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The role and importance of the institution of mediation in the mechanism of alternative dispute resolution

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Annotation. The article considers with the emergence of legislative foundations of mediation, meaning of the concept, history of formation, essence, principles, stages and classification issues.

Key words. Mediation, alternative dispute resolution, main principals of mediation, process and stage of mediations, agreement of mediation.

At the current stage of reforms aimed at ensuring the innovative development of the new Uzbekistan, the creation of an effective system of pre-trial settlement of disputes, transforming mediation and arbitration courts into institutions that can be trusted by citizens and entrepreneurs is vital.

Therefore, the resolution of the President of the Republic of Uzbekistan dated June 17, 2020 "On measures to further improve the mechanisms of alternative dispute resolution"[1] was relevant. Its main objectives are improving the system of protection of the rights and legitimate interests of individuals and legal entities, expanding alternative opportunities for dispute resolution, radically increasing the role of the institution of mediation, arbitration and international arbitration.

In order to ensure the smooth and effective implementation of the main provisions of the Law of the Republic of Uzbekistan "On Mediation", the resolution established a Mediation Center based on the integration of professional mediators and an Alternative Dispute Resolution Center operating as a non-governmental organization. These centers are tasked with promoting the development and popularization of mediation and other alternative dispute resolution methods. It is known that from January 2019, the law "On Mediation" came into force in our country.

In this regard, it has become very important to inculcate in the public consciousness of our society the reality of "mediation", the essence of this new institution, to explain to the general public its importance, value and advantages. The urgency of this mechanism for alternative dispute resolution is due, on the one hand, to the high efficiency of mediation in the practice of many foreign countries around the world, and, on the other hand, to the need to revive the historically formed but now obsolete values and traditions of our people. Accordingly, a comprehensive observation of the theoretical and legal basis, legal and socio-spiritual nature, content, principles, stages, specific features and characteristics, classification (models) of the institution of mediation is of both theoretical and practical importance.

First of all, it should be noted that the institute of mediation has long historical roots. The method of resolving disputes through third parties has been used since ancient times, even since the time of the primitive system. According to historical sources, the method of mediation was used in the ancient Sumerian, Babylonian and Phoenician states in the field of trade, in resolving disputes between traders. Also, in ancient Greece and the Republic of Athens, the services of mediators were used to resolve various disputes.

The Justinian Code, created in ancient Rome in the 6th century BC, recognized the institution of mediation to resolve disputes. The Romans called the mediators of disputes "medium". They were considered a separate influential category.

"Murosai madora" is one of the natural qualities of our ancient ancestors, which is reflected in the Avesto and has developed since that time. From ancient times to the present, tribal and tribal elders, and later mahalla chairmen (elders), elders, and respected people with extensive life experience, are primarily

[1] Халқ сўзи" (official newspaper of legislative news in Uzbekistan) June 18, 2020.

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concerned with resolving family disputes, as well as domestic, property, commercial, trade, and borrowing issues. have played a significant and mutually beneficial role in resolving disputes and reconciling the parties. Such qualities as tolerance, forgiveness, reconciliation are inherent in the nature of our people and have been carefully preserved in the chain of human values.

Mediation is derived from the Latin word "mediare", which means to mediate, to stand in the way, to intervene. Also, “mediation” is an alternative (pre-trial) method of resolving disputes in which an impartial, impartial mediator helps the parties to reach a mutually acceptable agreement, but it is not possible to make a decision on the dispute and advise either party. not entitled to give. There is information that the Institute of Mediation was used in the ancient Franks in the early second century BC. Mediation, in its present form, originated in the 1970s in the United States and other Anglo-Saxon legal systems. It has been used in European countries since the early 1990s.[1]

Mediation has long been widely used in both China and Japan. Today, in these countries, the participation of mediators in the settlement of disputes is more important than the resolution of disputes in court in terms of moral norms. Such conduct does not mean that the persons concerned are afraid of litigation in the courts of the state, but that wisdom, generosity, restraint, and prudence have acted wisely. Indeed, mediation is an integral part of the legal culture of the Chinese and Japanese peoples.

In the 1960s, an institution called the "American Rule" emerged in the U.S. Civil Court. Its original meaning the services of lawyers are paid by the parties, regardless of the consequences of the case. This means that there will be huge costs, huge sums to be paid.

Mediation has been used in European countries since the end of the last century. While the U.S.-sponsored model of mediation was more popular in Germany, it was less successful in France. (It should be noted that Bonaparte Napoleon adopted the Mediation Act in 1803. He influenced the situation in France, Switzerland and Germany). In this country, mediation was integrated into the justice system: mediators worked directly with the courts.

