

## COMMENTS

### MEDIATION OF LABOUR DISPUTES IN KAZAKHSTAN IN COMPARATIVE CONTEXT

GUZAL GALIAKBAROVA,  
Gumilyov Eurasian National University (Astana, Kazakhstan)

SHOLPAN SAIMOVA,  
Gumilyov Eurasian National University (Astana, Kazakhstan)

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*The authors undertake an analysis of features of mediation in individual labour disputes settlement in the Republic of Kazakhstan and the Russian Federation. The current paper also analyzes the experience of some foreign countries (USA, UK, Germany), based on a study which suggests the ways of improving the mediation institution in Kazakhstan. In addition, the identified advantages of mediation as an extra-judicial regulation of labour disputes, the authors point out the identified shortcomings of the matter in new the Labour Code of the Republic of Kazakhstan.*

*Relevance of the topic is reasoned to the fact that in the 21st century extra-judicial settlement of disputes is preferred worldwide these days. In this context, it is no exception to the regulation of individual labour disputes without appealing to the courts. It demonstrates the role and significance of the introduction and development of conciliation procedures, including mediation, without diminishing the importance of other remedies to protect labour rights and freedoms provided in the labour legislation.*

*An analysis of Kazakhstan's and Russia's procedural laws indicates a steady trend of expansion of alternative legal ways of disputes settlement in general, and particularly in labour disputes, including disputes between economic agents (employer and employee), which seems to be responded to the modern development of economic relations. Extra-judicial ways of conflict resolution may be undertaken not only by jurisdictional, but also by non-judicial mechanisms that are in the beginning stage of formation as alternative ways of resolving labour disputes at this period of Kazakhstan's development.*

*Key words: individual labour disputes; mediation; conciliation; extra-judicial settlement; alternative disputes settlement.*

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## 1. Introduction

Since its independence in 1991, Kazakhstan has created its statehood to established, developed and strengthened the foundations of its independence to provided for the country's territorial integrity and inviolability of borders; transferred the economy to a free market way of development and successfully integrated into the global market. However, the legal sphere needs further reforms. In this regard, it is increasing the role and significance of the introduction of mediation procedures, and, along with pre-trial dispute resolution methods, it is growing in importance with non-judicial resolution of disputes.

According to the guidelines for increasing productivity developed by the International Labour Organization (ILO), 'relations of production depend on the interaction between employees and employers. The nature of their interaction depends on the environment in which they operate, as well as the type of dispute that they are seeking to solve. There are a lot of disputes, but not everything can be resolved by the parties on the basis of consensus, dialogue and negotiation.'<sup>1</sup>

Article 13 of the Constitution of the Republic of Kazakhstan (Kazakhstan) provides for the right of citizens to protect their rights and freedoms with all means not contradicting the law, i.e. Therefore the Constitution entitles in addition opportunities to use judicial and other alternatives remedies of conflict resolution.

In different countries where mediation takes place a significant proportion of the time, it is understood that the relationship between people, social stability, welfare of the people are the main components of the basis for the state development.

An institution of mediation is not new for Kazakhstan, as even in historical traditional Kazakh society, the role of mediators was performed by judges ('Biy'). They resolved disputes and managed the reconciliation of the parties through negotiations between the conflicting parties. Despite this historical precedence, mediation has appeared in the legislation of modern Kazakhstan recently as one of the mechanisms of alternative resolution of legal disputes, whereas in many other countries, it has been used successfully for many years.

In Kazakhstan, the legal framework is not yet a completely formed science-based concept of the alternative procedure involving a mediator. Nowadays, considerable experience with integrating reconciliation procedures with the assistance of a mediator is used in the legal systems of different states. In many foreign countries, mediation exists and is used as a special form of settlement of disputes along and in

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<sup>1</sup> Labour dispute systems: guidelines for improved performance (International Training Centre of the ILO, International Labour Organization 2013) <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/publication/wcms\\_211468.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_211468.pdf)>.

connection with litigation. Unfortunately, the domestic jurisprudence of this practice remains poorly understood.

Attempts at a comprehensive study of theoretical and applied aspects of mediation in civil jurisdiction, including in comparative legal aspect or in the science of civil procedure and labour law, had not been previously undertaken.

## **2. Mediation as an Extra-judicial Remedy of Individual Labour Disputes Settlement in Russia, USA, UK, Germany**

The resolution of legal disputes by means of public proceedings, as noted by Russian scientist S.V. Nikoloyukin<sup>2</sup>, is due to a generally accepted way to ensure the stability and sustainable progress in modern market relations, and is identified as an essential element of the economic mechanism of any industrialized country in the world. At the same time, it should not be forgotten, that the formation of market relations, in the civilized sense of the term, is a long process and to a large extent depends on the level of legal protection of business entities and other economic activities. In this new environment there are merged conflicts in the social and labour spheres, which are not only related to direct violations of labour rights and guarantees, but often to contradictions and interests of the parties while adopting local acts that establish new conditions of work, changing the personnel policy of the employer.

