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The legal framework for mediation in Kazakhstan

Key words: *mediation, law, international commercial arbitration, civil litigation, public authority, the Civil Code of the Republic of Kazakhstan.*

I . The basis for mediation

I.1. The concept of Mediation under the laws of Kazakhstan

A . As the legal term the notion of mediation has been introduced into the legal system of the Republic of Kazakhstan in 2011 when the Law «On Mediation» was adopted. This Law in Article 2 includes the legal definition of mediation (sub-clause 5)). According to this definition, mediation represents «a procedure of resolution of a dispute's (conflict's) between [its] parties with assistance of a mediator (mediators) with the purpose [for the parties] to achieve a mutually acceptable solution [which procedures] is implemented by voluntary agreement of the parties.»

The Law dated January 28, 2011 «On Mediation» (as amended) (the «Mediation Law») serves as the legal basis for organization of mediation in Kazakhstan, defines principles of mediation and regulates mediation procedures. It also determines a mediator's status.

B . The Mediation Law in its Article 3 declares the following as purposes of mediation:

(i) achievement of a possible scenario/solution to resolve a dispute (conflict) acceptable for both parties of the mediation procedure; and

(ii) decrease of level of the parties' proneness to conflict.

These purposes are proposed to achieve in each case when mediation takes place to resolve a particular dispute (conflict).

C . The Mediation Law does not specifically identify mediation as an alternative way for dispute resolution («ADR») and, in general, the laws of Kazakhstan still restrictedly operate the term «alternative dispute resolution». However those documents representing conceptions or programs for further social and legislative development refer to ADR and to mediation as ADR device as well as they call for their further introduction into Kazakhstan's legal system. Particularly, The Conception of the Legal Policy of the Republic of Kazakhstan adopted by the Decree of the President of the RK dated September 20, 2002 #449 (now expired) proposed that in addition to all efforts in developing Kazakhstani judicial system «*alternative methods for settlement of civil-law disputes must be provided for, in particular, [with the aim] to regulate functioning of arbitration tribunals and to converge to international standards*». Later on, in Chapter 4 of The Conception for Development of Civil Society in the Republic of Kazakhstan for the period of 2006-2011 approved by the Decree of the President of the RK dated July 25, 2006 #154 there is now stated that «*in addition to the judicial practice there are alternative ways to settle social, interpersonal conflicts and disputes apply, and there the system to conform (harmonize) interests exists...*». Currently, in The Conception of the Legal Policy of the Republic of Kazakhstan for the Period from 2010 till 2020 adopted by the Decree of the President of the RK dated August 24, 2009 #858 in Section 2.7 there is also stated that «*establishing of different ways and means for achieving compromises between parties of private-law conflicts (such as mediation, intermediation and others) in both judicial and out-of-court procedures, including, among others, mandatory discussions of a possibility to use some means and conciliation procedures when preparing a case for a court's settlement, as well as development of out-of-court forms of protection of civil rights*» are defined as a guideline for development of Kazakhstani civil procedural legislation. In addition, in Section 3.2 of this Conception there is also declared that the system of arbitration courts and tribunals shall be

further developed.

D . In their turn, Kazakhstani scholars have considered the notion of ADR and different types of ADR in their publications. Particularly, professors Yu. Basinand M. Suleimenov stipulated that there, basically, the following three types of ADR can be distinguished: (i) negotiations, (ii) mediation and (iii) arbitration. In his later article professor M. Suleimenov mentions that there two different positions exist concerning the content of the concept of ADR: some scholars believe that ADR creates an alternative to courts of general jurisdiction, but others consider judicial system and arbitration as two separate phenomena and they treat all other procedures as the alternative(i. e. as ADR) to dispute settlement in both state courts and arbitration. Him personally considers alternative procedures for dispute resolution as «an aggregate of means and methods used by parties to achieve an agreement and when necessary - with involvement of an independent third party whose final judgment with respect to the merits of the dispute case is either advisable or obligatory». And in the same article, in addition to the aforementioned arbitration, mediation and negotiations, he also mentions such types of ADR as medarb (mediation and arbitration), mini trial, reconciliation of the parties, non-obligatory arbitration or expert assessment opinion.

