

A Comparative Analysis of the Mediation in Kazakhstan and States of Victoria and New South Wales

Saida Assanova, Almas Serikuly and Arhat Abikenov*

Alternative dispute resolution is a popular means for resolving disputes in many countries, including Australia. Parties to a dispute in Australia try to avoid the lengthy litigation and prefer to mediate. Therefore, Australian experience of the development of mediation may serve as a good example for Kazakhstan, a country in Central Asia, which shares many similarities with Australia. This article discusses history of the use of mediation in Australia and Kazakhstan and provides an overview of legislation governing mediation in Kazakhstan and the Australian States of Victoria and New South Wales. In addition, authors of the article propose several recommendations the implementation of which may help Kazakhstan develop mediation in the country. This, in turn, may help the parties to a dispute save their time and find the win-win solution, as well as reduce the workload of public courts and save budget money.

I. INTRODUCTION

Over the last few decades, the use of alternative dispute resolution (ADR) in Australia has increased dramatically.¹ ADR today is considered an effective means for the resolution of disputes without going to the court, and is defined by the National Alternative Dispute Resolution Advisory Council as “an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them”.² The most known ADR processes are arbitration and mediation. The main difference between them is that in arbitration the arbitrator or the tribunal makes a decision with which the parties are not always happy.³ In contradistinction to arbitration, a mediator, a neutral and impartial party, “assists the parties to reach their own agreement”.⁴

Mediation in Australia has many advantages. The list of such benefits includes, but are not limited to, the following: mediation “preserves good business relations, saves time and money, allows for parties to resolve their dispute on commercial terms”.⁵ In addition, mediation is “confidential, final, and within the control of the parties”⁶. Also, it “[may] be conducted at any place, at any time” and ‘involves without prejudice discussions’.⁷

Another advantage of mediation is a very high “success rate” of settlement of disputes. For example, approximately 83% of commercial lease disputes from 1996 to 2013 in New South Wales were mediated

* Saida Assanova: PhD candidate, Al-Farabi Kazakh National University. Almas Serikuly: Master of Commercial Law, the University of Melbourne. Arhat Abikenov: Candidate of Legal Sciences, Assistant Professor at Al-Farabi Kazakh National University.

¹ Tom Altobelli, “Mediation in the Nineties: The Promise of the Past” [2000] *Macarthur Law Review* 103.

²NADRAC Paper, *Dispute Resolution Terms* (September 2003) 9 <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>>.

³ Mark Addison, “10 Reasons Why Financiers Should Consider ADR” (2016) 32(9) *Australian Banking and Finance Law Bulletin* 188, 189.

⁴ Victorian Bar, *Mediation* (10 May 2017) <<https://www.vicbar.com.au/public/brief-barrister/alternative-dispute-resolution/mediation>>.

⁵ Michael Redfern, “Mediation Is Good Business Practice” (2010) 21 ADRJ 53, 54

⁶ Redfern, n 5, 54.

⁷ Redfern, n 5, 54.

successfully while the success rate of the disputes under farm debt mediation was around 93%.⁸ For these reasons, instead of bringing a lawsuit in court, parties to a dispute in Australia try to avoid the lengthy litigations and prefer to mediate.

In comparison to Australia, Kazakhstan does not have such long history and successful traditions in mediation. The first statute in this area was enacted there only in 2011, and there are still major barriers that prevent its wide application. Therefore, Kazakhstan needs to find a model country whose experience may help develop mediation in the country.

The purpose of this article is to compare legislation of Kazakhstan with laws of Victoria and New South Wales, identify major obstacles that prevent a greater use of mediation in Kazakhstan, and make suggestions that may help improve the current situation.

The article will discuss the history of mediation in Australia and Kazakhstan, main distinctions related to mediation in Kazakhstan and States of Victoria and New South Wales, as well as provide recommendations to Kazakhstan to increase the use of mediation on the basis of Australian experience.

II. HISTORY OF MEDIATION IN KAZAKHSTAN AND AUSTRALIA

A. History of Mediation in Kazakhstan

The Republic of Kazakhstan is a former republic of the USSR and the largest landlocked country in the world. The country is located in Central Asia and neighbouring with Russia, China, Kyrgyzstan, Turkmenistan, and Uzbekistan.⁹ Historically, the territory of the country was occupied by various nomadic tribes. Modern history of Kazakhstan began in 1465–1466 when the Kazakh Khanate was established by Janybek Khan and Kerey Khan¹⁰ (a title “Khan” was given to rulers in Central Asia countries).¹¹

During the XV–XVIII centuries, the main judicial power in the Kazakh society was possessed by the “court of biys”.¹² This legal institution was very respected among the folks before its abolition due to the legal reforms conducted by the Russian Empire. Some experts in Kazakhstan, including the former¹³ and current¹⁴ Chairmen of the Supreme Court, consider the “court of biys” as a prototype of the mediation¹⁵ as biys helped people settle their dispute and conciliated parties.

It should be noted that parties preferred to resolve their disputes before litigation since in this case they could avoid paying biylik.¹⁶ Biylik was a compensation for the biy’s legal services and depended on the

⁸ John McGruther, “Mediation Developments in the Australia/Pacific Region” (2014) 25 ADRJ 73, 74.

⁹ Denis Sinor and Edward Allworth, *Kazakhstan* (10 May 2017) Encyclopaedia Britannica <<https://www.britannica.com/place/Kazakhstan>>.

¹⁰ National Digital History of Kazakhstan, *The Trail of Statehood* (10 February 2015) <http://e-history.kz/en/project/view/3?type=publications&material_id=954>.

¹¹ Editors of Encyclopaedia Britannica, *Khan* (10 May 2017) Encyclopaedia Britannica <<https://www.britannica.com/topic/khan-title>>.