Mediation, in its modern sense, began to develop in the second half of the 20th century. Initially it began to develop in the US, UK and Australia, then gradually began to spread in Europe. Mediation procedures, particularly those of mediation being used as a tool of internal dispute resolution, have been traditionally widespread in Japan. Adherence by Japanese businessmen to alternative dispute resolution has traditionally been related to ethics – the negative attitude to the choice of a state court as a means of disagreements resolution.<sup>3</sup>

In ancient China, Confucius urged the use of mediation instead of going to court. He warned that controversial participation in trial is likely to enhance the exasperation of the parties in the conflict and hinder their effective interaction.<sup>4</sup>

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<sup>2</sup> *Николюкин С.В. К вопросу о праве на защиту прав предпринимателей в арбитражных судах // Вестник арбитражной практики. 2011. № 4. С. 12 [Nikolyukin S.V. K voprosu o prave na zashchitu prav predprinimatelei v arbitrazhnykh sudakh // Vestnik arbitrazhnoi praktiki. 2011. № 4. S. 12 [S.V. Nikoloyukin, On the Question of the Right to Protection of Entrepreneurs' Rights in Arbitration Courts, 4 Bulletin of Arbitration Practice 12 (2011)]].*

<sup>3</sup> *Габбасова А.С. Потенциал медиации в регулировании трудовых споров в Республике Казахстан // Вестник Казахского национального университета им. аль-Фараби. Серия Юридическая. 2013. № 2 (66). С. 162 [Gabbasova A.S. Potentsial mediatsii v regulirovanii trudovykh sporov v Respublike Kazakhstan // Vestnik Kazakhskogo natsional'nogo universiteta im. al'-Farabi. Seriya Yuridicheskaya. 2013. № 2 (66). S. 162 [A.S. Gabbasova, The Potential of Mediation in the Regulation of Labour Disputes in the Republic of Kazakhstan, 2(66) Bulletin of the Al-Farabi Kazakh National University. Series of Law 162 (2013)]].*

<sup>4</sup> *Паркинсон Л. Семейная медиация [Parkinson L. Semeinaya mediatsiya [L. Parkinson, Semeinaya mediatsiya]] 11 (Moscow 2010).*

Considering that simplification of proceedings and the exclusion of the extensive and confusing paperwork that has become known as red tape started a long ago, particular attention should be paid to the issue of extra-judicial settlement of disputes, the most spread mean of which is mediation.

In the global context, mediation could be seen as the next stage in the development of mankind invented ways of resolving conflicts.<sup>5</sup>

40% of disputes are resolved by mediators, and in 80% of cases it gives a positive result. In England 87% of cases are resolved with the help of mediators, i.e. to court in the US – 95, Slovenia – 35%.<sup>6</sup>

Global practice provides many examples of legislative enforcement of mediation. The corresponding acts were adopted in the United States, Austria, and Germany. The European Commission has approved a Code of Mediator. The European Union (EU) issued a series of guidelines governing activities of mediators, including a directive on mediation, which encourages the courts to include mediation in its procedures as well as encouraging the use of electronic information technologies in the mediation.<sup>7</sup> Under this directive, mediators must be aware of the existence of the European Code of Conduct for Mediators.<sup>8</sup> For example, the EU and Kazakhstan need to develop this kind of code.

The experience of European countries as well as Australia, Canada and the United States show participation of professional intermediaries in disputes makes the process of dispute resolution very effective.<sup>9</sup>

The first post-Soviet republic that introduced an institute of mediation was Moldova. Russia later adopted its own institute in 2010.<sup>10</sup> Kazakhstan became the third country to do so. According to the Russian scientist Mareshin, a majority of post-

<sup>5</sup> Stitt A., *Mediation: a practical guide* 15 (Routledge Cavendish 2004).

<sup>6</sup> *Мулдагалиев А. Правовые аспекты применения медиации // Зангер. 2015. № 6 (167). С. 32 [Muldagaliev A. Pravovye aspekty primeneniya mediatsii // Zanger. 2015. № 6 (167). S. 32 [A. Muldagaliev, Legal Aspects of the Use of Mediation, 6(167) Lawyer 32 (2015)].*

<sup>7</sup> Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (May 21, 2008) <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008L0052>> (accessed Jan. 25, 2016).

<sup>8</sup> *Загорка Х. Внедрение института медиации в Республике Казахстан. Законодательство Европейского союза и Совета Европы о медиации: медиация в индивидуальном трудовом законе // Зангер. 2013. № 2 (139). С. 81, 83 [Zakhorka Kh. Vnedrenie instituta mediatsii v Respublike Kazakhstan. Zakonodatel'stvo Evropeiskogo soyuza i Soveta Evropy o mediatsii: mediatsiya v individual'nom trudovom zakone // Zanger. 2013. № 2 (139). S. 81, 83 [H. Zahorka, Introduction of the Institute of Mediation in the Republic of Kazakhstan. The Legislation of the European Union and the Council of Europe on Mediation: Mediation in Individual Labour Law, 2(139) Lawyer 81, 83 (2013)].*

