

LEGAL STATUS OF THE MEDIATOR

ZHUNISPAEVA Ainur Bauyrzhanovna

Master in Fundamentals of Law and Economics, tutor-lecturer
Zhetysu University named after I. Zhansugurov
Taldykorgan, Kazakhstan

The development of out-of-court dispute settlement is the most important tool of the legal culture of modern society, which allows finding a mutually acceptable solution to conflicts and conflicts of interests, while maintaining confidentiality and not going through a long formal, often emotionally costly procedure of judicial proceedings, especially if this procedure concerns family or child-bearing relationships. The leading role in the out-of-court settlement process belongs to the mediator - mediator, who organizes and accompanies the process of negotiations and finding a compromise. It depends on the mediator whether the parties will be able to turn from opposing parties into contracting parties, whether they will be able to find a solution acceptable to all. The article discusses the concept of a mediator, the requirements for a mediator, the rights and obligations of a mediator. The role of the mediator in conducting the mediation procedure, the work of the mediator is shown.

Key words: mediation, mediator, conflict, disputes, negotiations.

Mediation is an out-of-court settlement of a dispute that the parties choose voluntarily to achieve a specific goal. Mediation (Latin *mediare* and English *mediation*) is a conciliation procedure based on negotiations between the disputing parties with the participation of a mediator (mediator) to reach a mutually beneficial agreement on the disputed issues [1].

In general, intermediaries were used in Ancient Greece, Babylon, and Ancient Rome. Mediation in the modern sense began to develop in Anglo-Saxon legal countries such as the United States and Great Britain from the middle of the twentieth century, and then spread to Europe.

Mediation is a way to resolve conflicts involving a third, neutral, and neutral side. This party acts as a mediator who helps the participants in the dispute reach a certain agreement. During negotiations, the mediator does not affect the final agreement between the parties in any way. The main task facing him is to compromise the discussions, that is, a solution that suits everyone. As a rule, in some cases it is an alternative to judicial methods of dispute resolution.

In everyday life, conflicts occur. Controversial situations occur everywhere: in the event of a divorce between spouses, when obligations between an employee and an employer, as well as between entrepreneurs, are not fulfilled. Often, most disputes can be resolved peacefully, that is, without trial. In this case, people turn to a mediator.

The term «mediator» is a literal copy of the English word «mediator», which means «mediator, conciliator» [2, c. 10].

Mediator – an independent individual engaged by the parties as an intermediary in the settlement of the dispute in order to assist the parties in planning on the merits of the dispute.

Mediators are not judges or representatives of any party to the dispute and do not have the right to plan on the dispute. They contribute only to the resolution of the dispute that has arisen, help the parties in the course of discussion to identify their true interests and needs, and find a solution that satisfies all participants in the conflict [3, c. 2].

According to Tsisana. A. Champlikashvili, the mediator should not offer a solution. He can only do this in cases where the parties themselves ask for it, and he should also try to avoid it. Because the solution he proposed will still be his solution. Where is the guarantee that this decision reflects the interests of the parties? This is one of the fundamental differences between mediation and mediation in the modern understanding of mediation – any form of third-party involvement in dispute resolution [4].

According to O.M. Dementyev, E.V. Tikhonova, the intermediary:

- 1) be able to evaluate the dispute by dividing it into separate issues and identifying the specific interests of the parties;
- 2) be a neutral organizer, set the tone for ne-

gotiations and help the parties reach procedural and substantive agreements;

3) be an active listener, separating the substantive moments of the dispute from the emotions of the parties, giving constructive feedback to the parties;

4) be a test of the validity and expediency of the ideas put forward by the parties to resolve the dispute, be a generator of alternative proposals for their resolution;

5) become a generator of alternative proposals for resolving a dispute, helping the parties get out of the stereotypes of habitual and often limited views on their problem.

6) expand the resources of the parties, send them to persons who can provide the necessary specific and other information, provide legal or economic advice [5].