The purpose of defining the concept of mediation is to create a clear picture of the features of this mediation and to determine the place of this institution in the legal and legislative systems of our country. Moreover, mediation is a new institution, and the people of our society are not yet sufficiently aware of its advantages. This situation requires an in-depth interpretation of the mediation phenomenon. Accordingly, the following definition can be put forward: mediation encompasses the notion of negotiation involving a third, impartial person who has no interest other than finding the most beneficial solution to the conflict or dispute between the two conflicting parties. Mediation is an alternative way of resolving conflicts based on a new non-traditional approach.

According to the definition in the Law of the Republic of Uzbekistan "On Mediation", mediation is a method of resolving a dispute with the assistance of a mediator on the basis of their voluntary consent so that the parties reach a mutually acceptable solution (Article 4). However, this definition does not deny that mediation is a process that is carried out under an impartial expert on the basis of certain procedures.

Mediation consists of negotiations conducted by a qualified and competent specialist (representative) with exceptional skill, courtesy and culture. Its success depends in many ways on the mediator’s experience, qualifications, knowledge, diplomatic qualities, competence, ability to respectfully listen to the views of the parties, to think, analyze and reasonably reconcile. The nature of mediation is also mentioned in the commentary of our great ancestor Burhoniddin Marginoni's work "Hidoya". The scholar states in his book that a person who consents to arbitration must possess all the qualities inherent in judges. "As long as two people consider someone worthy of arbitration and are satisfied with his decision, that decision is certainly true," the author said.[2]

The role of the mediator is to help the parties to the dispute find an opportunity to resolve their disputes independently, on mutually beneficial terms. The mediator does not examine the evidence, nor does it assess the legitimacy of the parties' claims. An impartial third party, a mediator, is neither a court nor an arbitrator and does not make any independent decisions on any disputes that may arise.[3]

[1] Legal Encyclopedia of Uzbekistan. - T. 2010, 300 pages.
[2] “Huquq va burch”, (“Law and Duty” journal) 2019, №2, p. 50.
[3] Juraeva X. "Медиация – муросаи мадора" // “Huquq va burch” (“Law and Duty” journal), 2019, №2, 50 - p..

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The purpose of the Law "On Mediation" is to create legal conditions for the development of alternative methods of dispute resolution, reducing the workload of the judiciary. The law provides for disputes arising from civil legal relations, including in connection with the conduct of business activities; individual labor disputes; in respect of disputes arising out of family relations, unless otherwise provided by law (Article 3). The law does not apply to disputes that affect or may affect the rights and legitimate interests of third parties who do not participate in mediation, the public interest.

One of the features of the law is that its separate article defines the basic concepts such as "mediation", "mediator", "mediation agreement", "agreement on the implementation of the mediation procedure", "agreement on the use of mediation".

Basic principles of mediation. The initiation and gradual implementation of the mediation process in the presence of an appropriate initiative (desire) is based on certain principles. The law enshrines the following important principles of mediation: voluntariness, confidentiality, cooperation and equality of the parties, independence and impartiality of the mediator (Article 5). We will explain each of these principles separately.

1. The principle of voluntariness. The importance of this principle is that mediation is applied when the parties have a mutual voluntary desire expressed in the agreement on the use of mediation. The parties to mediation have the right to refuse to use mediation at any stage of it. The parties are free to choose matters to discuss mutually acceptable agreement. It is prohibited to compromise or force a decision to be made during the mediation procedure.

2. The principle of confidentiality. The principle of confidentiality stems from the professional responsibilities of the mediator. The confidential nature of the mediation procedure is one of its important advantages over litigation. The meaning of this principle is that participants in mediation have no right to disclose information that became known to them during the mediation process without the written consent of the mediating party, its legal successor or representative who provided them.

Mediation participants may not be questioned as witnesses in cases that became known to them during the mediation process, nor may they be required to obtain information related to mediation, except as otherwise provided by law.

Before starting the mediation process, the mediator must warn the parties about the principle of confidentiality. Privacy mediation is followed at all stages of the procedure, from beginning to end. This principle also has an impact on clearly defining the starting and ending points of mediation.

3. The principle of cooperation and equality of the parties. The mediation procedure should be carried out with the exception of unilateral influence on the terms of the mediation agreement. Mediation is carried out in order to reach a mutually acceptable solution to the dispute on the basis of cooperation between the parties.