¹² Sabyr Ibrayev, *The Institution of Biys as a Source on the History of Court Proceedings in Kazakhstan* (18 October 2016) National Digital History of Kazakhstan <<http://e-history.kz/ru/contents/view/1612>> [trans of: Сабыр Ибраев, *Институт биев как источник по истории судебного делопроизводства в Казахстане* (18 октября 2016) Национальная Цифровая История Казахстана].

¹³ Bektas Beknazarov, *The Institution of Mediation Is Similar to the Court of Biys* (30 November 2012) Zakon.kz Information portal <<https://www.zakon.kz/4528026-institut-mediacii-skhozh-s-sudom-biev.html>> [trans of: Бектас Бекназаров, *Институт медиации схож с судом биев* (30 ноября 2012) Закон.Кз Информационный портал].

¹⁴ Kairat Mami, *Biy's Court* (10 May 2017) Supreme Court of the Republic of Kazakhstan <<http://sud.gov.kz/eng/content/biy-court>>.

¹⁵ Zeynebike Madybayeva, *Mediation as One of the Ways of Alternative Dispute Resolution* (10 May 2017) Grata International Law Firm <http://www.gratanet.com/up_files/Statya_po_mediatsii_Madyba.pdf> [trans of: Зейнебике Мадыбаева, *Медиация, как один из способов альтернативного разрешения споров* (10 мая 2017) Юридическая Фирма Grata International].

¹⁶ Virginia Martin, *Law and Custom in the Steppe: The Kazakhs of the Middle Horde and Russian Colonialism in the Nineteenth Century* (Routledge, 1st ed, 2001) 105.

seriousness of the offence and the amount of a claim.¹⁷ Indeed, biys helped the parties to resolve the conflict issues relatively quickly and help the parties keep good relationships.¹⁸ They were prominent public figures, whose influence, decisions, and assistance were able to conciliate not only the individuals, but also the conflicting tribes.¹⁹

Biys in the Kazakh society were elected judges and administrators in the Kazakh Steppe.²⁰ At the same time, one of the main objectives of the biys was “reconciliation of conflicting parties”.²¹ The most famous and influential biys were Tole Bi, Kazybek Bi, and AYTEKE Bi. The meaning of the word “biy” is still argued by linguists and historians.²² Some experts say that this word came from the word “biik”, which means “the highest one”.²³ On the other hand, there are opponents who are of the opinion that the origins of this word came from the Kazakh verb “bileu”,²⁴ which means “to manage”.

The title “Biy” was not easy to deserve. It could only be achieved through the respect of other people. Therefore, biys were great orators and knew customary law. It is important to note that this law was codified, and the most famous codified law, used by biys, was “Jet Jargy”.²⁵ At the same time, Islam also influenced the development of Kazakh society. For example, some norms of Sharia, the Islamic law, were also applied by the biys.²⁶

Another important quality that biys should have possessed was impartiality.²⁷ Therefore, biys had to be honest and fair. If they had not been honest and fair, people would have never sought their advice, judgment, or help resolve a dispute.²⁸

As can be seen, the medieval Kazakh judicial system included elements of the modern mediation:

- (i) a mediator, that is, a biy, was an impartial and independent party;
- (ii) a biy helped the parties resolve their dispute and keep good relationships between arguing parties; and
- (iii) conflicting parties tried to resolve their dispute before the commencement of litigation.

Due to the Russian Empire’s reforms, the court of biys was eliminated in the 19th century, but left its mark in the history of Kazakhstan as a fair and quick tool to resolve various civil and criminal disputes.²⁹

¹⁷ Virginia Martin, *Law and Custom in the Steppe: Middle Horde Kazakh Judicial Practices and Russian Colonial Rule, 1868-1898* (PhD Thesis, University of Southern California, 1996) 53.

¹⁸ Guzel Galiakbarova and Sholpan Saimova, “Mediation of Labour Disputes in Kazakhstan in Comparative Context” (2016) 4 *Russian Law Journal* 96, 97.

¹⁹ Salyk Zimanov, “The Kazakh Court of Biy’s in the Memory of Generations”, *Zakon Journal*, 1 January 2008 <<https://journal.zakon.kz/203439-kazakhskij-sud-biev-v-pamjati.html>> [trans of: Салық Зиманов, Казахский суд биев в памяти поколений (1 января 2008) Журнал Закон].

²⁰ Abdumalik Nysanbayev, Civilizational Traditions and the Advocacy of Rights and Liberties in Kazakhstan (2 November 2006) Wayback Machine <<https://web.archive.org/web/20061102123051/http://www.crvp.org/book/Series03/IIC-2/chap-2.htm>>.

²¹ Vladimir Furman and Yuliya Petrenko, *Mediation as a Modern Mean for Settlement of Conflicts* (10 May 2017) BMF Partners Law Firm <<http://bmf.kz/en-us/publications/articleid/30>>.

²² Karlygash Useinova, *The Role and Place of the Biy’s Institution in the Traditional Society of Kazakhs* (10 May 2017) <<http://nblib.library.kz/elib/library.kz/journal/Useinova051122.pdf>> [trans of: Карлыгаш Усейнова, Роль и место института биев в традиционном обществе казахов (10 мая 2017)].

²³ Useinova, n 22.

²⁴ Useinova, n 22.

²⁵ Aigul Abdildabekova and Elmira Teleuova, *The Direct Path of Kassym Khan and Jet Jargy of Tauke Khan* (10 May 2017) <http://www.rusnauka.com/2_KAND_2015/Pravo/1_184271.doc.htm>.

²⁶ Altaiy Orazbayeva, *Fundamental Provisions of the Biy’s Institution in the Kazakh Society* (10 May 2017) Kazakhstan’s Centre for Mediation <<http://kazmediation.kz/mediation-in-the-world-and-kazakhstan/95-institute-of-fundamental-biy-in-kazakh-society.html>> [trans of: Алтай Оразбаева, Основополагающие положения института биев в казахском обществе (10 мая 2017) Казахстанский Центр Медиации].

