have different approaches to the legal regulation of mediation [6, 7]. In this regard, for Russian practice, it is of particular interest to study the experience of legislative regulation of mediation in neighboring countries that have similar legal and cultural traditions, as well as those at similar stages of economic and social development [8]. Currently, there is a need for a comparative analysis of the legislation on mediation in the CIS countries. This is necessary in order to unify and standardize approaches to the regulation of homogeneous social relations.

## **2. Methods**

Various general scientific methods and the methods of logical cognition are used in the work: analysis and synthesis, systemic, functional and formal-logical approaches. The development of conclusions was facilitated by the application of formal-legal and comparative-legal methods.

## **3. Discussion and Results**

Mediation essentially means the assistance of a disinterested third party to two or more others in seeking an agreement in a dispute or conflict situation. Mediation is an out-of-court method of dispute resolution chosen by the parties on a voluntary basis to achieve specific goals.

The world experience of using mediation shows the positive aspects and its prospects. In particular, when using mediation procedures, conflicts in existing legal disputes are reduced, and the number of cases considered in court is also reduced.

The most common judicial conciliation procedure in the United States is mediation [9]. In general, such a procedure is quite regulated and universal in nature, however, its use, for example, in a small claims court or in a civil court is different [10].

In the Russian Federation, Kazakhstan, Belarus, mediation has been used for a long time as a way of settling conflicts in the pre-trial order. Today this is perceived by the world community as a sign of the maturity of society. It seems appropriate and necessary to carefully study and use this experience in the process of improving domestic legislation [11].

When conducting a comparative analysis of the legislation on mediation of various CIS countries, first of all, one should pay attention to the scope of the special legislation on mediation. So, according to Article 1 of the Act on Mediation of the Russian Federation, this act «regulates relations associated with the application of the mediation procedure to disputes arising from civil, administrative and other public legal relations, including in connection with the implementation of entrepreneurial and other economic activities, as well as disputes arising from labor relations and family legal relations»[1]. However, the mediation procedure cannot be applied to collective labor disputes, as well as in the event that such disputes affect or may affect the rights and legitimate interests of third parties not participating in the mediation procedure, or public interests. Similar provisions on the scope of the special act are provided for in the Republic of Belarus.

The scope of application of the Act on Mediation of the Republic of Kazakhstan [2] is wider. So, in Article 1 of the Mediation Act, the scope of mediation is disputes (conflicts) arising from civil, labor, family and other legal relations with the participation of individuals and (or) legal entities, as well as considered in the course of criminal proceedings in cases of small and medium severity, unless otherwise established by the acts of the Republic of Kazakhstan. In this case, the mediation procedure is not applied: 1) if such disputes (conflicts) affect or may affect the interests of third parties not participating in the mediation procedure, and persons recognized by the court as legally incompetent; 2) to disputes (conflicts) arising from civil, labor, family and other legal relations with the participation of individuals and (or) legal entities, when one of the parties is a state body; 3) in criminal cases of corruption crimes and other crimes against the interests of the public service and public administration.

In the Republic of Kazakhstan, mediation can be used even in criminal cases on crimes of small and medium severity. Russian legislation is more conservative. It does not allow mediation in cases arising from public legal relations.

Practically for the legislation of all countries, the principles of mediation are general. Special acts contain regulations, in accordance with which mediation is carried out on the basis of the following principles: 1) voluntariness; 2) equality of the parties to mediation; 3) independence and impartiality of the mediator; 4) inadmissibility of interference in the mediation procedure; 5) confidentiality.

Particular attention is paid to the principle of voluntariness. This is no coincidence. For the successful conduct of mediation, a mutual desire of the parties to discuss the range of those problems with which they (or one of the parties) wish to go to court is necessary. Thus,

in the absence of the necessary desire, the mediation procedure cannot be implemented. The mediator does not have power over the disputing parties (unlike, for example, the court). Moreover, he does not have the authority to resolve the dispute that has arisen.

The Russian legislative act provides that the activity of a mediator can be carried out both on a professional and non-professional basis. The activities of a mediator on an unprofessional basis may be carried out by persons who have reached the age of eighteen, who have full legal capacity and have no criminal record. The activity of a mediator is not a business activity. Persons who have reached the age of twenty-five, have a higher education and have received additional professional education on the application of the mediation procedure can carry out the activities of mediators on a professional basis. Retired judges can also carry out the activities of mediators on a professional basis. Lists of retired judges who have expressed a desire to carry out the activities of mediators on a professional basis are maintained by the councils of judges of the constituent entities of the Russian Federation.

In order to develop and establish standards and rules for the professional activity of mediators, as well as the procedure for monitoring compliance with the requirements of these standards and rules by mediators operating on a professional basis and (or) organizations carrying out activities to ensure the conduct of the mediation procedure, self-regulatory organizations may be created. mediators.

