

ABSTRACT

**Of the dissertation for the degree of Doctor of Philosophy (PhD)
in the specialty 6D030100 - Jurisprudence**

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Alternative ways of resolving disputes in civil proceedings: theoretical and practical aspects

General description of the paper. The dissertation is devoted to theoretical and law enforcement aspects of alternative methods of dispute resolution, including business and general civil practice in civil proceedings under the legislation of the Republic of Kazakhstan. The paper examines the theoretical foundations of alternative law enforcement aspects of dispute resolution, defines the legal status and place of the norms of alternative methods of resolving disputes in the system of modern law of Kazakhstan, studies the legal principles of regulating public relations in the field of conciliation procedures. It also reveals the legal nature and limits of the application of an amicable agreement, mediation, participatory procedures in civil proceedings, examines international experience and makes a comparative analysis on the formation of the effective application of conciliation procedures.

Relevance of the research topic. Currently, the significance and effectiveness of alternative means of resolving disputed relations is of great importance for society, which, in turn, contributes to a positive assessment of the role and place of traditional justice in the legal system of Kazakhstan.

The measures taken in recent years can hardly be called optimal, since the decrease in the workload of courts occurs mainly by reducing the procedural form, expanding its simplified modifications. It seems that such measures should be resorted to last, when all other means of solving the problem have been exhausted. One of the reasons is that any simplified forms of dispute resolution accelerate the process at the cost of an inevitable decrease in the quality of justice, even in cases of the same type. For this reason, it is necessary to use other resources to reduce the judicial burden, not related to the reduction and simplification of the civil procedural form. These other resources include all known forms of ADR: mediation, arbitration, claims procedure and administrative form. Each of these forms in the modern period has obstacles to their effective use.

In the domestic scientific literature, there are no comprehensive studies of the institution of alternative resolution of legal disputes through the prism of the theory of state and law. Today, there is an urgent need for a deep theoretical understanding of the legal nature of alternative methods of resolving legal disputes, the effectiveness of their use and the prospects for their implementation in legislation. The need to eliminate these gaps in domestic jurisprudence and address these issues predetermines the relevance of the research topic.

The choice of the topic of the dissertation is due to the lack of interdisciplinary works devoted to the study of alternative ways of resolving legal disputes. A similar trend exists not only in Kazakhstan; in other countries, the lack of comprehensive work in the field of alternative methods of resolving legal disputes also affects practice.

The degree of elaboration of the research topic. Certain issues affecting the procedural aspects of the functioning and legislative regulation of the activities of institutions for alternative dispute resolution in civil proceedings were described in educational and methodological literature, scientific articles and monographic works, but there was no comprehensive study of this topic before the appearance of this work.

A significant contribution to the study of the institution of alternative dispute resolution was made by: Valikhanov Ch.Ch., Zimanov S.Z., Suleimenov M.K., Baymoldina Z.Kh, Duisenova A.E., Karagusov F.S., Zdrok O.N., Kalashnikova S.I., Kunitsyna I.V., Kuzbagarov A.N., Nosyreva E.I., Machuchina O.A. and others.

Certain aspects of alternative dispute resolution in general are reflected in the works of such authors as Shaimenova A., Gaisina A.R., Tochilkina E.D., Kozyuk M.N., Lazarev S.V., Nikolyyukin S.V., Panchenko V.Yu., Rubinshtein E.A. and others.

Leading scientists and judges of the Republic of Kazakhstan and the Russian Federation made a significant contribution to the study of the regulation of the process of reconciliation of parties under civil procedural legislation: Suleimenova U., Kasymova M.T., Khudoikina T.V., Tsivilskaya T.A., Shamlikashvili Ts.A. ., Shvarts O., Yusupova R.B., Stoletova D.E., Skvortsov O.Yu., Sattarova A.A., Nestoliy V., Takhmina A.V., Toropova A.A. Yusupova R.B. Knyazev D.V. and etc.