A mediator is, first of all, a person who knows how to listen, maintain attention for several hours of the procedure. At the same time, be understanding of what is happening and be able to distance yourself from your judgments, creating a space for an equal dialogue between the parties to the conflict. It is important for a mediator not to impose his own vision of the situation, to perceive different points of view and to be sensitive to cultural differences. What seems self-evident to some is not so obvious to others, and a mediator is a person who is able to work in the context of cultural differences, helping the parties to form a common, mutually understandable language of interaction. In addition, a mediator is a person with well-developed social intelligence, communication skills, he knows how to be natural, create a working atmosphere, and if necessary, defuse the situation with an appropriate and timely joke. To become a good mediator, it is absolutely not necessary to be a lawyer. According to the law on mediation, anyone over the age of 25 who has a higher education and has been trained in mediation can become a professional mediator.

The law of the Republic of Kazakhstan on Mediation dated January 28, 2011 provides the following interpretation for a mediator: «a mediator is an independent individual engaged by the parties to conduct mediation on a professional or social basis in accordance with the requirements of the law on Mediation» [6].

A mediator must be an individual who is independent, impartial, not interested in the out-

come of the case, selected by mutual agreement of the parties to mediation, included in the Register of mediators and has agreed to perform the functions of a mediator.

The activity of a mediator can be carried out both on a professional basis (professional mediator) and on a voluntary basis (public mediator).

In accordance with the law of the Republic of Kazakhstan on mediation, the following requirements are established for public mediators:

1. Persons who have reached the age of forty and are registered in the Register of public mediators.

2. When conducting conciliation procedures in court in accordance with the Civil Procedure Code of the Republic of Kazakhstan and the administrative procedural code of the Republic of Kazakhstan, judges may carry out the activity of a mediator on a voluntary basis.

For professional mediators:

1. Persons who have a higher education, have reached the age of twenty-five, have a document (certificate) confirming the passage of training under the training program of mediators, approved in accordance with the procedure determined by the Government of the Republic of Kazakhstan, and are in the Register of professional mediators.

2. Retired judges who are in the Register of retired judges who carry out the activity of a mediator on a professional basis may carry out the activity of a mediator on a professional basis.

The activity of a mediator is not a business activity.

Persons engaged in the activity of a mediator also have the right to carry out any other activities not prohibited by the legislation of the Republic of Kazakhstan.

The following persons cannot become mediators:

1) authorized to perform state functions and equated to them;

2) recognized by the court as incapacitated or with limited legal capacity in accordance with the procedure established by law;

3) in respect of which criminal prosecution is carried out;

4) a person who has an outstanding or outstanding criminal record under the procedure established by law.

The law also specifies the rights and obliga-

tions of the mediator. Rights of the mediator:

1) to hold meetings simultaneously with all parties and individually with each

of the parties in the course of mediation and to obtain information from the parties about the dispute (conflict) itself to the extent necessary and sufficient for mediation;

2) inform the public about the implementation of its activities (quantity,

duration, effectiveness), observing the principle of confidentiality;

3) if, in his opinion, further efforts in the mediation process do not lead to the settlement of the dispute (conflict) between the parties, refuse to conduct it or terminate the mediation with the written consent of the parties.

Duties of a mediator:

1) when conducting Mediation, Act only with the consent of the parties to mediation;

2) before the start of mediation, explain to the parties to mediation its goals and principles, the procedure for conducting it, the rights and obligations of the parties and the mediator, the procedure, and legal consequences of agreeing on the settlement of a dispute (conflict) by mediation;

3) assist the parties in the consistent exchange of documents, information and messages on the issues discussed;

4) inform the parties to mediation about their professional experience and competence;

5) to terminate mediation in the presence of contradictions between the personal interests of the mediator and his / her duties during mediation, which may affect his / her impartiality and independence, as well as in the presence of other circumstances that exclude his / her participation or require termination of his / her participation in mediation;

6) constantly improve their professional level under the training program of mediators under the rules determined by the Government of the Republic of Kazakhstan.

The mediator may not provide legal, advisory, or other assistance to any party.