E . In line with those conceptual documents approved by the President of Kazakhstan as mentioned above, there two laws were adopted on December 28, 2004. The first one is the Law «On International Arbitration» (initial title was the Law «On International Commercial Arbitration» and it was replaced with the current title in July 2013) regulates those relations arising in the process of functioning of international arbitration on the territory of Kazakhstan, as well as the procedures and conditions for acknowledgement and enforcement of international arbitral awards in Kazakhstan. The second one is the Law «On Arbitration»; it regulates terms and conditions of creation and functioningof arbitration tribunals in the RK, as well as procedures for enforcement of their decisions. Neither these two Laws no the Mediation Law expressly define (in legal terms) arbitration, international arbitration and mediation as types of ADR.

However, having an access to dossiers of drafts of all these Laws, including the RK Government's explanatory notes, conclusions and scientific expert opinions which were made to accompany the drafts of the Laws when they were submitted to the RK Parliament, one will find that these acts were initially meant to regulate respective types of alternative dispute resolution of civil-law disputes and (as mediation) some other types of conflicts. In addition, in the most of scientific and mass media publications of Kazakhstani scholars, judges and attorneys all three of these procedures are clearly regarded as types of ADR.

F . In all of available publications in Kazakhstan, mediation is acknowledged as a type of ADR and it is generally understood similar way as it is defined in the Mediation Law. For example, professor M. Suleimenov defines mediation as «settlement of a dispute with assistance of an independent neutral intermediary who promotes to achieve an agreement between the parties». A. Duisenova (the Executive director of the Kazakhstani International Arbitrage) also emphasizes: «mediator is not an arbitrator, he does not determine who is right and who is wrong, he does not make a decision on a dispute. Mediator helps the parties to settle the conflict with benefits to all the parties». A.Sholimova proposes that as a type of ADR «mediation represents a specific form of intermediation which does not propose that a third party makes a judgment on a dispute, but correspondingly a mediator's main purpose is to assist parties [of the dispute] to bring the dispute, as soon as possible, to a mutually beneficial and viable solution». Such common understanding of mediation is also expressed in the publication of all reports made by its participants at the international conference organized by the Institute of Legislation of the RK Ministry of Justice held on October 19, 2012 in Astana.

G . Above arbitration is considered to represent one of ADR available under the laws of Kazakhstan. By such reference to availability of ADR we mean enforceability of the results of respective type of ADR according to provisions of local legislation and not just a fact that applicable law does not prohibit a procedure.

Particularly, according to Article 1 of the Law «On Arbitration», the Law applies with respect to disputes arising out of civil-law relationship with participation of individuals and/or legal entities. Under Article 6 of this Law, arbitration tribunals shall settle such disputes in accordance with legislation of Kazakhstan. Article 32 of this Law regulates the terms under which competent courts provide assistance to arbitration tribunals to secure enforcement of future arbitral awards on separate disputes. Article 33 of this Law also sets forth that arbitral awards are acknowledged to be mandatory for the parties of a respective dispute. Finally, Article 46 of the Law «On Arbitration» establishes that when the parties fail to implement an arbitral award such award becomes subject to its enforcement pursuant to execution procedures as provided for by the RK laws on execution of judicial decisions.

In its turn, pursuant to Article 1 of the RK Law «On International Arbitration», it applies with respect to disputes arising out of civil-law relationship with participation of individuals and legal entities which disputes are resolvable by international arbitration. Article 6(4) specifically provides for that a dispute can be brought to and settled in the international arbitration if at least one party of the dispute is a non-resident of the Republic of Kazakhstan. According to Article 32 of this Law arbitral awards are acknowledged to be mandatory and, when a respective petition is submitted to a competent court, it shall be carried into effect in accordance with the RK civil procedural legislation. Article 25-1 of this Law also regulates the terms under which competent courts provide assistance to arbitral tribunals to secure enforcement of future arbitral awards on separate disputes, as well as in collecting evidences.

Both of these Laws concerning arbitration establish certain restrictions with respect to those categories of disputes which cannot be settled in arbitration, including international arbitration. However this is a topic of separate consideration as it goes beyond scope of consideration in this report.

Neither the Mediation Law nor both of the Law «On Arbitration» and the Law «On International Arbitration» contain any provisions allowing to reveal any relationships between mediation and arbitration. Professor M. Suleimenov also mentions the absence of a special regulation in existing legislation of Kazakhstan for mediation under the auspice of an institutionalized arbitration. For example, these Laws do not regulate whether arbitration should be suspended if the parties of the dispute reach an agreement to solve it in mediation. On the contrary, these Laws on arbitration propose that the parties may reach an amicable agreement and the tribunal will have to formally confirm it. It should be noted that in one of his publications professor Suleimenov M.K. proposed to draft, on the basis of the 2002 - UNCITRAL Model Law on International Commercial Conciliation, a law on conciliation procedures with participation of mediator in civil-law judicial proceedings and in arbitration. However this proposal with respect to regulation of mediation in arbitration has not been implemented.