<sup>9</sup> *Бактыбаев Н. Институт медиации в условиях инновационного развития казахстанского общества // Вестник КУАМ. 2013. № 1. С. 277 [Baktybaev N. Institut mediatsii v usloviyakh innovatsionnogo razvitiya kazakhstanskogo obshchestva // Vestnik KUAM. 2013. № 1. S. 277 [N. Baktybaev, Institute of Mediation in Terms of Innovative Development of Kazakhstan Society, 1 Bulletin of KUAM 277 (2013)].*

<sup>10</sup> *Muldagaliev A. Id.*

Soviet countries have the same historical and cultural background, which explains the identity of the legal systems.<sup>11</sup> In this regard, it is a common aim to explore foreign legislation on mediation along with the Russian legal science. In recent years, there has been an increased interest in the mechanisms of extra-judicial resolution of specific categories of legal cases, with no role pleads to judicial mechanisms. Extra-judicial settlement of disputes are procedures for conciliation without referring to a court through the voluntary participation of parties in negotiations. This dispute resolution, which is aimed at reducing the conflict.<sup>12</sup>

There a number of developmental prospects for seen in the development and use of mediation for the settlement of individual labour disputes. Moreover, in the last decades of the 20th century, mediation had been used more and more in individual disputes and conflicts within in companies.<sup>13</sup>

It should be noted that it became a widespread, practice in foreign countries, to establish specialized state organizations and agencies engaged in the settlement of disputes arising out of labour relations. For an example, the case of the Federal Mediation and Conciliation Service (FMCS) and the Mediation Research & Education Project, Inc. (MREP) in the United States<sup>14</sup> is illustrative. According to the annual reports of FMCS, the service annually conducts about 5,000 mediations in disputes arising in the course of collective bargaining, of which 86% the parties reached an agreement add about 2,000 mediations in disputes arising out of the breach of the collective agreements, of which 74% the parties reached an agreement.<sup>15</sup>

Unfortunately, in Kazakhstan, extra-judicial cases are not recorded officially, this causes a lack of ability to analyze not possible to analyze the practice of mediation in labour disputes resolution.

The United States is an interesting example where the entire legal system aims to ensure that the majority of disputes are resolved voluntarily before the trial, and the judge may suspend a trial and advise the parties to apply for a mediator.

Mediation has often been equated with constructive behavior of both sides, and on questions which were not worthwhile to fight on questions that are not worthy of length court mitigation, for example, small claims or personal disputes. In the United States, mediation has a tradition in labour relations since 1898, when

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<sup>11</sup> D. Maleshin, *The Russian Style of Civil Procedure*, 21(2) Emory International Law Review 559 (2007).

<sup>12</sup> Бекбасова Г., Амуртаева Д. Особенности рассмотрения конфликтов институтом медиации в Республике Казахстан // Закон и время. 2013. № 05 (149). С. 41–42 [Bekbasova G., Amurtaeva D. *Osobennosti rassmotreniya konfliktov institutom mediatsii v Respublike Kazakhstan // Zakon i vremya*. 2013. № 05 (149). S. 41–42 [G. Bekbasova, Amurtaeva D, *Features Grievance Mediation Institute in the Republic of Kazakhstan*, 05(149) Law and Time 41–42 (2013)]]].

<sup>13</sup> Kramer, *Alternative Dispute Resolution in the Work Place*, § 1.02 1–8 (1998).

<sup>14</sup> MREP Grievance Mediation Report (2008).

<sup>15</sup> Sixty-First Annual Report (Federal Mediation and Conciliation Service 2008).

the Erdman Act created a settlement system for disputes between railway carriers and workers for salaries, working time or other worker conditions.<sup>16</sup> This law first obliged the parties to a mediation or a conciliation attempt by the Chairman of the Interstate Commerce Commission; as a second step then to an arbitration procedure before an Arbitration Board.<sup>17</sup> In 1991, the US Supreme Court opened the way to further individual mediation in the labour law, which lets calculate that more and more now mediation is used for individual disputes in labour law.<sup>18</sup>

In recent years, courts and legislatures in the US not only encourage alternative forms of dispute resolution, but also take certain steps to ensure that the data forms litigants have resorted to without fail.<sup>19</sup>

An indicator of the growing importance of negotiations and settlement agreements for the American justice system is the fact that some of the training programs of law schools, as well as training programs for lawyers, include a course and negotiation skills to resolve the dispute.<sup>20</sup>

The US experience in the field of alternative settlement of labour disputes was the same by the UK. British analogy of the US Federal Mediation and Conciliation Service is the Advisory, Conciliation and Arbitration Service (ACAS), established on the basis of the Ensuring Employment Act of 1975. It was started as an independent body to assist in the resolution of individual and collective disputes by means of alternative methods, including mediation. As a general rule, any complaint made to the Labour Tribunal, which is the main body for consideration of labour disputes in England, Wales and Scotland is recorded and automatically sent to ACAS. After receiving a copy of the complaint, the mediator appointed by the Service addresses the dispute's parties with a proposal to start a mediation procedure. If the dispute can not be resolved through conciliation, the case is referred back to the Labour Tribunal.<sup>21</sup>

It is believed that reconciliation conducted by the Service in collective labour disputes is more effective than the individual. Firstly this may be due to the fact that the parties are afraid to apply for more costly procedures and, in individual disputes the worker often relies on satisfaction of their claims, if he/she further appeal to the Labour Tribunal. The activity of the labour tribunals is linked to the resolution of

<sup>16</sup> Mark Lembke, *Mediation im Arbeitsrecht* 31 (2001).