²⁷ Gaukhar Kurganbekova, *The Role of the Biy’s Institute in a Legal Reform of Kazakhstan* (10 May 2017) Research Articles of Kazakhstan <<https://articlekz.com/article/12164>> [trans of: Гаухар Курганбекова, Роль института биев в проведении правовой реформы в Казахстане (10 мая 2017) Научные статьи Казахстана].

²⁸ Kurganbekova, n 27.

²⁹ Zhanar Tolepbergen, *The Court of Biys* (3 September 2015) Aktyubinskiy Vestnik <<http://avestnik.kz/?p=29632>> [trans of: Жанар Толепберген, Суд биев (3 сентября 2015) Актюбинский Вестник].

The modern development of mediation in Kazakhstan began in 2011 by enactment of the *Statute “On Mediation”*.³⁰ The Law was adopted in order to reduce the workload of the courts and litigation costs. To conform with the Law, the *Civil Procedure*, *Criminal*, and *Criminal Procedure Codes* of Kazakhstan were also amended. According to the statistics of the Supreme Court of Kazakhstan,³¹ mediators participated in 5,090 civil and 5,521 criminal cases in 2014. In 2015, mediation was conducted in 6,750 civil and 4,524 criminal cases.

B. History of Mediation in Australia

It is known that before the settlement of Europeans, Aboriginal and Torres Strait Islander communities in Australia not only had their customary law for around 40,000 years, but also had their own dispute resolution system.³² In this regard, Bauman and Pope wrote the following:

The ability of Indigenous communities to deal with conflict in ways that reflect their local practice and reinforce local community authority not only help make communities safer and more enjoyable places to live, they also go some way to addressing the sources of dysfunction and systemic conflict.³³

As a result, the National Alternative Dispute Resolution Advisory Council (NADRAC) found such a traditional way of the dispute settlement effective and did not prevent its use where communities would like to apply it and there are no contradictions with the Australian legal system.³⁴

Because of the diversity of Aboriginal cultures, the methods and techniques of resolving conflicts may vary.³⁵ Despite this fact, it is fair to say that the dispute resolution process, which existed within Indigenous communities, operated in a similar way to the Kazakh counterpart. For example, in case of any disputes arising, the parties referred to the respected Elders. The Elders (men and women) were trustworthy and honest people, who were also concerned for the whole community’s future.³⁶ Therefore, it is fair to say that the prototype of mediation also existed among the Indigenous people of Australia.

Although little research has been done on Aboriginal dispute resolution mechanisms,³⁷ it is clear that this tool still plays an important role in the contemporary life of Aboriginal communities. It should be noted that in the recent years there were launched several projects³⁸ that aimed at developing mediation within the Indigenous communities.

Contemporary development of ADR in Australia “had its origins in 1979, with the establishment of a coordinating committee to test the notion that many disputes which had been unresponsive to court

³⁰ Statute “On Mediation” (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

³¹ Supreme Court of the Republic of Kazakhstan, *The Judicial System of the Republic of Kazakhstan. Mediation*, Infographics <<http://sud.gov.kz/rus/content/sudebnaya-sistema-rk-mediaciya>>.

³² Harry Croft, *The Use of Alternative Dispute Resolution Methods within Aboriginal and Torres Strait Islander Communities* (2015) <<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1036&context=access>>.

³³ Toni Bauman and Juanita Pope, “Solid Work You Mob Are Doing – Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia” (Report to the National Alternative Dispute Resolution Advisory Council, FCA Indigenous Dispute Resolution & Conflict Management Case Study Project, ACT, 2009) 115.

³⁴ National Alternative Dispute Resolution Advisory Council, Parliament of Australia, *Indigenous Dispute Resolution and Conflict Management* (January 2006) Attorney-General’s Department <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Indigenous%20Dispute%20Resolution%20and%20Conflict%20Management.PDF>>.

³⁵ Peter Grose, “An Indigenous Imperative: The Rationale for the Recognition of Aboriginal Dispute Resolution Mechanisms” (1995) 12(4) *Mediation Quarterly* 327, 333.

³⁶ Helen Bishop, “Aboriginal Decision Making, Problem Solving and Alternative Dispute Resolution – Challenging the Status Quo” (Paper presented at the Alternative Dispute Resolution in Indigenous Communities (ADRIC) Symposium, Melbourne, 27 July 2015) 4.

³⁷ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* Report No 31 (1986) [692].

³⁸ See, eg, Sue Duncombe, “The NSW Youth Koori Court: A New Pilot Program” (2015) 10 *Law Society of NSW Journal* 80, 80–81.

processes could be resolved quickly and inexpensively by using mediation".³⁹ In the same year "NSW propos[ed] to use mediation for the resolution of minor civil and criminal disputes".⁴⁰

Now it is difficult to imagine but "just over 30 years ago, mediation [in Australia] could be found only in Community Justice Centres, or in specific contexts such as family or environmental and planning disputes".⁴¹ However, today there are many Acts, Rules, and Regulations, which refer to mediation at both the federal and state levels.⁴²

III. OVERVIEW OF THE LEGISLATION ON MEDIATION IN KAZAKHSTAN AND STATES OF NEW SOUTH WALES AND VICTORIA

A. Mediation in the Republic of Kazakhstan

In this part, the authors suggest making a comparative analysis of legislation of the three jurisdictions to identify the main differences and similarities. It is believed that identifying such areas may be helpful for local governments to use foreign experience and improve the mediation process.

As it was noted in Part II, mediation in Kazakhstan is governed by the *Statute "On Mediation"*. It also "defines principles and procedure [of mediation] as well as the status of a mediator".⁴³

The Law consists of 4 Chapters and 28 Articles. Chapter 1 provides an overview of general provisions. According to Art 1 of the Law, mediation in Kazakhstan is applied to "disputes (conflicts) arising from civil, labour, family and other relations with participation of individuals and (or) legal entities, as well those considered during criminal proceeding in cases of minor and medium gravity crimes".