No other ADR devices exist in Kazakhstan under its national law. It appears that no arrangement can be identified as an ADR device if an applicable law fails to provide support in implementation of results of such arrangement proposing judicial support to enforce it. Though, in accordance with general principles declared in the RK Civil Code, participants of civil-law relationship are entitled to establish forms, terms and conditions of their relations and to choose forms and means for settlement of their disputes and conflicts.

H . Under the Mediation Law mediation can be used to settled disputes and conflicts arising out of civil, labor, family and other types of relationships with participation of individuals and/or legal entities. The Mediation Law also allows using mediation to settle disputes and conflicts within criminal legal proceedings on cases concerning crimes of a little and middle heaviness (i.e. those which are not serious or major crimes) unless otherwise is established by laws of Kazakhstan.

However, mediation cannot apply if:

(i) a dispute (conflict) infringes or can infringe on interests of third parties not participating in mediation;or
(ii) a dispute (conflict) infringes or can infringe on interests of an individual(s) who are legally incapable or restrictedly capable due to a court's decision(s); and
(iii) when a state authority (state body) is a party to a dispute (conflict).

It is also prohibited to apply mediation on criminal cases concerning corruption offences and other crimes against interests of state service and state governance.

All the respective provisions as mentioned above are included in Article 1 of the Mediation Law.

I . According to the Mediation Law, there both out-of-court and court-annexed mediation are accepted in Kazakhstan. Article 20(2) of the Mediation Law specifically states that mediation to settle disputes can be applied both before the parties bring their dispute to court and after a trial proceeding starts.

J . After the Mediation Law was passed in 2011 a lot of different types of activities concerning creation of organizational, methodological and cadre elements of successful functioning of mediation device have been undertaken in Kazakhstan.

A number of organizations involved in activities associated with organization of mediations and mediators' training were established in different cities of Kazakhstan, as well as registers of certified mediators have been formed. For example, as one of the most notable, the Integrated Center of Mediation and Peacemaking «Mediation» (headed by Mrs. S. Romanovskaya) has been set up in Almaty with branches in other regions of Kazakhstan. As it is mentioned in the Center's website (www.mediation.kz), during the last two-year period after adoption of the Mediation Law the Center has provided training and certified 183 mediators under three specially designed training programs such as «General Course of Mediation», «Specialized Course of Mediation» and «Training for Mediation Trainers». In the register of this Center there 98 certified mediators included.

The Kazakhstani Center of Mediation (www. kazmediation.kz) in Almaty (director Mrs. I. Vigovskaya) has also created its own register of mediators. This register divides mediators based on where mediators reside and where they can effectively offer their services. Such division includes 9 major cities of Kazakhstan and even Munich (Germany).

The Kazakhstani International Arbitrage (KIA) chaired by professor M. Sulemenov also offer mediation as alternative way for disputes resolution (www.arbitrage.kz). Mediation is carried out in accordance with the KIA Rules of Reconciliation (Mediation).

There other mediators' organizations can be also found in Kazakhstan.

The overall trend is an increase in the number of mediations in different areas of private and public (administrative and criminal) law. In addition, an increase in the number of certified mediators can be also noted, as well as in the number of people interested in taking special training to become certified mediators.

K . There no centralized official statistic and analytical information exist in Kazakhstan concerning number of mediations. Each organization of mediators, however, can offer their own data.

For example, from the website of the aforementioned Integrated Center of Mediation and Peacemaking «Mediation» one can know that «starting from August 5, 2011, when the RK Law «O Mediation» came into effect, professional mediators of the Center prepared (invited to mediation) and completed mediation on 1 dispute considered within a criminal proceedings on criminal case (related to a traffic accident), on 18 civil-law disputes (arisen from family, labor and other legal relations), as well as more than 200 disputes concerning consumer rights protection».

