Mediation in the Kyrgyz Republic: some issues

Use of various ways to protect the rights and freedoms of citizens, along with judicial protection, is allowed by the Constitution of the Kyrgyz Republic: subparagraph 2 of paragraph 1 of Article 40 provides that "*the state shall ensure development of extrajudicial and pre-trial methods, forms and ways of protecting human and civil rights and freedoms*".

In Kyrgyzstan, the Law of the Kyrgyz Republic "On Mediation" was adopted in summer of 2017[1] and came into force on February 11, 2018 (the "Mediation Law").

In a broad sense the term "mediation" refers to a method for resolving a conflict with assistance of an impartial third party when the decision is made by the parties themselves[2]. Thus, the role of a mediator[3] is to help the parties smooth the differences between them, establish an atmosphere of cooperation, contribute to the elaboration of terms for a mutually beneficial agreement. At the same time, the parties may give the mediator more powers, for example, to allow the mediator to submit a draft decision of the disputed issue.

The Mediation Law defines mediation as a procedure for a dispute settlement with the assistance of a mediator (mediators) by agreeing the interests of the disputing parties with a purpose to reach a mutually acceptable agreement (Article 2)[4].

One of the important issues is the scope of mediation. According to Article 1 of the Mediation Law, mediation can be used in disputes that arise from civil, family and employment relations. As to application of mediation to disputes arising from criminal law relations, this is possible only in cases directly stipulated by law (Article 1.2 of the Mediation Law).

Despite many advantages of mediation, its application does not always result in expected outcomes. It should be noted that mediation is effective in cases when both parties want and seek to resolve a conflict, and plan to continue their business relations. Such position usually leads to the willingness of the parties to settle the disputed issue amicably, cooperate with each other in a constructive way and good faith, meet halfway and find a compromise, voluntarily fulfill those arrangements/agreements that the parties reached as a result of mediation.

In this regard, special attention should be drawn to one of the fundamental principles of mediation which is voluntariness (Articles 3 and 4 of the Mediation Law). This principle means that use of mediation to resolve a conflict or a disputed issue is a voluntary willingness of the parties, and the parties cannot be forced by anyone to use mediation.

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[1] Adopted by the Jogorku Kenesh (Parliament) on 22.06.2017, signed by the KR President on 28.07.2017, came into force on 11.02.2018.

[2] See for example Bruntseva E.V. International Commercial Arbitration, 2001, p.22.

[3] A mediator is defined as an independent individual who meets the requirements of the Law and assists the parties in mediation (Article 2 of the Mediation Law, Article 2 of the KR Civil Procedure Code dated 25.01.2017 (the "CPC").

[4] The same definition is provided by Article 2 of the CPC.

It should be noted that the Mediation Law grants a judge[5], an arbitrator[6], an investigator[7] and an authorized official of the body of inquiry[8] the right to refer parties to a dispute, a misconduct case and a criminal case to an information meeting with the mediator, and the parties are not allowed to refuse to participate in such a meeting[9]. However, it is the parties that, by virtue of the principle of voluntariness, decide on their need for mediation and have the right to refuse to have it.

With regard to voluntariness, provisions of the Mediation Law provide the following:

- any of the parties may withdraw at any time during mediation (Article 23);

- performing arrangements/agreements reached by the parties as a result of mediation must be voluntary (Article 4.3).

It is very important that the parties to a dispute understand from the very beginning that the arrangements/agreements reached as a result of mediation must be performed voluntarily, as stipulated in the Law on Mediation. If one of the parties refuses to comply with the agreement reached, there is no enforcement mechanism in the mediation: neither the mediator, nor anyone else can force the parties to perform the result of mediation.

Thus, it may turn out that having spent time, money and other resources for mediation, the parties will not be able to achieve a result they want - a solution to the disputed issue, and parties or one of the parties will have to further continue to make efforts to resolve the dispute.

If mediation was conducted in the course of a court proceeding or arbitration, it is possible to use the provisions of Article 22 of the Mediation Law, under which, on the basis of a settlement agreement[10], a court or an arbitration tribunal may approve a settlement agreement in accordance with procedure code or applicable rules of the arbitration tribunal (Article 22.4 of the Mediation Law). Thus, this provision works in the case of mediation in the course of a court trial or arbitration.

[5] The judge's action to explain to the parties their right to settle the dispute through mediation as well as the judge's right to refer the parties to a mandatory information meeting with a mediator is provided by Article 153 of the CPC, Article 30 of the KR Criminal Procedure Code dated 02.02.2017, coming into force on 01.01.2019 (the "Criminal Procedure Code").

[6] The Law "On Arbitration Tribunals in the Kyrgyz Republic" does not contain an appropriate provision yet.

[7] The investigator's authority to refer an accused person and a victim to an information meeting with a mediator is provided by Article 35 of the Criminal Procedure Code.

[8] Authority of the authorized official of the body of inquiry to refer an accused person and a victim to an information meeting with a mediator is provided by Article 39 of the Criminal Procedure Code.

[9] Para 1 and 2 of Article 20 of the Mediation Law, Article 41.5.7, Article 45.2.3 and Article 47 2.5 of the Criminal Procedure Code.

[10] A written agreement of the parties on settlement of a dispute, reached by them as a result of mediation (Article 2 of the Mediation Law).

Besides, in accordance with the Mediation Law, the parties may agree to stipulate in a settlement agreement a provision on execution of an executive notation by a notary to fulfill the conditions of a settlement agreement (Article 22.5).

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