Article 2, which includes some basic definitions used in the Law, defines a mediator as "an independent individual engaged by the parties for conducting mediation on professional and non-professional basis in accordance with the requirements of this Law".⁴⁴ However, Art 9 also sets out additional requirements to a mediator, requiring them to "be an independent, impartial, not interested in the outcome of a case individual, chosen by a mutual consent of the parties to mediation, listed in the register of mediators and who has agreed to perform the functions of mediator".⁴⁵

Article 4 of the Law outlines the following five principles on a basis of which mediators need to conduct mediation: voluntariness; equal rights of the parties to mediation; independence and impartiality of mediator; inadmissibility of intervention in mediation procedure; and confidentiality.

Chapter 2 of the Law provides an overview of the legal status of mediators and organisations conducting mediation. It is interesting to note that the Law divides mediators into professional and non-professionals mediators. Professional mediators are those who are not younger than 25 years, listed in the register of professional mediators, and have higher education and a certificate confirming the completion of the mediators training program. Retired judges can also conduct activity of a mediator on a professional basis.⁴⁶ According to cl 3 of Art 9, persons who have reached the age of 40 and are listed in the register

³⁹ Wendy Faulkes, "The Modern Development of Dispute Resolution in Australia" (1990) 1(2) ADRJ 61, 61.

⁴⁰ Wendy Faulkes, "Linking ADR Practitioners President's Welcome" (1987) 1(1) *Alternative Dispute Resolution Association of Australia* 1, 1.

⁴¹ Justice Patricia Bergin, "The Objectives, Scope and Focus of Mediation Legislation in Australia" (2013) 2(2) *Journal of Civil Litigation and Practice* 49, 49.

⁴² Bergin, n 41, 50–54.

⁴³ Statute "On Mediation" (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁴⁴ Statute "On Mediation" (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁴⁵ Statute "On Mediation" (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁴⁶ Statute "On Mediation" (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

of non-professional mediators are eligible to conduct activity of a mediator on a non-professional basis.⁴⁷ In addition, current judges may also act as non-professional mediators when they conduct conciliation procedures in accordance with the *Civil Procedure Code of the Republic of Kazakhstan*. It is worth mentioning that cl 4 of Art 66 of the *Civil Procedure Code of Kazakhstan*,⁴⁸ which provides a list of inadmissible evidences, says that in case of non-settlement of the dispute, the judge who acted as a mediator cannot present any information obtained during mediation in the future trial.

Although Art 9(5) of the Law states that activity of a mediator “is not an entrepreneurial activity”, cl 7 of Art 9 does not allow public servants and persons equal to conduct mediations.⁴⁹ In addition to them, the following persons cannot conduct mediation:

- incapable or partially incapable;
- in respect of whom there is a criminal prosecution;
- having outstanding conviction or conviction that is not expunged according to the procedure provided for by the law.⁵⁰

Chapter 3 of the Law describes how the mediation in Kazakhstan is conducted. For instance, these provisions govern issues related to the mediation procedure, place, time, and language of mediation may be found in this Chapter. It is worth mentioning Arts 24 and 25 that govern mediation conducted during criminal proceedings and mediation in family relations.⁵¹

B. Mediation in New South Wales

Besides the court-ordered mediation, there is, of course, an opportunity for the parties in New South Wales to refer their dispute to ADR, including mediation.

Currently, there are 37 Acts and 18 Regulations that refer to mediation in the State of New South Wales. At the same time, reference to “dispute resolution” can be found in 69 Acts and 22 statutory rules and regulations of the State. It is also worthwhile to mention that only the *Farm Debt Mediation Act 1994* (NSW) contains the word “mediation” in its title. As for the explanation of the terms, only the *Civil Procedure Act 2005* (NSW) provides the meaning of “mediation”, “mediation session”, and “mediator”.⁵²

Section 23 of the *Community Justice Centres Act 1983* (NSW) states that “attendance at and participation in mediation sessions are voluntary”.⁵³ However, there is an exception, which relates to a court-ordered mediation where “the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties”.⁵⁴ In case of a court-ordered mediation, registrars often act as mediators. It should be noted that there exist the Australian National Mediator Standards⁵⁵ for registrars. Thus, it means that registrars who act as mediators have the required skills, knowledge, and qualifications for conducting mediation sessions.⁵⁶

⁴⁷ Statute “On Mediation” (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁴⁸ Гражданский процессуальный кодекс Республики Казахстан [Civil Procedure Act of the Republic of Kazakhstan] [authors' trans] <<http://adilet.zan.kz/rus/docs/K1500000377>>.

⁴⁹ Statute “On Mediation” (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁵⁰ Statute “On Mediation” (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁵¹ Statute “On Mediation” (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁵² Civil Procedure Act 2005 (NSW) s 25.

⁵³ Community Justice Centres Act 1983 (NSW) s 23.

⁵⁴ Community Justice Centres Act 1983 (NSW) s 26.

⁵⁵ Mediator Standards Board, *Australian National Mediator Standards* (September 2007) Federal Court of Australia <http://www.fedcourt.gov.au/services/ADR/mediation/mediation_standards.pdf>.

⁵⁶ Campbell Bridge, “Comparative ADR in the Asia-Pacific – Developments in Mediation in Australia” (Paper presented at the Alternative Dispute Resolution Conference, Singapore, 4–5 October 2012) 11.