From the official website of the Specialized Inter-District Juvenile Court of Karagandy oblast of Kazakhstan (www.juvencourt.kz) more detailed information can be found regarding results of activity of the Center of Mediation and Law «Dostasu» located in the city of Karagandy. As it is announced «there are more than 65 of successfully conducted mediations on the credit of the Center «Dostasu». Those are disputes where we helped to parties in out-of-court procedure to cross the difficult way from conflict to agreement. The amount of only monetary claims settled in such mediations exceeded 10 million tenge. These results of mediation are categorized as follows:

- reconciliation of the parties on instituted criminal cases - 2 mediations (3,6%);

- family conflicts, including partition of property and determining children's place of residence

- 14 mediations (21,8%);

- consumer disputes - 18 (32,7%);

- credit relationships (disputes between banks and their clients regarding loans repayment) - 4 mediations (7,2%);

- commercial disputes, including those with participation of several legal entities - 8 mediations (14,4%);

- refusal from mediation - 1 case;

- disputes with providers of public services - 4 mediations (7,2%);

- interpersonal conflicts, including those on instituted administrative proceedings (light harm to someone's health, slander, insult) - 4 mediations (7,2%);

- disputes with mass media - 3 mediations (5,5%);

- disputes between individuals regarding money claims - 8 mediations.»

On the website of the Media Center of the RK Internal Affaires authorities there the following has been announced: «for the half-year period [of2013] 475 cases were closed (completed) with the use of mediation. It is undoubtedly progress! Taking to the consideration that during the last year [2012] peacemakers [mediators] managed to settle and prevent judicial proceedings in only 122 conflicts».

M . The same website of the Media Center includes a kind of forecast stating that «if such increase would take place in future, there is a good perspective that this Law [the Mediation Law] will finally start work in full».

Karagandy Center of Mediation and Law «Dostacu» has also noted positive trends. They particularly mention, as positive examples, successful mediation on such disputes as partition of property and business, reconciliation and repayment of debts when periods of limitation of action expired, amicable resolution of about 20 consumer rights related disputes. For the last category of disputes they see it significant that successful dispute resolution became possible due to use of principles and methods of mediation and not with any references to legal norms and sanctions of the consumer law. They also believe that first outcome of application of the Mediation Law shows wide opportunities for spread of mediation in Kazakhstan. «*Taking into consideration politically correct mentality of Kazakhstani people we believe that mediation will have important future. However, introduction of mediation into life moved a significant layer of legal and humanitarian problems*». Some specific problems are mentioned in this publication, but we can identify them, in addition to other, from another sources.

For example, representatives of Kazakhstani mediators' organizations who participated in the conference held on September 26, 2012 in Almaty blamed judges, prosecutors and investigators that they do not explain people the meaning of mediation and possibilities offered by the Mediation Law.

Even a year after adoption of the Mediation Law there was an opinion that a little change appeared to happen. The head of the Bostandyk District Court in Almaty A. Sarsembayev identified two reasons to this: (i) there are no authoritative mediators yet and (ii) people do not know how to treat [use, apply] mediation.

Similarly, the Chairman of the RK Supreme Court Mr. B. Beknazarov also mentioned the following: «mediation procedures have not begin to work to the fullest extent... There the Law [On Mediation] exists, many public association of mediators have been created, [such of] private mediators as the matter of fact, but it is not everywhere people take mediation as real opportunity to resolve a dispute... May be it is because here in Kazakhstan it's been more convenient and easier to file a suit to courts. We have insignificant amount of dues for application to courts established. Nevertheless, we require from chairmen of courts to create necessary conditions for mediators.»

However practicing mediators see that «the judiciary of Kazakhstan shows a positive perception of mediation as a method of reconciliation of parties [of a conflict/dispute]... However, while judges positively take for the new law [the Mediation Law], internal affairs authorities in the meantime

do not demonstrate such understanding. At the same time, for the present, there is no mutual understanding achieved with the most of practicing lawyers, attorneys and notaries, who believe that mediators act as their competitors, and they forget that mediators and lawyers are representatives of allied professions having the same historical roots».

In their turn, its is fair to mention that representatives of the General Prosecutor's Office also support introduction of mediation into the practice allowing its application during different stages of judicial proceedings and on pre-trial examination/investigation of criminal cases. Certain proposals on content of the legislation concerning mediation are also voiced.

There is also an opinion that a model for regulation of mediation chosen by Kazakhstani law looks not viable and «adoption of the Law On Mediation will bring more harm than advantages». The critic is expressed concerning (i) legal determination of those fields where mediation can be used, (ii) the sphere of application of the Mediation Law which is also improperly defined (as M. Suleimenov says, without clear separation of mediation on civil-law disputes and in criminal proceedings),(iii) unnecessary strict rule with respect to mediators performing on the non-professional basis, (iv) provisions regarding content of the mediation agreement, etc. In his later article professor M. Suleimenov, however, expressed his hope that mediation in Kazakhstan will develop as it is an international trend, and he proposed certain priority directions for such development. We tend to share this opinion and to support these proposals.