<sup>17</sup> Hans-Juergen Zahorka, *Mediation in Labour Relations: What Can Be Learned from the North American and EU Example*, Labour Legislation and Arbitration Project <<http://www.libertas-institut.com/de/PDF/Mediation.pdf>> (accessed Jan. 25, 2016).

<sup>18</sup> *Gilmer v. Interstate/Johnson Lane Corporation*, (90–18) 500 U.S. 20 111 S.Ct. 1647 (1991).

<sup>19</sup> Abraham P. Ordoover, *Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution*. (2d ed. National Institute for Trial Advocacy 2002).

<sup>20</sup> Mark Schoenfeld & Mick Schoenfeld, *The McGraw-Hill 36-Hour Negotiation Course* (McGraw-Hill, N.Y. 1991).

<sup>21</sup> David & Francis, *A comparative assessment of labour dispute resolution in the United States and the United Kingdom*.

individual disputes involving workers, trade unions, employers and their associations. Even if these disputes are closely related to collective relations, it can be argued that in the UK there is an observed trend towards a significant reduction of the number of collective labour disputes, while there is an increasing number of individual disputes. It appears that the weakening of the trade union movement and the reduction of strike activity promotes increasing the load on the Labour Tribunals as the only remedy of protecting workers' rights.<sup>22</sup> Despite the fact that in the UK more than half of all the employees' claims are resolved out of court,<sup>23</sup> according to British experts in labour law, '... in comparison with the standards of most developed countries, the British dispute resolution procedures in labour relations are very messy.'<sup>24</sup>

In addition to the United States and Britain, there is a widespread internal mechanism of labour disputes resolution in the public institutions and bodies. For example, US companies usually have already established a special office or division to resolve complaints. In England, this type of service has been established in state bodies, such as the Ministry of Health (1998) and the Agency for Social Payments (since 1998). The researchers note that in the London municipal department on fire safety and civil defense, there was increased effectiveness of the internal mechanisms for resolving employees complaints after the training on mediation techniques.<sup>25</sup>

In continental Europe, labour dispute mediation is used much less than in the UK and the US. This is largely due to a quite effective system of labour justice. At the same time, labour courts also focus on the prompt and mutually beneficial settlement of cases. For example, in accordance with the Labour Procedural Code of Germany, the court must make an attempt to conciliate parties.<sup>26</sup> As a rule, this function is performed by the Chairman at the preliminary hearing, and only if it is impossible to reach an agreement will the full composition of court to be gathered. The German court, in this case, is comprised of two juror judges, each representing respectively the employers and trade unions, and one professional judge; the chairman and they consider the

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<sup>22</sup> Лютов Н.Л. Коллективное трудовое право Великобритании: [монография] [Lyutov N.L. *Kollektivnoe trudovoe pravo Velikobritanii: [monografiya]*] [N.L. Lyutov, *Collective Labour Law of UK: [monograph]*] 106, 119–120 (Wolters Kluwer 2009).

<sup>23</sup> N. Selwyn, *Selwyn's Law of Employment* 498 (14 ed. Oxford University Press 2006).

<sup>24</sup> Brown, Hanami & Blanpain, *Industrial Conflict Resolution in Great Britain. Industrial Conflict Resolution in Market Economies. A study of Canada, Great Britain and Sweden* 103 (T. Hanami and R. Blanpain eds., Deventer-Netherlands 1987).

<sup>25</sup> Boule & Nestic, *Mediation: principles, process, practice* 4–5, 332 (London, Dublin, Edinburgh, Butterworth 2001).

<sup>26</sup> Захорка Х.Ю. Примирительные процедуры в трудовых отношениях в зарубежных странах. Что можно почерпнуть из опыта Северной Америки и ЕС? [Zakhorka Kh.Yu. *Primiritel'nye protsedury v trudovykh otnosheniyakh v zarubezhnykh stranakh. Chto mozjno pocherpnut' iz opyta Severnoi Ameriki i ES?*] [H. Zahorka, *The Conciliation Procedure in Labour Relations in Foreign Countries. What can be Learned from the Experience in North America and the EU?*] <<http://www.trudsud.ru/ru/docs/publications/primiritelnye-protsedury-v-trudovykh-otnosheniyakh-v-zarubezhnykh-stranakh/>> (accessed Jan. 25, 2016).

case<sup>27</sup>. According to the German judge in resignation Manfred Pillar 'mediation in Germany is a modern method of solving conflicts where the parties voluntarily and on their own responsibility could resolve their conflict in consultation with each other confidently and with the support of a neutral third party.'<sup>28</sup> Mediation could thereby become a successful model for labour disputes resolution in our country.