It is also interesting to note that the *Civil Procedure Act 2005* requires the parties referred to mediation to participate in it in good faith. Although the Act does not define the parameters of “good faith”, there are some cases where judges considered this issue.⁵⁷ For example, in *United Group Rail Services Ltd v Rail Corp* the Court of Appeal decided that parties mediate or negotiate in good faith if their approach to settling the dispute is honest and genuine.⁵⁸

In case of court-ordered mediation, the court may make an order, which specifies the amounts that are needed to be paid by one or more of the parties. If there is no such an order, costs are usually shared between the parties if there is no any agreement among them that indicates any payable proportion.⁵⁹

Other sections of the *Civil Procedure Act 2005* regulate matters related to privilege, confidentiality, agreements and arrangements arising from mediation sessions, as well as directions by the mediator and its protection from liability. As for the latter aspect, it should be noted that mediators have “the same protection and immunity as a judicial officer”.⁶⁰

It is fair to say that mediation is used in New South Wales widely. For example, according to statistics, only the Supreme Court of New South Wales referred 1,092 disputes to mediation in 2012. One year later 1,088 cases were referred to mediation by the Supreme Court. The slight decrease in the number of cases referred to mediation (only 839) in 2014 was impacted by the pilot of informal settlement conferences.⁶¹

Considering the importance of mediation, there are provisions in New South Wales that oblige barristers and solicitors to “inform the client or the instructing solicitor about the alternatives to fully contested adjudication”.⁶²

C. Mediation in Victoria

In general, Victorian legislation is similar to its New South Wales counterpart. The use of alternative dispute resolution in Victoria is supported by the State’s government. It is noticeable if we take a glance at Victorian legislation where one may find 79 Acts and 17 Regulations, which refer to “dispute resolution”. Furthermore, there are 30 Acts and 17 Regulations that refer to “mediation”. It should be noted that, like in New South Wales, there is only the *Farm Debt Mediation Act 2011* (Vic), whose title includes the word “mediation”.

Under the Victorian legislation,⁶³ mediation, whether referred by the court or not, is considered as a form of the alternative dispute resolution. ADR, in turn, is defined as “a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute”.⁶⁴

In Victoria, there are three courts, which may refer a proceeding or any part of it for mediation: the Supreme Court,⁶⁵ the County Court,⁶⁶ and the Magistrates’ Court.⁶⁷ However, if a party fails to partake

⁵⁷ See, eg, *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996.

⁵⁸ *United Group Rail Services Ltd v Rail Corp* [2009] NSWSCA 177.

⁵⁹ Bridge, n 56, 12.

⁶⁰ *Civil Procedure Act 2005* (NSW) s 33.

⁶¹ Supreme Court of New South Wales, *Provisional statistics (27 January 2015)* Supreme Court of New South Wales <[http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/6bd219cf5f0333b6ca257ddc000d00a1/\\$FILE/Annual%20Review%202014%20Provisional%20statistical%20data.pdf](http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/6bd219cf5f0333b6ca257ddc000d00a1/$FILE/Annual%20Review%202014%20Provisional%20statistical%20data.pdf)>.

⁶² See, eg, *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) s 36; *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW) s 7

⁶³ *Civil Procedure Act 2010* (Vic) s 3.

⁶⁴ *Civil Procedure Act 2010* (Vic) .

⁶⁵ *Victorian Civil and Administrative Tribunal Act 1988* (Vic) s 88.

⁶⁶ *County Court Act 1958* (Vic) s 78(1)(hca).

⁶⁷ *Magistrates’ Court Act 1989* (Vic) s 108(1).

in a court-ordered mediation, it may be ordered by the court to pay another party's wasted costs. For example, such a decision was taken in *Smith v Queensland*.⁶⁸

It is worthwhile to mention that if the conflicting parties are unable to resolve their dispute through discussions, they can try to settle their dispute through the mediation service of the Dispute Settlement Centre of Victoria that provides this confidential service on a free basis.⁶⁹

Another important law that needs special attention is the *Farm Debt Mediation Act 2011*. Its purpose, just like in New South Wales, is to assist farmers in resolving their farm debt disputes by providing them with the option to mediate before a creditor takes any enforcement actions.⁷⁰ Such a measure protects farmers, assisting them to resolve their disputes related to financial matters.

D. Differences in Legislations on Mediation of Kazakhstan and States of Victoria and New South Wales

One may say that the overall use of ADR in Australia is patchy and idiosyncratic.⁷¹ At the same time, it is impossible to deny the fact that mediation in Australia is used more widely in comparison with Kazakhstan.

Legislation governing mediation in Kazakhstan and States of Victoria and New South Wales have many similarities since the Kazakhstani law-makers considered the Australian experience. For example, referral to Australia may be found in the Concept of the Draft of Statute "On Mediation".⁷² It is also likely that Kazakhstani members of the Parliament familiarised themselves with the Australian experience and tried to implement similar provisions. Despite this, there are, of course, several differences. It is suggested to take a glance at the major ones below.

- Court-ordered mediation

On the contrary to Australia,⁷³ judges in Kazakhstan cannot refer disputes for mediation or arbitration without a written consent of the parties.⁷⁴ Furthermore, Art 20(3) of the Statute "On Mediation" states that "judges and officials that carry out criminal prosecution shall not force parties in any form to mediate".⁷⁵ However, it should be noted that the Supreme Court of Kazakhstan began a pilot program at the beginning of 2017, the aim of which is to implement a mandatory pre-trial mediation for the certain categories of disputes (hereditary, divorce, division of property, eviction, certain labour issues, insurance, etc).⁷⁶ It means that if plaintiff fails to prove that they tried to settle one of the abovementioned disputes through mediation, the lawsuit will be dismissed by the court.

- Participation of State bodies in the mediation

Unlike in Australia, government agencies and departments of Kazakhstan cannot take part in mediation. According to some views,⁷⁷ there are several barriers. One of the main reasons to prohibit State bodies

⁶⁸ *Smith v Queensland* [2014] FCA 691.

⁶⁹ Dispute Settlement Centre of Victoria, *Mediation* (12 May 2017) <<https://www.disputes.vic.gov.au/about-us/mediation-0>>.

⁷⁰ *Farm Debt Mediation Act 2011* (Vic) s 1.

⁷¹ National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, Report to the Attorney-General (September 2009) 1.