The purpose and objectives of dissertation paper. The purpose of this work is a detailed description of alternative ways of resolving legal disputes, clarification of their essential features, content, types; determination of the features of their application in various spheres of public relations and ways of using foreign experience in Kazakhstan. To achieve this purpose, it is necessary to solve the following tasks:

- to formulate a more accurate definition of the concept of "mechanisms of alternative dispute resolution", as well as "conciliation procedures" and identify the place and role of alternative methods of dispute resolution and conciliation procedures in the system of resolving legal disputes of the Republic of Kazakhstan;
- to generalize and develop general theoretical knowledge about alternative ways of resolving legal disputes in general and conciliation procedures in particular;
- to explain in more details the prerequisites for the emergence, stages of formation and development of alternative methods of resolving legal disputes;
- within the framework of comparative legal study and taking into account Kazakhstan's experience to characterize the types, signs and principles of alternative methods of resolving legal disputes and the peculiarities of their use;
- also highlight the advantages and disadvantages of alternative methods of resolving legal disputes, taking into account Kazakhstan's experience;
- to analyze overseas experience of law regulation and alternative ways to resolve legal disputes usage;
- to determine the current state of normative regulation of alternative methods of resolving legal disputes and the prospects for their wider implementation in Kazakhstan;

- present current directions for improving the procedural methods of applying alternative dispute resolution in civil proceedings.

The object of the research is social relations arising in the process of functioning of legal mechanisms, the institution of alternative dispute resolution in civil proceedings.

The subject of the research is theoretical, legal and practical aspects of improving alternative methods of resolving legal disputes.

Methodological basis and research methods. To solve the set tasks and achieve the set purpose, a complex of philosophical, general scientific and special-scientific principles and methods of cognition was used, each of which made it possible to objectively and comprehensively study the subject.

Normative and legal base of the research. The theoretical basis of the work is scientific works in the field of the theory of state and law, constitutional law, philosophy, the work of practicing lawyers, as well as works from other legal disciplines. The normative and legal base of the study is the Constitution of the Republic of Kazakhstan, the Civil Procedure Code of the Republic of Kazakhstan, the Law of the Republic of Kazakhstan on Mediation and other regulatory legal acts of the Republic of Kazakhstan, international regulatory legal acts and regulatory legal acts of individual foreign states. Particular attention is paid to domestic legislation and foreign and international legislation on alternative ways of resolving legal disputes.

Scientific novelty of the research. The scientific novelty of the results obtained lies in the fact that the presented work is a general theoretical comprehensive scientific study of alternative methods for resolving legal disputes, their essence, types, features of legal regulation in the Republic of Kazakhstan and their application, taking into account foreign experience and international legal standards, in which the author proposes new scientific -practical conclusions on the development of the theoretical and legislative framework for ADR in Kazakhstan.

The main provisions for the defense:

1. The following definitions are formulated:

Alternative dispute resolution mechanisms. Conciliation procedures.

2. On the basis of a comprehensive analysis of the place and role of alternative methods of resolving disputes and conciliation procedures in the system for resolving legal disputes of the Republic of Kazakhstan, it is substantiated that alternative methods and conciliation procedures do not acquire an independent status in a single system for resolving legal disputes, and they are not completely independent from public justice. These two areas are inextricably interconnected, organically complement each other and do not compete with each other.

3. The main trends in the historical development of alternative ways of resolving legal disputes are highlighted:

- the court of biys, which has historically confirmed its effectiveness as a mechanism for out-of-court dispute resolution, was the basis for the further development of alternative methods of resolving legal disputes and as a reaction of the legal system to an increase in the dynamics of social processes;

- further differentiation (specialization) and expansion of the use of alternative methods for resolving legal disputes as a result of the growth of species diversity, the number and complexity of legal disputes using simplified procedures and digitalization technologies;

- reforming out-of-court forms of dispute settlement.

Based on the results of the analysis of the prerequisites for the emergence of alternative dispute resolution, it was concluded that the practice of alternative (out-of-court) proceedings and dispute resolution, which developed in Kazakh customary law, had its own specifics, which differed from modern practice. The functioning of the named institution was based on an ideological paradigm based on fostering a respectful attitude among citizens towards each other, towards the elder of the clan, mutual assistance to loved ones, reconciliation, aimed at preserving peace and harmony in society.

4. Negotiations, mediation and arbitration are analyzed in detail as the most common types of alternative methods for resolving legal disputes, as a non-state system of forms that determine the procedure for methods, means of resolving legal disputes based on the agreement of the parties, which are characterized by their universality, flexibility, confidentiality, provide fast and effective (with a minimum expenditure of effort, time and money) elimination of contradictions between conflicting persons.

Based on the results of such consideration, the main features of alternative methods of resolving disputes are highlighted:

- non-state character;
- the contractual nature of the use of ADR for resolving disputes;
- universality;
- legal nature;
- flexibility;
- confidentiality.