In Germany, according to the Labour Procedural Code, there is a provision for the traditional exclusion of arbitrary decisions in labour law. Thus, it is excluded that the arbitration courts will be established with a low legal training, independence and less tied to the substantive law than the labour courts.<sup>29</sup> In Germany, the binding decision in labour disputes are the exclusive domain of the Labour Courts. However, there are some elements, such as the German Labour Procedural Code, which stimulate judges to solve the dispute in the first session. This is inter-judicial mediation, which de facto led to a relatively quick procedure for the parties seeking justice before the labour courts. about 80% of the cases were settled within six months, only 4% lasted more than one year.<sup>30</sup> Therefore judicial mediation in Germany contributes to the overall quickening of the process as well as reducing the load on the courts. Mediation is useable has been used as a decentralized, deregulated and unified system with many different facets of attempts and results, and also in an environment of relative high legal fees for all parties.<sup>31</sup>

Next, the case of Kazakhstan will be considered The establishment of specialized bodies dealing with the settlement of individual labour disputes is rather premature. Much more rationale is needed to improve the existing jurisdictional mechanism provided by current legislation. The lowest indicators of appeals to the court for protection of violated rights are reported in such countries as China and Japan. According to Maleshin, such countries do not have 'a high legal culture, but the desire of both the State and citizens to reduce the role of law in society', where 'traditional dispute resolution is based on a sense of justice, and only then the law'<sup>32</sup> is clear. The Kazakh procedural system is the foundation of the whole system of resolving legal conflicts. However, as Mednikova fairly noted, 'being the universal form of human rights protection, judicial protection should not be a panacea for all

<sup>27</sup> Забрамная Е.Ю, Шмелева Е.С. Обзор систем разрешения трудовых споров, применяемых в развитых странах [Zabramnaya E.Yu., Shmeleva E.S. *Obzor sistem razresheniya trudovykh sporov, primenyaemykh v razvitykh stranakh* [E.Yu. Zabramnaya, E.S. Shmeleva, *Review of Grievance Systems Used in Developed Countries*]].

<sup>28</sup> Sh. Manfred, *Iz praktiki sudebnoi mediatsii v Germanii*, 3(140) Zanger 34 (2013).

<sup>29</sup> Grunsky, *Arbeitsgerichtsgesetz* § 4 annot. 2, 7 ed. (1995).

<sup>30</sup> Mark Lembke, *Mediation im Arbeitsrecht* 31 (2001).

<sup>31</sup> *Arbeitsgerichtsgesetz Nordrhein-Westfalen* [AGH] [Labour Procedure Code], 19.11.1999, *Die Monatsschrift für Deutsches Recht* [MDR] at 611, 2000.

<sup>32</sup> D. Maleshin, *Id.*

legal problems.<sup>33</sup> Due to the great similarity of the legal systems, it can be argued that at this stage of the development of Kazakhstan, it would be appropriate to research, along with the experience of foreign countries, the practice of neighboring Russia in some issues of regulation of labour mediation.

A comparative analysis of statistical data on the number of labour disputes in the courts in our countries was undertaken.

The results indicate that The Russian federation has, 7813432 and 645161 case in labour disputes in the courts of common jurisdiction in 2011 and 2012, respectively. The Republic of Kazakhstan had 5185 and 6956 for the same years.<sup>34</sup>

Conducting this analysis became problematic with respect to the Kazakh Statistics, as unfortunately, in recent times there is data referred to as 'Generalization of court practice of labour disputes, including on the practice of hiring and dismissal of employees for 2013', which provides data only for 2011 and 2012. However, this information provided that due to the prevailing amount of the population and the broadness of the territory of Russia the number of labour disputes is very high. Such dynamics of appeals to the court, in our view, demonstrate that the shortcomings of the mechanism of individual labour disputes resolution are most acutely expressed in a post-crisis period. A post-crisis period is a time when the number of violations of workers' rights by employers sharply increase. Employers are then seeking to decrease the costs of doing business through reducing costs staff, and, therefore, by reducing the level of legal guarantees to employees. The lack of effective mechanisms for the pre-judicial settlement of labour disputes led to mass appeals of workers to the courts of general jurisdiction.

And under due to such a workload of the judicial system, for both Russia and Kazakhstan, intensive introduction of mediation determined as particularly acute problem.

The for Russian legislation mediation as a conciliation procedure with participation of the intermediary, has been known for years, however, mainly in a framework of the trial. For example, the Arbitration Procedural Code of the Russian Federation of July 24, 2002 № 95-FZ (chapter 15) provides the application of a mediator in order to resolve the dispute. In particular, Art. 138 of the Arbitration Procedural Code stipulates that the parties may settle the dispute by entering into a settlement agreement or by using other conciliatory procedures, including mediation procedure, if it is

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<sup>33</sup> Медникова М.Е. Досудебное урегулирование споров в сфере экономической деятельности (проблемы теории и практики): Автореф. дис. ... канд. юрид. наук [Mednikova M.E. *Dosudebnoe uregulirovanie sporov v sfere ekonomicheskoi deyatel'nosti (problemy teorii i praktiki): Avtoref. dis. ... kand. yurid. nauk* [M.E. Mednikova, *Pre-trial Settlement of Disputes in the Sphere of Economic Activity (Theory and Practice): Abstract. Dis. ... Cand. Jurid. Sciences*]] 3 (Saratov 2007).