⁷² Концепция проекта Закона Республики Казахстан «О примирительных процедурах (медиации)» [Concept of the Draft of Law of the Republic of Kazakhstan "On Conciliation Procedures (Mediation)"] s 9 [authors' trans] <http://www.adilet.gov.kz/sites/default/files/Kontseptsia_PZRK_o_Miedatsii.doc>.

⁷³ Krista Mahoney, "Mandatory Mediation: A Positive Development in Most Cases" (2014) 25(2) ADRJ 120.

⁷⁴ *Civil Procedure Act 2015* (Kazakhstan) Art 24.

⁷⁵ Statute "On Mediation" (Kazakhstan) No 401-IV of 28 January 2011, Art 20(3) [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁷⁶ Supreme Court of the Republic of Kazakhstan, *The Supreme Court Has Launched a Pilot Project to Implement Mandatory Pre-trial Settlement of Disputes (Conflicts) in Certain Categories of Disputes in Order of Mediation* (6 February 2017) <<http://sud.gov.kz/rus/news/verhovnyy-sud-zapustil-pilotnyy-proekt-po-vnedreniyu-obyazatelnogo-dosudebnogo-uregulirovaniya>>.

⁷⁷ Marat Zhumagulov, *Perspectives of the Application of Judicial Mediation in Administrative Proceedings* (11 May 2017) The Supreme Court of the Republic of Kazakhstan <<http://sud.gov.kz/rus/content/perspektivy-primeneniya-instituta-sudebnoy>>.

from participating in mediation in Kazakhstan is related to conformity with Art 6 of the *Statute "On Mediation"*, which states that “the parties to mediation shall enjoy equal rights ... and shall incur equal duties”.⁷⁸ It is believed that government bodies, in performing their functions use tools of force and coercion, and it is not possible to ensure equal opportunities for the parties not only in the court, but also in mediation. Another obstacle is related to the fact that public servants are restricted in deciding the issues as they must act within limits permitted by law and cannot represent the government agencies.⁷⁹ More precisely, they must follow the written instructions even if they think that their actions or the ultimate result would be wrong or absurd. In addition, there is an opinion that it is difficult to settle a dispute or reach a compromise with the state bodies because of the legal restrictions.⁸⁰

We believe that the abovementioned differences influence the development of mediation in the three jurisdictions. From the authors' point of view, the first two differences prevent the dynamic development of mediation in Kazakhstan.

IV. CURRENT SITUATION AND PROSPECTS OF DEVELOPMENT OF MEDIATION IN KAZAKHSTAN

A. Criticisms of Mediation in Kazakhstan

Mediation in Kazakhstan is a relatively new field that is still in the formation process. However, it is largely criticised by local attorneys, who are experienced in court proceedings and familiar with the litigation peculiarities in the country. Some of the criticisms are as follows:

- (1) Mediation is a voluntary process and it is not recommended to a court to refer the parties, which are angry at each other, for a mediation before or at the beginning of the proceedings.
- (2) If one party does not fulfil its obligations taken during mediation, another party will in any case be forced to go to the court. Therefore, litigation is inevitable.
- (3) Mediation services are not cheap. If there are certain disputes in which the parties are obliged to refer to mediator, they should be rendered on a free basis. Otherwise, the parties will bear unforced expenses. Therefore, it was suggested to the Government to approve the tariffs for mediation services.
- (4) Only a person with a law degree should be eligible to become a mediator. Therefore, it was advised to amend this provision in the *Statute "On Mediation"*.⁸¹

After thorough analysis of the abovementioned critique, the authors deem it necessary to give their opinion on them:

- (1) Although the authors support the view that judges should refer the parties for mediation only when it is appropriate (“ripe time”), statistical data⁸² show the necessity of referral parties for mediation at the preliminary stage. Therefore, it is wrong to think that judges should refer parties only in the middle or at the end of the court proceedings, instead of doing this at the early stages.
- (2) Usually parties to mediation reach their own agreement. It means that they voluntarily agree to do or not to do certain actions. In this regard, it is believed that the number of mediation attendees who then reject to fulfil their obligations is insignificant.

[mediacii-v-administrativnom-sudoproizvodstve](#) [trans of: Марат Жумагулов, *Перспективы применения института судебной медиации в административном судопроизводстве* (11 мая 2017) Верховный Суд Республики Казахстан] [authors' trans].

⁷⁸ Statute “On Mediation” (Kazakhstan) No 401-IV of 28 January 2011, Art 6 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁷⁹ Zhumagulov, n 77.

⁸⁰ Zhumagulov, n 77.

⁸¹ Raziya Abdykadyrova, *A Kind Word Without a Gun: Do We Need a Mandatory Mediation?* Rezonans (online) (28 March 2017) <<http://rezonans.kz/obshchestvo/item/2074-dobroe-slovo-bez-pistoleta-nuzhna-li-obyazatelnaya-mediasiya>> [trans of: Рязя Абдықадырова, *Доброе слово без пистолета: нужна ли обязательная медиация?* Резонанс (онлайн) 28 марта 2017] [authors' trans].

⁸² Bergin, n 41, 55–56.

- (3) The suggested recommendation, however, contradicts principles of the market economy. Mediators are not public servants, and therefore it is not appropriate for the Government to set the minimum and/or maximum price for mediation services.
- (4) There are many successful mediators who did not graduate from law schools but possess the required skills to conduct mediation. Moreover, in-depth knowledge of the law is not required if the mediation is not evaluative.⁸³

Based on our arguments that mediation is a valuable tool, in the next part we recommend considering the changes that may improve the use of mediation in Kazakhstan.

B. Recommendations Based on the Australian Experience

After having carefully analysed the Victorian and New South Wales experience, the authors believe that the following recommendations may help Kazakhstan's Government and non-governmental organisations develop mediation in the country.