In Russia, the self-regulatory organization of mediators performs the following main functions:

- 1) develops and establishes the conditions for the membership of mediators carrying out activities on a professional basis and organizations carrying out activities to ensure the conduct of mediation in a self-regulatory organization of mediators;
- 2) establish and apply disciplinary measures in relation to its members;
- 3) maintains the register of members of the self-regulatory organization of mediators;
- 4) represents the interests of members of a self-regulatory organization of mediators in their relations with federal government bodies, government bodies of the constituent entities of the Russian Federation, local government bodies, as well as with international professional organizations of mediators;
- 5) develops and approves standards and rules for the professional activity of mediators;
- 6) develops and approves the rules of business and professional ethics of mediators, including the code of professional ethics of mediators;
- 7) develops the rules for conducting the mediation procedure;
- 8) develops standards for the training of mediators;
- 9) exercise control over the professional activities of its members in terms of their compliance with the requirements of the law, standards and rules of the self-regulatory organization of mediators, the conditions of membership in the self-regulatory organization of mediators.

Following the Russian Federal Act, Article 9 of the Mediation Act of the Republic of Kazakhstan provides that the activities of a mediator can be carried out both on a professional basis (professional mediator) and on a non-professional basis. However, the Kazakhstani Act provides for unnecessarily strict requirements for mediators who carry out activities on a non-professional basis. They can be persons who have reached the age of forty (for comparison in the Russian Federation - eighteen) and are in the register of non-professional mediators. The register of non-professional mediators who mediate in the territory of the Republic of

Kazakhstan on a non-professional basis is maintained by the authorized body of the municipality.

Along with mediators who carry out their activities on a non-professional basis, in accordance with Article 15 of the Act on Mediation of the Republic of Kazakhstan, members of the local community who have extensive life experience, authority and an impeccable reputation, elected by the meeting (gathering) of the local community for these purposes, can conduct mediation. The minutes of the local community meeting on the election of members of the local community as non-professional mediators shall be sent to the authorized body within ten working days for inclusion in the register of non-professional mediators.

This excessive legislative regulation and the presence of administrative barriers raise serious doubts about the viability of the institution of non-professional mediators, who, unlike professional mediators, should carry out mediation on a free basis.

The Russian Federation, the Republic of Belarus, and the Republic of Kazakhstan are states that have been developing mediation as an alternative mechanism for resolving legal disputes for ten years. At the same time, some states of the Commonwealth of Independent States have adopted special legislation only in recent years. For example, in the Kyrgyz Republic the act of mediation was adopted only in 2017 [12]. This act applies to relations associated with the application of mediation to disputes arising from civil, family and labor legal relations. To disputes arising from criminal law relations in cases directly provided for by regulatory enactments. Thus, the legislator has resolved the issue of applying mediation to criminal cases in favor of certain corpus delicti. This requires a special proviso in the law. At the same time, mediation is not applied if the dispute affects the interests of persons who do not participate in mediation, or persons recognized by the court as incapable, except for cases when these persons or legal representatives of incapacitated persons enter into the process as a party to mediation.

Even later, in 2019, a special act on mediation in Azerbaijan was adopted [13]. According to him, the mediation procedure regulates public relations. The act also has the character of defining the goals, principles, application of the rules of mediation and the status of mediators (mediators). The mediation process is used in the regulation between conflicting parties in family, labor, civil and economic disputes. One of the main results that is expected to be achieved through the use of mediation is a significant reduction in the workload of the courts. Reducing the workload in the courts will also improve the quality of litigation.

In the Republic of Uzbekistan, the legal regulation of mediation is at the first stage of its development. The first steps are being taken in this area. On January 1, 2019, the Mediation Act entered into force, adopted on July 3, 2018 [14]. As in most countries, the mediator's activity can be carried out on a professional or non-professional basis. A person who has completed a special training course under the training program for mediators approved by the Ministry of Justice of the Republic of Uzbekistan, as well as entered in the Register of Professional Mediators, can carry out the activities of a mediator on a professional basis.

There is currently no special normative act on mediation in Armenia. However, this is not an obstacle to the emergence of mediation in this country. The emergence of mediation in Armenia is associated with the implementation of legal and judicial reforms in the country. The goal of introducing mediation was primarily to reduce the burden on the country's judicial system. The main legal provisions governing the procedure for conducting the



mediation procedure are enshrined in the Civil Procedure, Family and Civil Codes of the Republic of Armenia.

The legislation of Turkmenistan does not provide for such a way of resolving disputes as mediation. At the moment, standard forms of reconciliation are applied without the participation of any mediators or specialists, provided for by the labor code on disputes between workers and employers, the criminal code in the framework of atonement by the offender for the harm caused to the victim, as well as reconciliation of spouses within the framework of family law.