A mediator is a highly qualified problem solver, mediator. Its task is to help the parties find a common language, understand each other's positions, and direct them to achieve a mutually beneficial and feasible agreement.

Mediators do not judge who is right or wrong

in a dispute, do not give legal or psychological advice. They facilitate communication between the parties, help to find a constructive solution to the dispute.

What does the mediator's work include?

– Holding meetings with the parties to the dispute to discuss.

– Use of mediation techniques to facilitate communication and reach an agreement between the parties to the dispute.

– Clarification of the problem between the disputing parties.

– Identification of their needs and interests.

– Meetings with experts - lawyers, psychologists, financial consultants, notaries – to obtain information on controversial issues.

– Preparation of an agreement on the case.

Mediation is a process where the parties agree to try to settle their dispute using a neutral third party who will lead and structure the negotiation process.

Mediation has become popular because it can be an effective way to settle legal disputes before trial. Mediation provides a personal approach to dispute resolution.

The main task of the mediator is to achieve a change in the initial views of the parties since the parties enter into a dispute with fixed, rigid positions and perceptions of the situation.

An important role in mediation is played by understanding the emotions of the parties. All disputes are emotional. The whole mediation process deals with emotions, unless of course, it is exclusively formal, concerning only the assessment of the costs of the trial. A mediator needs to be able to see the manifestation of emotions, interpret them correctly and influence them.

It is important in conducting mediation to work with the self-esteem, personal values, prejudice of the parties. The mediator needs to be able to recognize, identify and effectively manage the peculiarities of human behaviour. To do this, he needs knowledge of psychology. Psychology today is increasingly perceived by lawyers as a vital tool for resolving conflicts in the judicial environment, whether in commercial, family, labour disputes or other disputes. The most effective mediator is one who combines psychological legal competencies.

LITERATURE

1. *Dementiev O.M., Tikhonova E.V.* Alternative Dispute Resolution: A Brief Analytical Essay. – Tambov, Pershin R.V. Publishing House, 2010.
2. Law of the Republic of Kazakhstan dated January 28, 2011, No. 401-IV on mediation.
3. *Koryakin V.M.* Mediation as a way of dispute settlement, and the possibility of its application to military legal relations // Law in the Armed Forces. 2010. N 10. PP. 2-5.
4. *Myrzakhanova M.N., Myrzakhanov E.* Fundamentals of legal conflictology and mediation: textbook. – Almaty: «Technoerudit», 2018. – 124 p.
5. *Nosyreva E.I., Sternin I.A.* «Mediation» or «mediation»: on the question of terminology // Arbitration Court. 2007. N 1. P. 10.
6. *Shamlikashvili Ts.A.* Mediation as an alternative dispute settlement procedure: what a judge needs to know in order to competently offer the parties an appeal to the mediation procedure: studies. manual for universities teaching in the specialty «Jurisprudence». – M. Interregional Center for Managerial and Political Consulting, 2010. – P. 23.

ПРАВОВОЙ СТАТУС МЕДИАТОРА

ЖУНИСПАЕВА Айнур Бауыржановна

магистр основ права и экономики, тьютор-преподаватель
Жетысуский университет им. И. Жансугурова
г. Талдыкорган, Казахстан

Развитие внесудебного урегулирования споров – важнейший инструмент правовой культуры современного общества, позволяющий найти взаимоприемлемое решение в конфликтах и противоречии интересов, сохраняя конфиденциальность и не проходя через долгую формальную, часто эмоционально затратную процедуру судебного разбирательства, особенно если эта процедура касается семейных или детско-родительских отношений. Ведущая роль в процессе внесудебного урегулирования принадлежит медиатору – посреднику, организующему и сопровождающему процесс переговоров и поиска компромисса. Именно от медиатора зависит, смогут ли стороны превратиться из противоборствующих в договаривающихся, смогут ли они найти приемлемое для всех решение. В статье рассмотрено понятие медиатора, требования к медиатору, права и обязанности медиатора. Показана роль медиатора в проведении процедуры медиации, работа медиатора.

Ключевые слова: медиация, медиатор, конфликт, споры, переговоры.