1. Broader Application of Mediation in Commercial Disputes

It is recommended to increase awareness of availability of ADR tools to businessmen to resolve their disputes. One such a step may be the establishment of the Kazakhstani Disputes Centre like the Australian Disputes Centre.⁸⁴ Taking into account the creation of the Astana International Arbitration Centre,⁸⁵ the purpose of which is to resolve investors' disputes, it will be worth it to consider the opportunity to accommodate the Disputes Centre there with branches across major cities of Kazakhstan. Thus, encouraging the greater use of ADR will save states' and litigants' time and money.

2. Participation of State Bodies in Mediation

Currently, due to the restrictions imposed by the legislation,⁸⁶ state bodies cannot attend mediation. However, in the authors' view, there is a need to eliminate these provisions and follow the Australian experience.⁸⁷ Although the use of ADR, including mediation, is not a panacea,⁸⁸ its application may reduce the workload of the courts and save time and costs for the parties. Therefore, if the Government is interested to encourage greater application of mediation, it should initiate such changes. This step may be crucial as it will show the Kazakhstani citizens that the Government actively uses this tool for resolving its disputes.

In addition, the need to allow state bodies to attend mediation is related to the need of the quick resolution of issues that may arise between government agencies themselves.

3. Mediation between Taxpayers and Tax Bodies

From the authors' experience of working with local and foreign investors and government authorities, it is recommended to introduce mediation between taxpayers and tax bodies (ie the State Revenue Committee of the Ministry of Finance of Kazakhstan). It is no secret that many disputes arise from tax-related issues. Although it is expected that from 1 July 2017 there will be implemented some provisions regarding the Appellate Commission,⁸⁹ which will consider taxpayers' complaints, the authors advise to

⁸³ Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative* (22 June 2016) Mediate.com <<http://www.mediate.com/people/personprofile.cfm?uid=217>>.

⁸⁴ Australian Disputes Centre <<https://disputescentre.com.au>>.

⁸⁵ Astana International Financial Centre <<http://www.aifc.kz>>.

⁸⁶ Statute "On Mediation" (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <<http://adilet.zan.kz/eng/docs/Z1100000401>>].

⁸⁷ Brian Preston, "The Use of Alternative Dispute Resolution in Administrative Disputes" (2011) 22(3) ADRJ 144.

⁸⁸ Preston, n 87, 158.

⁸⁹ Kanat Skakov and Stanislav Lechshak, *Changes in Tax and Customs Legislation: Novelties in the Appeals Procedure and Certain Administrative Matters* (18 January 2017) Dentons Law Firm <<https://www.dentons.com/en/insights/alerts/2017/january/18/changes-in-tax-and-customs-legislation-in-kazakhstan>>.

implement such mediation, based on the Australian experience.⁹⁰ The main advantage of mediation in comparison with the settlement of the dispute under the Appellate Commission is equality of the parties.

4. Online Mediation

Due to the development of new technologies, it is now possible to conduct mediations electronically. The use of email and video calling applications save a significant amount of time and money. The parties are no longer required to be physically present at mediation, and spend money on travelling and renting facilities. Online mediation may be convenient to use in cases where the parties “are disabled, live in remote areas or are prisoners”.⁹¹ It is believed that such a mediation may be used widely in a family, “where the parties have a history of domestic violence”,⁹² and consumer-related matters.

5. Costs

The matter of costs is of paramount importance to the parties to mediation since some of them are not always able to afford it. This, in turn, contradicts cl 3 of Art 13 of the *Constitution of Kazakhstan*. This provision states that “[e]veryone shall have the right to qualified legal assistance. In cases stipulated by law, legal assistance shall be provided free of charge”.⁹³ One may say that mediation, if it fails, just delays the party’s access to justice. However, it is not always true. Therefore, if a pilot project of the Supreme Court of Kazakhstan⁹⁴ succeeds and a pre-trial mediation will be mandatory, it is recommended for mediation expenses to be funded by the Government. At least, it is believed that mandatory mediation should be rendered on a free basis for the vulnerable people. This view is supported by the local judges,⁹⁵ who refer to Arts 67 and 68 of the *Criminal Procedure Code of Kazakhstan*.⁹⁶ For example, cl 5 of Art 68 states that:

Work remuneration of an advocate shall be carried out in accordance with current legislation. The body that conducts the criminal procedure, when there are reasons for it, shall have the right to indemnify the suspect, the accused, the person on trial, the convict, and the acquitted person fully or partially from payments for legal assistance. In this case, remuneration for the work shall be carried out at the expense of the State.⁹⁷

6. New Subject in Law Schools

“Implications of not including ADR in the law curriculum and the disadvantages faced by law graduates who have not completed ADR training” were explained in the article by Tania Sourdin.⁹⁸ The introduction of such a subject in law schools in Kazakhstan will be valuable in terms of promotion of non-adversarial practice.⁹⁹

As it was noted above, the provision concerning the *non-professional mediators* was criticised before the Bill became a law. The main argument was related to the fact that non-professional mediators are usually not familiar with techniques and methods applied by the professional mediators, and therefore

⁹⁰ Christopher Budd, “Will ADR Improve the Australian Taxation Office’s Dispute Resolution Processes?” (2016) 27(2) ADRJ 76.

⁹¹ Anthony Sissian, “Online Dispute Resolution: The Advantages, Disadvantages, and the Way Forward” (2014) 42(6) ABLR 445, 446.

⁹² Shoshanna Zohar, “Online Mediation in Family Law – The Advantages and Disadvantages of Technology” (2016) 19(7) *Internet Law Bulletin* 386, 387.

⁹³ *Constitution 1995* (Kazakhstan) Art 13(3).

⁹⁴ Supreme Court of the Republic of Kazakhstan, n 76.

⁹⁵ Assem Ramazanova, *Mediation in Criminal Proceedings*, Zakon.kz <https://online.zakon.kz/Document/?doc_id=31619647>.

⁹⁶ *Criminal Procedure Code* (Kazakhstan) 2014 [Ministry of Justice (Kazakhstan) trans].

⁹⁷ *Criminal Procedure Code* (Kazakhstan) 2014, Art 68(5) [Ministry of Justice (Kazakhstan) trans].

