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IMPLEMENTATION OF MEDIATION IN THE REPUBLIC OF AZERBAIJAN

Mediation is one of the alternative, out-of-court, means of dispute resolution along with negotiations, participatory procedure, arbitration, etc. The principles of the mediation procedure contribute to its attractiveness. In addition, by reducing the workload of judicial bodies through weeding out disputes on which mutual agreement is achievable, this institution promotes the creation of an optimal legal culture, protection of rights and legitimate interests enshrined in the Constitution of the Republic of Azerbaijan and other normative legal acts.

The institute of mediation is relatively new to the legal system of Azerbaijan. The adoption of the Law of the Republic of Azerbaijan «On Mediation» on March 29, 2019, necessitates the introduction of appropriate amendments to a number of regulatory legal acts of the Republic to ensure their unity and interconnection. The author analyzes the norms of this Law, as well as some provisions of the Law «On Notaries» related to the use of mediation. Separately, the issue of the form of a mediation agreement, its content, ways to ensure its compliance with the requirements of the law and to prevent the execution of unlawful provisions of these agreements is considered.

Keywords: *mediation, mediator, dispute resolution, alternative dispute resolution, settlement agreement*

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The practice of dispute resolution with the help of a disinterested third party has been widely used among different strata of Azerbaijani society since ancient times. Having an ancient culture of statehood dating back to the IV–III millennia BC, the oldest Azerbaijani states, which played an important role in the military and political history of the region, had close ties with the ancient Assyrian, Akkadian states, including the Sumerian state, which widely used the institute of mediation. The application of this institute is reflected in the national fiction, including the mythology of the ancient Oghuz Turks, depicted in «Book of Dede Korkut», works of Nizami Ganjavi, and other literary and historical sources. Mediation has also been widely used in the field of international relations. For example, Sarah-Khatun, a member of the ruling Aqqoyunlu family, repeatedly participated in the settlement of controversial issues arising both within the country and in the field of diplomatic relations in the international arena. The Naibs who ruled the cities during the khanates, in addition to conducting financial, police, and judicial affairs in the territory under their control, also performed functions similar to mediation, i. e. resolved disputes that did not require judicial proceedings [Mustafazade 2005].

Until 1917, the practice of mediation was widely used to settle a wide range of disputes at the level of the peasant community, including for the resolution of trade disputes. Due to the predominance of totalitarian ideology in the USSR, which assumed absolute and comprehensive state control over public life, the institution of mediation did not develop during this period. Mediation activities in the field of resolving conflicts that arose in everyday life and production were carried out by trade unions and party bodies. Nevertheless, mediation was used

in the field of regulation of foreign economic, political and international relations.

The Law of the Republic of Azerbaijan «On Mediation» was adopted on March 29, 2019. Naturally, the prolonged absence of this institution is fraught with certain legal, technological, and other changes, but since the institution of mediation is not something completely new and has been widely used in practice throughout the historical development of Azerbaijan, it has every chance for successful implementation in the practice of dispute resolution.

The effectiveness of the judicial system directly depends on the possibility of resolving the conflict, which is not always achieved through the adoption of a judicial act. Any court decision may be appealed, and another lawsuit may be filed against any claim. All this leads to the accumulation of dozens of court cases around one conflict and does not bring the parties any closer to its resolution [Abolonin 2014: 2].

Mediation refers to the system of alternative, out-of-court, dispute resolution (ADR). According to T. Krapp, alternative dispute resolution includes all dispute resolution methods, both out-of-court and in-court, which can be applied during the trial [Krapp 1995: 45]. A special feature of negotiations is their direct implementation by interested parties. In other words, negotiations aimed at reaching a mutually beneficial agreement are carried out by the parties to the dispute without the participation of a third party. Conciliation and mediation are carried out with the participation of a disinterested third party, whose activities are aimed at facilitating the resolution of a particular dispute and concluding a mutually beneficial agreement. Although the terms «mediation» and «conciliation» are used as synonyms, generally conciliator is a neutral third party whose active participation is expressed in the proposal of recommendations, while the mediator carries out activities aimed at establishing an appropriate environment for cooperation between the parties and reaching a mutually beneficial agreement between them [Bühring-Uhle 1995: 63]. In arbitration proceedings, the dispute under consideration is solved not by the parties, but by a third party.