The parties to mediation shall enjoy equal rights and bear equal responsibilities in choosing the mediator, the procedure for conducting the mediation procedure, their point of view in the mediation procedure, methods and means of protection of this point of view, obtaining information, assessing the mutual acceptance of the terms of the mediation agreement. Article 8).

4. The principle of independence and impartiality of the mediator. The mediator is independent in carrying out the mediation procedure. No interference in the activities of the mediator in the implementation of the mediation procedure is allowed. The mediator must be impartial, conduct the mediation procedure in the interests of the parties and ensure their equal participation in mediation, fulfill the obligations of the parties and create the necessary conditions for the exercise of their rights. If there are circumstances that impede the independence and impartiality of the mediator, he must inform the parties and refrain from carrying out the mediation procedure (Articles 9 and 13).

The Law "On Mediation" contains the following article: "The Ministry of Justice of the Republic of Uzbekistan and other interested organizations shall ensure the implementation of this Law, its delivery to the executors and the explanation of its essence and significance among the population."[1]

On November 29, 2018, the order of the Ministry of Justice "On approval of the Regulations on the procedure for the formation and maintenance of the register of professional mediators" was adopted. According to the regulations, a professional mediator is a person who has undergone a special training course

[1] National Database of Legislation 04.07.2018, No. 03/18/482/1447; 30.07.2019, 03/19/551/3493.

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on the training program of mediators approved by the Ministry of Justice of the Republic of Uzbekistan, as well as included in the register of professional mediators.

On January 31, 2019, the Minister of Justice of the Republic of Uzbekistan signed Order No. 54-mh "On approval of the Mediator Training Program." Its main purpose is to train mediators to use mediation in disputes arising within the framework of the law, to provide them with basic knowledge of negotiation technology, stress management and dispute management, mediation procedures, to develop practical skills in conflict resolution.

It should be noted that the Presidential Decree of June 17, 2020 instructed the Ministry of Justice to organize special training courses (at the Center for Legal Training) to train and improve the skills of professional mediators.[1]

The main stages of mediation. Based on the analysis of foreign experience and established practice, as well as the legislation introduced in our country, the following (stages) of mediation can be noted:

1. Introduction; 2. joint meeting (session); 3. separate meetings (conversations) with the parties; 4. continuation of the joint session; 5. negotiations; 6. final mediation agreement.

We will try to explain the content of these steps:

1. **At the stage of introduction to mediation**, the representative (mediator) greets the parties, chooses the method of mediation and thanks them for their consent; explains to the parties the essence of mediation and the role and status of the mediator; respects the participants, treats them politely and sincerely with culture, explains the confidentiality of the negotiations and signs the agreement; the mediator himself seeks to gain the trust of the parties, emphasizing his strict adherence to confidentiality requirements.

In his introductory speech, the mediator also explains to the participants of the mediation their rights and duties in a friendly, humble, calm voice and in a gentle tone (tone), stating his authority and defining the authority of the parties; it is also important to determine that the parties are not limited in time during the mediation period, and are not engaged in other activities (concerns); it is necessary to determine whether those sitting around the course have experience of participating in mediation processes before.

The mediator should emphasize to the parties the difference between mediation and litigation or arbitration. In mediation, the parties explain the importance of working together, collaboratively, to reach a reasonable and mutually beneficial decision. Requirements explained to the parties and approved by them will need to be formalized in writing. The parties should also be reminded that the mediation process seeks to reach a consensus decision that is fair to both parties. It should also be noted that the mediator is not a judge, but an impartial facilitator in reaching a mutually acceptable decision for the parties. It would be expedient if the mediator considered the parties equally and determined the right to initiate the first speech by lot; doing so increases the participants ’respect and trust in him.

2. Joint session phase. The mediator begins this phase with humility and caution in a gentle voice, following the path of further gaining and strengthening the trust of the parties. In a neutral position, the mediator should ask the parties open-ended questions and try to determine their wishes, views (positions) and needs. It is necessary to try to find out the root causes of the conflict between the two sides, the content of the problem, the root cause.

3. Stage of separate meetings with the parties. It is important to have individual conversations with each party involved in mediation. This is because the parties to the conflict may not be able to express themselves in front of each other, and may express their deepest thoughts (opinions) to the mediator in private conversations. To do this, the mediator must create an atmosphere of mutual respect and trust based on sincerity and humility. It is best to ask open-ended questions that allow the interviewee (party) to express themselves freely. For example, “My friend (brother, sister, aunt), please, what is the essence of the problem that is causing the conflict? Please tell, whats the story of them big puppys ..... ”; "Of course, everything we say will remain between us, don't worry ..."