<sup>34</sup> Данные Судебного департамента при Верховном Суде Российской Федерации [Dannye Sudebnogo departamenta pri Verkhovnom Sude Rossiiskoi Federatsii [The Data of the Judicial Department under the Supreme Court of the Russian Federation]] <<http://www.cdpep.ru>> (accessed Jan. 25, 2016).

not contrary to federal law.<sup>35</sup> That is, there are a variety of conciliation procedures, including the participation of a mediator or without it.

The Federal Law № 193-FZ 'On alternative dispute resolution process involving a mediator' came into force since 1 January 2011.<sup>36</sup> As follows from Article 1 of this Law, it is developed for the application of alternative dispute resolution procedures with the participation of an independent person – a mediator, promotion of business partnerships; the formation of ethical business practices and harmonization of social relationship.

The object of the regulation Federal Law № 193-FZ defines the use of mediation in disputes arising out of civil relations, including relations in entrepreneurial and other economic activities, as well as disputes arising out of labour relations and family relations. Such a rule is stipulated in the legislation of Kazakhstan. Analyzing this provision, it can be concluded that legislators in our countries have special expectations from an effective use of mediation procedures in labour relations. However, it seems that mediation is not of demand in disputes arising from labour relations, unlike in business or family disputes. The majority of labour disputes is associated with the misuse of disciplinary measures and dismissal. Here such confrontation reaches its peak, and as judicial practice shows, the content of most settlement agreements reduces to payment by employee a different kind of 'compensations'.

It should be noted that the Federal Law № 193-FZ provides using mediation not to labour disputes, but disputes arising out of labour relations. In this regard, the object of disputes arising out of labour relations may be much broader than the subject arising out of individual labour disputes. However, the main object of a dispute arising from labour relations still seems to be the decision made by the employer in respect to a particular employee who did not agree with such decision. It may be, for example, that disputes arising from the decision to change the labour conditions defined by the parties of the labour contract such as dismissal or non-payment of certain sums. It should be noted that neither the Russian legislator or Kazakhstan provides in the Labour Code rules that determine which institution of labour law mediation related. It will not contribute to prompt introduction of mediation procedures in disputes arising out of labour relations.

Another feature of the Russian legislation, in contrast to the Kazakh, is that in Russia, conciliation may be held on disputes arising out of labour relations, with the

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<sup>35</sup> Арбитражный процессуальный кодекс Российской Федерации № 95-ФЗ [Arbitrazhnyi protsessualnyi kodeks Rossiiskoi Federatsii] [APK RF No. 95-FZ] [Code of Arbitration Procedure], Rossiiskaia Gazeta [Ros. Gaz.], Jul. 24, 2002.

<sup>36</sup> Федеральный закон № 193-ФЗ «Об альтернативной процедуре урегулирования споров с участием посредника (процедуре медиации)» [Federal'nyi zakon No. 193-FZ 'Ob al'ternativnoi protsedure uregulirovaniya sporov s uchastiem posrednika (protsedure mediatsii)'] [Federal Law No. 193-FZ 'On Alternative Dispute Resolution Procedure Involving a Mediator (Mediation Procedure)'], Rossiiskaia Gazeta [Ros. Gaz.], Jul. 27, 2010.

exception of collective labour disputes. It is concerned with the fact that mediation in collective labour disputes is already regulated by the Labour Code of the Russian Federation (consideration of a collective labour dispute in the Conciliation Commission, with the participation of a mediator and (or) in the labour arbitration – *Author*). This prohibition is highly controversial, not least because historically, mediation appeared as a special procedure for the settlement of collective labour disputes, and has proven its effectiveness with regard to this category of cases for many years of application in foreign countries.

According to Part 3 of Article 7 of the Federal Law № 193-FZ, the signed agreement on the use of mediation as well as the signed agreement on conducting mediation and related direct conducting this procedure is not an obstacle for applying to the court or arbitral tribunal, if otherwise provided by federal law.

Maleshin proved that the Russian procedural system often borrows from procedural institutions in the enforcement process from overseas (like the Anglo-Saxon and Romano-Germanic) but may have different content from the original version that determined its mixed and original character.<sup>37</sup> A comparative analysis between the laws of our countries shows that have come to the conclusion that the Kazakh civil proceedings are influenced by the culture of society and the level of its legal institutions.