Mediation is carried out on a voluntary basis, however, on a number of issues, the legislator prescribes the mandatory presence of the parties at a preliminary mediation meeting before going to court. This category of issues includes commercial, family, and labor disputes. The pre-mediation phase is important because it paves way for the actual mediation process [Kerkmez 2010]. The pre-mediation phase precedes the mediation stage and includes making contact with the proponent, contacting the opponent and preparing to work on resolving the conflict. The mediation phase includes the stages of convening the mediation, opening remarks from both the parties, having a joint discussion, private caucuses, negotiation, and closure [Carnevale, Pruitt 1992: 43].

Thus, in accordance with the procedural legislation, when applying to the court, the plaintiff must provide information on compliance with the mandatory pre-trial settlement of the dispute and provide an appropriate document attesting to this.

However, mediation can be carried out not only in a claim (pre-trial) order but also in the course of legal proceedings. At the same time, in accordance with Article 21.3 of the Law «On Mediation», the initiative to conclude an agreement on the application of the mediation process can come from either one or all interested parties, or from the court. In this respect, I consider it expedient to include in Article 183 of the Civil Procedure Code of the Republic of Azerbaijan «Clarification of the Rights and Obligations of the Persons Participating in the Case» a provision explaining to the parties their right to use mediation to resolve the dispute and its consequences.

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In accordance with Article 329.2. of the Civil Code of the Republic of Azerbaijan, «transactions are made orally or in writing (simple or notarial)». Article 45 of the Law of Azerbaijan «On Notaries» states, that «notaries and relevant executive authorities, within their powers, approve transactions subject to a notarization in cases provided for by the legislation of the Republic of Azerbaijan, and

other transactions at the request of the parties». Thus, the legislator points out two grounds for notarization of the transaction: 1) in cases where it is directly provided in the legislation and 2) based on the will of the parties. At the same time, the second paragraph of the same article requires the persons authorized to carry out the notarization of documents «to check the compliance of the contents of the transaction they certify with the law and the real intentions of the parties». In accordance with Article 402.1 of the Civil Code of the Republic of Azerbaijan, even preliminary agreements on the conclusion of a contract on the transfer of property, performance of works, or provision of services (main contract) in the future on the terms stipulated in the preliminary contract must be concluded in the form established for the main contract. Also, this article, as well as Article 329.1 of the Civil Code, indicates the nullity of transactions concluded in violation of the rules on their form.

Article 33.1 of the Law «On Mediation» establishes a written form for settlement agreements concluded between the parties. «The following issues shall be regulated in the settlement agreement:

33.1.1. date and place of the conclusion of the agreement;

33.1.2. information about the parties;

33.1.3. subject of dispute;

33.1.4. information about the mediator(s) and the mediation organization if mediation process is implemented by mediation organization;

33.1.5. conditions on resolution of the dispute that parties have agreed and method and periods for fulfilling them;

33.1.6. consequences of not performing or poorly performing the provisions of settlement agreement;

33.1.7. other issues in accordance with this Law, the Civil Code of the Republic of Azerbaijan and other legislative acts».

A mediation agreement is a civil contract, therefore agreements for which mandatory notarization is prescribed by law, if included in the content of a mediation agreement, are also subject to mandatory notarization, but Article 33.1 of the Law «On Mediation» does not contain a corresponding provision.