⁹⁸ Tania Sourdin, “Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field” (2012) 23(3) ADRJ 148.

⁹⁹ Kathy Douglas, “The Teaching of ADR in Australian Law Schools: Promoting Non-adversarial Practice in Law” (2011) 22(1) ADRJ 49.

they may discredit the mediation process.¹⁰⁰ Therefore, it is believed that they must undergo trainings before being granted the right to conduct the mediation sessions. Also, it is worthwhile to consider the adoption Regulations by the Government. For example, Australia has the Australian National Mediator Standards¹⁰¹ that determine standards and requirements for mediators.

7. Farm Debt Mediation

Kazakhstan, like Australia, has a large territory and a small population. Therefore, the Government is actively trying to develop agribusiness in the country.¹⁰² From the authors' point of view, the adoption of a similar law or provisions, requiring a creditor to mediate with a farmer before the commencement of the enforcement actions, may help the Kazakhstani Government to improve this area of economy. Farmers will have a chance to settle their dispute with the assistance of a mediator. Such a step will enable farmers, experiencing financial problems, to renegotiate the terms and conditions of their agreements or consider debt restructuring options with creditors. This will, in turn, lead to a stable situation in the agriculture and motivate investors to enter the local market.

8. Improvement of Enforceability of Settlement Agreements Reached during Mediation in Kazakhstan

According to Kazakhstani judges,¹⁰³ there are some issues with the enforcement of settlement agreements in Kazakhstan. The current legislation does not contain a precise regulation of the procedure for the enforcement of settlement agreements. The absence of a clear procedure for the enforcement seems to be a stumbling block that creates certain difficulties in practice and prevents the development of mediation in Kazakhstan.¹⁰⁴ Therefore, there is an urgent need to develop clear regulations on the enforcement of settlement agreements in Kazakhstan.

V. CONCLUSION

Kazakhstan and Australia have many similarities: both countries have a huge territory and a small population, as well as "large economic resources¹⁰⁵ of many mineral commodities".¹⁰⁶ That is why Australia¹⁰⁷ is considered as a model country for Kazakhstan. However, there is one more thing that Kazakhstan may copy and use as a template – mediation.

This article discussed the history of the use of mediation in Australia and Kazakhstan, and provided an overview of legislation governing it in Kazakhstan and the Australian States of Victoria and New South Wales. During a comparative research, it was known that the abovementioned jurisdictions have three major distinctions. The first one relates to a court-ordered mediation, which cannot be exercised by the judges in Kazakhstan. The second distinction is concerned with the participation in mediation

¹⁰⁰ Lyubov Ulbasheva, *There Are No Losers in Mediation* (2 October 2013) Abiyev (online) <<http://www.abiyev.kz/8601-v-mediacii-proigrayshih-storon-ne-byvaet.html>> [trans of: Любовь Ульбашева, «В медиации проигравших сторон не бывает», *Abiyev* (онлайн) 2 октября 2013] [authors' trans].

¹⁰¹ Mediator Standards Board, n 55.

¹⁰² Prime Minister of Kazakhstan, Government of Kazakhstan, *Kazakh Prime Minister Gives Instructions on Development of Agricultural Sector* (13 August 2013) <https://primeminister.kz/en/news/selskoe_hozyaistvo/premer-ministr-serik-ahmetov-dal-rijad-poruchenij-po-dalnejshemu-razvitiyu-agropromyshlennogo-kompleksa-strany>.

¹⁰³ Olzhas Shalabayev, *Mediation Practice on the Consideration and Resolution of Specific Cases in Kazakhstan*, Infozakon (7 November 2017) <<http://infozakon.kz/courts/5416-mediativnaya-praktika-po-rassmotreniyu-i-razresheniyu-konkretnyh-del-v-kazahstane.html>> [trans of: Олжас Шалабаев, *Медиативная практика по рассмотрению и разрешению конкретных дел в Казахстане* (7 ноября 2017) Infozakon] [authors' trans].

¹⁰⁴ Shalabayev, n 103.

¹⁰⁵ US Geological Survey, US Department of the Interior, *Kazakhstan* <https://minerals.usgs.gov/minerals/pubs/country/2013_myb3-2013-kz.pdf>.

¹⁰⁶ Geoscience Australia, Australian Government, *Australia's Identified Mineral Resources* <<https://www.ga.gov.au/scientific-topics/minerals/mineral-resources-and-advice/aimr>>.

¹⁰⁷ Australasian Institute of Mining and Metallurgy, *Country Snapshot: Mining in Kazakhstan* <<https://www.ausimmbulletin.com/feature/country-snapshot-kazakhstan/>>.

of state bodies. On the contrary to the Australian counterparts, Kazakhstan's government agencies and departments cannot attend mediation. The third major difference is related to the existence in Kazakhstan of non-professional mediators. Analysis of legislation of Victoria and New South Wales showed that there were no such mediators in these states.

Considering the importance of the issue, the authors made recommendations aimed at increasing the use of mediation in Kazakhstan and improving its quality based on the Australian experience. It was proposed by the authors to:

- (1) increase awareness of availability of ADR tools to businessmen;
- (2) allow state bodies to attend mediation;
- (3) introduce mandatory mediation between taxpayers and tax authorities;
- (4) implement online mediation;
- (5) render mediation services on a free basis for vulnerable people by funding them from the state budget;
- (6) introduce a new subject (Fundamentals of ADR) in law schools;
- (7) develop National Standards for non-professional mediators;
- (8) adopt a new law or provisions that will aim at protecting a farmer from the enforcement measures from the creditor's side by requiring the latter to suggest preliminary mediation; and
- (9) develop clear regulations aimed at improving the enforcement of settlement agreements.

The authors believe that implementation of the abovementioned recommendations will enable Kazakhstan to develop ADR mechanisms, save the significant amount of money, and reduce the courts' workload.