It should be noted that this country periodically hosts events dedicated to mediation issues and the experience of foreign countries in this area. Also, at the initiative of foreign organizations, educational events on mediation and other alternative ways of resolving disputes are held in higher educational institutions. Therefore, there is hope that mediation will appear in this country as well.

The legal regulation of mediation in each country must be considered taking into account the influence of international law, including the law of the European Union. So, even in those countries where there are no laws on mediation at the national level, the rules on mediation are present due to the participation of states in several Hague Conventions.

## **4. Conclusion**

The analysis shows that the mediation mechanism for resolving disputes is, to one degree or another, accepted by all countries that are members of the Commonwealth of Independent States. In many countries, this legal institution has legislative institutionalization in the form of a special act (for example, the Russian Federation, the Republic of Kazakhstan, the Republic of Belarus). In some states, the possibility of using mediation is provided for by general procedural legislation [15].

Thus, the legislation on mediation of the CIS countries is distinguished by significant diversity. At present, the number and level of detail of legislative norms on mediation and other related methods of dispute settlement, as well as norms allowing the use of mediation and other alternative methods of dispute settlement, vary greatly from country to country. In particular, the scope of mediation is specific. Its use in the public sphere is generally prohibited. Permission to use mediation in criminal cases is available in the legislation of the Republic of Kazakhstan, but only as an exception and only for crimes of small and medium gravity. There are also peculiarities in the legal status of the mediator, the procedure for conducting mediation, the legal significance of the mediation agreement and other parameters of this legal institution. In general, we can say that the legal aspects of the use of mediation in each CIS country have unique features.

## **Conflict Of Interest**

The authors confirm that the information provided in the article does not contain a conflict of interest.

## References

- Federal Act of 27.07.2010 № 193-FZ «On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure)». URL: <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102140445>
- Act of the Republic of Kazakhstan «On Mediation» No. 401-IV dated 28.01.2011. URL: [http://online.zakon.kz/Document/?doc\\_id=30927376](http://online.zakon.kz/Document/?doc_id=30927376).
- Act of the Republic of Belarus «On Mediation» dated 12.07.2013 No. 58-3. URL: [http://kodeksy-by.com/zakon\\_rb\\_o\\_mediatsii.htm](http://kodeksy-by.com/zakon_rb_o_mediatsii.htm)
- Act «On Mediation» of the Republic of Moldova. № 134-XVI of June 14, 2007. Monitorul Oficial al Republicii Moldova, 2007. No. 188-191 / 730
- Act of the Republic of Moldova dated July 3, 2015 No. 137. URL: [http://base.spinform.ru/show\\_doc.fwx?rgn=78300](http://base.spinform.ru/show_doc.fwx?rgn=78300)
- Hopt Kl.J., Steffek F. 2013 Mediation: Principles and Regulation in Comparative Perspective. Oxford University Press.
- Schonewille M., Schonewille Fr. (eds.). 2014. The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World. Eleven International Publishing.
- Tyul'kanov S.L., Gevorkova K.V. 2015. Zakonodatel'nye osnovy primeneniya mediatsii v stranah SNG i blizhnego zarubezh'ya. *Sovremennoe pravo*. № 12: 147-158 (in Russian).
- Kovach K. 2014. Mediation in a Nutshell. 3rd edition. West Publishing Company.
- Kimberlee K. Kovach. 2015. The Mediation coma: purposeful or problematic. *Cardozo Journal of Conflict Resolution*. Vol. 16. №3: 757-759.
- Kornakova S.V., Mishchenko E.V., Mishin V.V. 2020. Primenenie soglasitel'nyh procedur v stranah SNG: sravnitel'no-pravovoj analiz. *Aktual'nye problemy rossijskogo prava*. № 4: 176-186 (in Russian).
- Act of the Kyrgyz Republic dated July 28, 2017 No. 161 «On mediation». URL: <http://cbd.minjust.gov.kg/act/view/ru-ru/111668>.
- Act of the Republic of Azerbaijan dated March 29, 2019 No. 1555-VQ. URL: [http://base.spinform.ru/show\\_doc.fwx?rgn=122426](http://base.spinform.ru/show_doc.fwx?rgn=122426).
- Act of the Republic of Uzbekistan dated July 3, 2018 No. 3PY-482 «On mediation». URL: [http://base.spinform.ru/show\\_doc.fwx?rgn=107749](http://base.spinform.ru/show_doc.fwx?rgn=107749).
- Sorokoletova, M.; Baeva, S.; Korniyushkina, A.; Kravets, S.; Stus, N. Development of mediation in Russia: extrapolation of foreign experience. *Gênero & Direito*, v. 9, n. 04, 30 May 2020.