Due to the fact that mediation operates entirely on a voluntary basis, some countries have not made arrangements regarding the enforceability of the agreement reached at the end of the process [Mediation 2008: 38]. In accordance with the Law of the Republic of Azerbaijan «On Enforcement» the mediation agreement is not included in the list of enforcement documents. However, this provision does not exclude the need for an appropriate mechanism to ensure the execution of the decision. Since the agreement reached as a result of mediation is a civil contract, its implementation is carried out in accordance with the procedure established by law for contracts. Under Article 33 of the Law «On Mediation», the settlement agreement must contain provisions regarding non-fulfillment or improper fulfillment of the terms of the contract. The list of ways to ensure the fulfillment of obligations provided for in Article 460.1 of Chapter 24 of the Civil Code of the Republic of Azerbaijan includes «pledge, penalty, retention of the debtor's property, surety, guarantee, deposit and other means provided for by this Code or contract».

Article 16.4 of the Law «On Mediation» indicates the absence of responsibility of the mediator for the failure of the parties to reach a mutually beneficial agreement or its non-fulfillment. In accordance with the amendments made to Articles 34.3 and 34.4 of the Law «On Mediation» on July 9, 2021, in case one of the parties refuses to voluntarily execute the settlement agreement or fails to execute it within the stipulated time, the enforcement of the settlement agreement is possible through the appeal of the other party to the court. Initially, the article provided for the possibility of applying to notary authorities to obtain a notary's executive inscription. Pursuant to Article 76 of the Law of Azerbaijan «On Notaries», in order to withhold sums of money from the debtor or claim property, the notary at the location of the debtor must make executive inscriptions on the documents establishing the debt. At the same time, the article notes the need to comply with two conditions for the production of an executive inscription: the first is the indisputability of the debt, the second is the non-expiration of the terms provided for in Article 373 of the Civil Code of the Republic of Azerbaijan, unless other terms are provided for by law. In other words, the article does not ban the issuance of an executive inscription to mediation agreements. Furthermore, the amendment does not correspond to the Article 45 of the Law «On Notaries» according to which notaries are authorized to approve transactions at the request

of the parties. Thus, there is a need to bring the two normative legal acts in line with each other.

As noted above, the parties can apply the mediation procedure both before and after the case is accepted for production, but before the court decides on the case. In this case, the settlement agreement concluded as a result of its application is subject to approval by the judge. The agreement is approved by the ruling of the court, which terminates the proceedings in the case. The judge is also entitled to issue a reasoned ruling on the non-approval of the agreement and continue the proceedings. The basis for refusal to approve the settlement agreement of the parties in accordance with Article 52.5 of the Civil Procedure Code of the Republic of Azerbaijan is a contradiction to the law or violation of the rights and legitimate interests of other persons. Since the powers and duties of the mediator and the mediation organization do not include checking the content of the text for its legality, this check is carried out in accordance with the procedure and cases provided for by law only by a judge. In this connection, in order to avoid the inclusion of illegal provisions in the contract and their execution, I consider it advisable to establish a mandatory notarized form for mediation agreements concluded out of court. In this case, in accordance with Article 45 of the Law «On Notaries», the content of the certified agreement will be checked for «compliance with the law and the actual intentions of the parties» [Allahyarova 2021].

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Особенности применения медиации в Республике Азербайджан

Медиация – один из альтернативных внесудебных способов разрешения споров наряду с переговорами, партисипативной процедурой, арбитражем и т. д. Снижая нагрузку на судебные органы путем отсева споров, по которым возможно достижение взаимного согласия, этот институт способствует созданию оптимальной правовой культуры, защите прав и законных интересов, закрепленных в Конституции Азербайджанской Республики и других нормативных правовых актах.

Институт медиации является относительно новым для правовой системы Азербайджана. Принятие Закона Азербайджанской Республики «О медиации» 29 марта 2019 г.

обусловливает необходимость внесения соответствующих изменений в ряд нормативных правовых актов для обеспечения их единства и взаимосвязи. В статье анализируются нормы указанного закона, а также некоторые связанные с применением медиации положения Закона «О нотариате». Отдельно рассматривается вопрос о форме медиативного соглашения, его содержании, способах обеспечения его соответствия требованиям законодательства и предотвращения исполнения неправомерных положений этих соглашений.

Ключевые слова: *медиация, медиатор, разрешение споров, медиативное соглашение, альтернативное разрешение споров*

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