Naturally, the mediators actively listen to the interlocutor, sometimes expressing sympathy for his feelings, saying, "I understand you very well." "So what do you think should be done to solve the problem ...?" it will be helpful to create an incentive to continue the conversation.

4. The next stage (continuation) of the joint session.

[1] "Халқ сўзи" (official newspaper of legislative news in Uzbekistan). 2020 y. June 18.

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At this stage, the mediator will summarize the information received from the parties during separate conversations and continue the negotiations, calling on the parties to cooperate. In doing so, it seeks to turn the views of the parties into their interests. Of course, everyone involved in mediation will have their own interests. In order to understand these interests, "brainstorming" can be organized to find a solution to the problem. Different options for the solution can be discussed. It would be appropriate to analyze and evaluate each option, explaining its pros and cons. At this stage, it is necessary to create an opportunity for the parties to talk to each other, exchange views, ask questions.

5. Negotiation stage.

The organization, conduct and management of negotiations is a central and highly responsible part of any mediation process. Through negotiations, the disputing parties will be able to articulate their positions through direct consultation and coordinate them through a mediator (trying to compare and harmonize their approaches as much as possible). The parties may also use the services of personal representatives, attorneys or counselors to communicate and substantiate their views.

A very important stage of mediation during the negotiations is the opportunity for both parties to express their views, opinions on the situation, to express an opinion (presentation). Each party is given the floor to take turns agreeing to agree. The mediator listens to them attentively and actively, and may, if necessary, make appropriate notes for himself.

When expressing the views (positions) of the parties, the mediator should not have their say, not react to the events, not to evaluate them, not to add concluding remarks.

During the negotiations, the parties will be able to submit their demands and proposals for discussion, to present arguments and arguments in this regard.

The mediator can and should continue the discussion, explaining to the parties the pros and cons of each proposal. The mediator will also turn the position of the parties to their interests and continue negotiations until a mutually acceptable (beneficial) solution is reached. If it is not possible to reach a positive agreement in the process, that is, if the situation becomes a dead end, it will be announced on the basis of appropriate formalities.

Through mediation, the mediator seeks to determine the fundamental interest that comes from mediation, which is important to each of the parties.

Identifying the proposals of the parties, discussing them will have a positive effect. It is necessary to find a solution to the problem on the basis of their cooperation, to clarify how and to what extent they can give concessions to each other. Their desire to understand each other should be supported.

6. Mediation agreement is the final stage.

At this stage, everything that is known in the negotiations, conversations and discussions (down to all the details) is summarized on the basis of analysis, arranged in an integral chain. The text of a mutually acceptable mediation agreement will be developed jointly. Each of its clauses is agreed with the parties. The agreement is stated in a neutral, impartial, simple language. It is necessary to make sure that the language of the text, the method of narration is understandable to the parties.

The text of the final agreement will be read to the participants. The mediation agreement is signed by the parties. The mediator congratulates the parties on reaching an acceptable agreement and shakes their hands. It shows that the friendship between them has been preserved and that they are happy that the cooperation will continue in the future.

Article 29 of the Law on Mediation is called a mediation agreement, which states:

"In the event of a dispute between the parties on the results of the mediation procedure or a mutually acceptable decision on the terms and conditions of performance of obligations, a written mediation agreement will be concluded between the parties.

A mediation agreement shall be binding on the parties to it and shall be executed by the parties in good faith and voluntarily in the manner and within the time limits provided for therein.

In case of non-fulfillment of the mediation agreement, the parties have the right to apply to the court for protection of their rights. The consequences of non-performance of a mediation agreement may be determined by the parties in the agreement itself. ”

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Thus, mediation is used on the basis of the will of the parties in order to reconcile the conflicting parties, to reconcile peacefully. Article 15 of the law states that "the fact of participation in mediation may not serve as evidence of guilt."

The question of whether a mediator is paid for the service is also of interest to everyone. Non-professional intermediaries work gratefully. The activities of professional intermediaries can be on a fee or gratuitous basis. If a non-professional is employed, then his or her travel, accommodation and meals may be reimbursed. Who pays and how much depends on the agreement of the parties. Typically, the costs are shared equally between the parties. If the mediator refuses to conduct the process, he is obliged to return the initial payment.

Thus, mediation is a new institution entering our social and legal life today, and is one of the important tools for the enlightened resolution of disputes and conflicts.

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