5. The advantages of using ADR are that their use: saves the parties time and money, eliminates the continuation of court proceedings, the multiplicity of repeated applications to settle a dispute in mediation (at any stage); creates a further prospect of comfortable mutual relations of the parties in the future, which contributes to reduce the level of conflict in society; because the resolution of the dispute, that is, the parties reach an agreement voluntarily, which means that the execution of such an agreement is more likely, which is the basis for the creation of a favorable legal environment.

Disadvantage of using ADR are that: alternative forms establish facts rather than rights, therefore overwhelmingly ADR does not resolve disputes that involve complex legal issues; alternative methods of dispute resolution are effective for reaching an agreement between the two parties (and if there are more parties, then it will be almost impossible to resolve this dispute); to resolve the conflict in an alternative way, voluntary cooperation between the parties is mandatory (if the parties do not contact each other in the process of resolving the dispute, they will not be able to achieve a result by alternative means); the interest of the parties to the

dispute in the possibility of retaining the right to appeal a court decision or in attracting public attention to a particular problem, or, finally, in the need to delay the resolution of the dispute when one of the parties benefits from a delay in its resolution.

6. Proposals to use international experience in the course of domestic transformations do not mean simple copying, borrowing all the provisions of theory and law enforcement practice in general, which is impossible due to our historical, legal traditions, legal awareness, economic and social conditions. Therefore, the experience of foreign states must be passed through the prism of Kazakhstani legal institutions, taking into account their peculiarities and characteristics.

7. The conclusion that alternative dispute resolution as an institution of the legal system is developing in two main directions: within the framework of the existing judicial system and outside it, provides a basis for systematizing alternative methods of resolving disputes into two main types on the basis of their belonging to the sphere of legal regulation: public and private. In this connection, the need arose for new forms of improvement and classification of alternative methods for resolving legal disputes on:

- the form of dispute resolution;
- the main legal system;
- objectives: protection of rights and dispute resolution, reaching a compromise;
- principles of the process: adversarial, consensual;
- peculiarities of the law enforcement process: jurisdictional, non-legal, alternative dispute resolution;
- the obligatory execution of decisions: binding, recommendatory;
- participation of a third party: with, without involvement;
- formalization: formalized process, not formalized process;
- openness: confidential and public.

8. The following topical directions for the further development of the ADR institution in civil proceedings have been identified and disclosed:

- building the correct approach to further improving legislation in the field of ADR depends on the formation of a range of requirements to improve conditions and proper control to the organizational and legal activities of organizations in the field of ADR (including the collection and analysis of statistical data);
- the development of rules and mechanisms aimed at accounting and reporting taxes in the implementation of professional activities by persons involved in mediation, arbitration and other types of ADR, is subject to a comprehensive analysis, objective establishment of the reasons and conditions that impede this direction for further strengthening and development of the ADR institution;
- the process of integrating the institution of alternative dispute resolution into the Kazakh legal environment has not yet been completed. The theoretical provisions, classifications and application of the principles of ADR require further development, and, despite its availability and seeming simplicity, it is not popular among citizens and legal entities on such a large scale as in foreign practice. This, to some extent,

testifies to the insufficient competence of the negotiators and the development of negotiating technologies.

The theoretical and practical significance of the dissertation research. The theoretical significance of this dissertation lies in the fact that it deepens and develops the theory of civil procedural law by researching such a poorly studied legal phenomenon as the institution of conciliation procedures.

Including the formulated conclusions and practical suggestions can be used:

- in lawmaking;
- in research activities;
- in law enforcement work;

- the results of the research can be used in the educational process in lectures and practical classes in higher educational institutions for the training of highly qualified specialists in the field of pre-trial settlement of disputes.

Approbation of research results. The main provisions and conclusions of the dissertation, as well as individual results of scientific research, were reflected in ten scientific publications in foreign and national scientific publications, including five articles, reports at international scientific and practical conferences, three articles in journals recommended by the Control Committee in the field of education and science of the Ministry of Education of the Republic of Kazakhstan, as well as in the journal “Australasian dispute Resolution journal”, which is included in the international database of Thomson Reuters, and “RivistaDiStudiSullaSostenibilita”, which is included in the Scopus database.

The thesis was prepared and discussed at the Department of Civil Law, Civil Procedure and Labor Law of the Law Faculty of al-Farabi KazNU.

Publication of research results. The main provisions of the dissertation are presented in 10 publications. Among them: 2 articles in international scientific publications included in the Scopus / Thomson Reuters database.

The structure and scope of the dissertation. The dissertation paper consists of an introduction, three chapters, including eight subsections, conclusions, and a reference list. The total volume of the dissertation is 143 pages.