The possibility of pre-judicial settlements of individual labour disputes in Kazakhstan is rarely used. It is mostly determined with difficulties, due to the formation and function of the conciliation committees as well the lack of personnel able to skillfully resolve the dispute. Moreover, as Professor Amandykova suggested, today the mentality of people is focused on judicial resolution of legal disputes, rather than on an alternative resolution.<sup>38</sup>

This situation is complicated by the fact that the legislature of Kazakhstan in the Law 'On Mediation' provides mediation in civil and criminal proceedings as an alternative remedy of dispute resolution. This law determined that mediators shall consider disputes (conflicts) arising out of civil, labour and family and other relations with the participation of individuals and (or) legal entities. Yet in the new Labour Code of the Republic of Kazakhstan, which entered into force on 1 January 2016, there is

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<sup>37</sup> Обобщение судебной практики рассмотрения трудовых споров, в том числе по вопросам практики найма и увольнения работников от 15 апреля 2013 [Obobshchenie sudebnoy praktiki rassmotreniya trudovykh sporov, v tom chisle po voprosam praktiki naima i uvol'neniya rabotnikov ot 15 aprelya 2013 goda] [The Generalization of the Judicial Practice of Labour Disputes, Including on Recruitment Practices and Laying off Workers of April 15, 2013]] <<http://sud.gov.kz/rus/content/za-2013-god>> (accessed Jan. 25, 2016).

<sup>38</sup> Амандыкова С.К., Муканов М.Р. Медиация в Республике Казахстан: становление и перспективы развития [Amandykova S.K., Mukanov M.R. *Mediatsiya v Respublike Kazakhstan: stanovlenie i perspektivy razvitiya* [S.K. Amandykova, M.R. Mukanov, *Mediation in the Republic of Kazakhstan: formation and development prospects*]] <[http://www.rusnauka.com/35\\_NOBG\\_2013/Pravo/9\\_151992.doc.htm](http://www.rusnauka.com/35_NOBG_2013/Pravo/9_151992.doc.htm)> (accessed Jan. 25, 2016).

not provision for mediation as an alternative method of individual labour disputes resolution, the codes indicates only that 'individual labour disputes are considered by the Conciliation Commission, and on outstanding issues or non-enforcement of the conciliation committee's decisions – by the courts, except for small businesses and heads of the executive body of the legal entity' (clause 1 article 159). The Labour Code provides that the term of consideration of individual labour disputes shall be suspended during the period of mediation agreement on a labour dispute, and in case of absence of a conciliation commission, before its creation (article 160).

Expanding the method of contractual regulation of labour relations, the state provides greater autonomy to employers. However, it must be noted that this independence is not always for the benefit of employees. According to the Russian scientist Kurennoi, today the state is not fully thinking about the need for a comprehensive and, at the same time, differentiated approach to the problems and it creates a very explosive situation. Departing from undue interference in the regulation of labour relations, the state often leaves workers tête-à-tête with the employer.<sup>39</sup>

We agree with Professor Kurennoi and believe that a similar situation exists in Kazakhstan. The adoption of a new Labour Code itself hasn't resolved all the problems in regulation of labour relations, as it doesn't contains any links to the extra-judicial resolution of individual labour disputes, which may eventually become a popular and quite progressive mechanism for settlement of specified categories of labour disputes.

Since 1 January 2016, when a new Code of Civil Procedure of the Republic of Kazakhstan entered into force, there has been applying another innovation in the field of extra-judicial settlement of disputes. Thus, the notion of judicial mediation was introduced in legislation. President Nazarbayev noted, at the signing ceremony for the new code of Civil Procedure of Kazakhstan, that 'Reconciliation will be not only applied by mediators but also judges and appellate courts, as well as lawyers. The widespread use of reconciliation would relieve the judicial system, and most significantly – reduce the time to resolve disputes. The development of mediation would increase the level of civic participation.'<sup>40</sup>

Thus, the President of Kazakhstan proposes to strengthen the work on the introducing and applying mediation procedures in the field of labour relations. This very timely, as the violation of labour rights, unfortunately, has been rising year

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<sup>39</sup> Куренной А.М. Новое законодательство о труде: итог или этап? Ученые-юристы МГУ о современном праве [Kurennoi A.M. *Novoe zakonodatel'stvo o trude: itog ili etap? Uchenye-yuristy MGU o sovremennom prave* [A.M. Kurennoi, *New Labour Legislation: the Result or the Stage? Legal Scholars of Moscow State University on the Current Law*]] 103 (JSC Publishing house 'Gorodets' 2005).

<sup>40</sup> Подписан новый Гражданский процессуальный кодекс Республики Казахстан // Закон и время. 2015. № 11 (179). С. 3 [Podpisan novyi Grazhdanskii protsessual'nyi kodeks Respubliki Kazakhstan // Zakon i vremya. 2015. № 11 (179). S. 3 [Signed a New Code of Civil Procedure of the Republic of Kazakhstan, 11(179) Law and Time 3 (2015)]]].

on year. According to the Federation of Trade Unions of Kazakhstan the majority of labour disputes arise in three sectors – oil and gas; mining and construction systems, reaching a proportion of the last three years of 80%.<sup>41</sup> Perhaps so many disputes could be reduced with the proper application of the rules relating to non-judicial settlement of disputes, as mediation possesses several advantages which have been systematized and demonstrated in comparison with the judicial process.

Why choose mediation?

There are some disadvantages of judicial disputes settlement and advantages of mediation:

1) The start of the process depends only on the one party, without taking into account the opinions of other – The parties voluntarily (mutually) decided to initiate the procedure;

2) Judge is appointed – Parties have the right to choose the mediator;

3) Judge is a representative of authority – Mediator is not a representative of authority;

4) The formality of the trial – Informal procedure;

5) Publicity – Confidentiality;

6) Competitiveness – Co-operation;

7) The lawsuit in favor of one party – Achieving a solution acceptable to both parties;

8) Decision is based on the law – Decision is based on the law considering parties' interests.

It could be concluded that the key element of mediation is human factor which is tied the whole process.

In practice, parties often take no action and will not seek, a persistent conflict situation could lead to negative consequences for both parties. For the employee, unresolved conflict can lead to such consequences as dissatisfaction with its work; stress; decreased motivation to work. For the employer there are the problems of the declining quality and quantity of production, the instability of the workforce, and the emergence of management problems. As a result, the accumulated negative energy could be transformed into real protest action. In this regard, believe that it is necessary to strengthen the responsibility for a deliberate provocation of the labour conflict.

In this regard, consider that by analogy with the 'external' mediation services in the enterprises an internal mediation service could be created, or staff mediator units could be introduced. For example, employees of legal departments involved in claims work could combine the profession of lawyer and mediator.

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<sup>41</sup> *Вааль Тамара, 80 трудовых конфликтов за три года решили профсоюзы в Казахстане // Власть [Vaal' Tamara. 80 trudovyykh konfliktov za tri goda reshili profsoyuzy v Kazakhstane. Vlast' [Tamara Vaal, 80 labour conflicts decided to trade unions in Kazakhstan for three years. Governance]]* <http://vlast.kz/novosti/11466-80-trudovyyh-konfliktov-za-tri-goda-resili-profsouzy-v-kazakhstane.html> (2015) (accessed Jan. 25, 2016).

### 3. Conclusion

The study suggests that mediation has become an independent element of the legal doctrine and practice in Kazakhstan. It is advisable for Kazakhstan to have a robust institute and mechanisms of mediation. And what the following, among others, has to be included in all considerations who want to go this way consequences?

1) Mediation needs plurality. It may be possible to include all the possibilities, especially labour relations.

2) A law for the promotion of mediation is recommended, with provisions for the possibility of mediation for those who apply, and so will not contribute to further over crowding of the courts.

3) The Kazakh association of mediators should take up an intensive exchange of views and experiences with their foreign colleagues whenever possible, because mediation is an excellent means for investors into the Kazakh economy.

4) As mediation cannot be prohibited to Kazakhstan, it should be boosted by the state institutions. This could keep employees or companies, for individual cases; or trade unions, companies or associations in the situation of collective cases could be kept from crowding the courts. This would avoid the danger that court settlements could take longer than an appropriate time.

It means that for the further strengthening of this institution need to improve the rules relating to labour relations based on the experience of developed countries. In particular, the following recommendations are proposed:

– to introduce an amendment to clause 1, article 159 of the Labour Code of the Republic of Kazakhstan. The amendment should read as follows: 'Individual labour disputes are considered by the conciliation commission, by mediators, and on unresolved issues or non-enforcement of the conciliation committee's decision by the courts, except for small businesses and heads of the executive body of the legal entity';

– to supply clause 1, article 159 of the Labour Code of the Republic of Kazakhstan with the following rule: 'The parties, by their choice, could apply for resolution of individual labour disputes to the conciliation commission (the court – in the procedure stipulated by this Code) or to settle the dispute through mediation';

– due to the introduction of judicial mediation, the courts should actively promote the effectiveness of this type of mediation;

– to improve mechanisms of individual labour dispute resolution through the establishment in large organizations of specialized services or departments involved in the settlement of disputes through mediation;

– to develop a Code of Ethics for the mediator in Kazakhstan;

– to abandon the use of the adjective 'alternative' and to consider conciliation as an independent remedy of dispute resolution along with traditional judicial procedures or other jurisdictional mechanisms of legal affairs. The advantage of

mediation is that it allows parties involved to find a way out of labour disputes while keeping functioning labour relations and saving the employer's reputation.

In summary, suppose that mediation could and should be widely used by the parties of an individual labour dispute for its early resolution and mutually beneficial terms for each other, which along with other conditions would significantly affect the reduction of the burden on the judicial system of the Republic of Kazakhstan.

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### **Information about authors**

**Guzal Galiakbarova (Astana, Kazakhstan)** – Ph.D. student in Law of Department of Civil Law Disciplines, Faculty of Law, Gumilyov Eurasian National University (Ryskulbekov Str., 16 – ap.65, Astana, 010009, Kazakhstan; e-mail: galiakbarova\_gg@enu.kz).

**Sholpan Saimova (Astana, Kazakhstan)** – Associate Professor of Department of Theory and History of the Country, Constitution, Faculty of Law, Gumilyov Eurasian National University (Abylai-khan Avenue, 39/1 – ap.52, Astana, 010009, Kazakhstan; e-mail: saimova85@gmail.com).