I.2 . Existing legal base for mediation in Kazakhstan.

A . The Mediation Law serves as a primary source of the existing legal framework for mediation in Kazakhstan. However, respective provisions of the Civil Procedural Code and the Criminal Procedural Code also regulate certain aspects concerning conduct of mediation. Such regulation mostly relates to time period for conduct of mediation and acknowledgement of settlement agreements reached in result of mediation by courts and prosecuting authorities (as it is provided for in Articles 24(4) and 27(7) of the Mediation Law).

In turn, when referring to mediation within the judicial proceeding on a civil-law disputes, Article 27(5) of the Mediation Law provides for mandatory approval of the settlement agreement by the court to be made according to the procedures established in the RK Civil Procedural Code: such approval is required by Article 49 of the Civil Procedural Code dated July 13, 1999 (as amended).
It should be noted that the Mediation Law does not prevent mediation to settle conflicts arising out of administrative-law relationships or concerning administrative violations, though it also does not include any specific provision concerning this aspect. One can also see from the statistic data above that respective categories of conflicts were already settled in mediation in Kazakhstan. However, nether the RK Code on Administrative Violations dated January 30, 2001 (as amended) establishing rules for judicial proceedings on administrative violations, not the RK Law dated November 27, 2000 «On Administrative Procedures» (as amended) which sets forth procedures for administrative protection of rights and legitimate interests of citizens, operate the notion of mediation and provide for any regulation of mediation within respective judicial proceedings and implementation of administrative procedures.

B . The Mediation Law has been amended twice after it was adopted in 2011.

First time amendments to the Mediation Law were introduced by the RK Law dated February 17, 2012 «On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan Concerning Matters of Improvement of Appeal, Appellate (Cassational) and Supervisory Proceedings, Increase of Level of Trust and Provision of Accessibility to Justice». One of the amendments replaced conditions and procedure for extension of period for mediation. Particularly, if under the earlier version of Article 23(2) initial 30-day period for mediation in the court-annex procedure could be extended for another 30 days by the court and only «if necessary», the amendment now sets forth that the parties themselves (not the court) can make such extension in the respective mediation agreement followed by their subsequent joint notice to be given to the court. In addition, no «necessity» rule to

justify such extension remained. This amendment made legal framework for the mediation agreement to correspond to general rules of the RK Civil Code regarding any agreement, providing that only the parties to the agreement may amend it, and not any third party is entitled to do it.

Another amendment introduced by the aforementioned amending Law dated February 17, 2012 has a rather technical nature. In particular, initial version of Article 27(5) proposed that an amount of the state due which was paid before submission of a dispute to court shall, after a settlement agreement is concluded, be returned to its payer in the procedure set forth in the Civil Procedural Code. However such procedure is established in the RK Tax Code, and the amendment to the Mediation Law corrected this reference.

C . Second time amendments to the Mediation Law were introduced by the RK Law dated July 3, 2013 «On Amendments and Additions to the Constitutional Law of the Republic of Kazakhstan and Certain Legislative Acts of the Republic of Kazakhstan on the Matter of Exclusion of Contradictions, Omissions, Collisions Between Norms of Law in Different Legislative Acts and Provisions Favoring Commitment of Corruption Violation».

One of the amendments relates to the provision of Article 1(2) of the Mediation Law according to which mediation cannot apply, in addition to other established cases, if a dispute (conflict) infringes or can infringe on interests of an individual(s) who are restrictedly capable due to a court's decision(s).

Significant amendment was made to Article 24(3) which now sets forth that if in mediation one of the parties of its is a minor, then participation of its teacher or psychologist or the minor's legal representative shall be obligatory. Before such amendment reference to minors' legal representatives (parents, guardians, etc.) was missing.

The rest of amendments entitled akims (mayors) of towns subordinated to oblast (Kazakhstani regional) centers, in addition of other categories of local akims, to maintain registers of non-professional mediator.

D . In the Annex to this Report there is the text of the Mediation Law translated into English can be found. The text was extracted from the official website of the Union of Judges of the RK (http://www.ujk.kz/union/?sid= 133), corrected and updated by the author of this Report to make it correspondent to amendments introduced into the Law up to the date of this Report.

E . Issues concerning the concept and significance of mediation as ADR were brought to public consideration in Kazakhstan quite recently and there is no specific monographs issued by Kazakhstani scholars related to the topic. The most of related publications are made in mass media, mostly for the purpose of publicity of the Mediation Law and first results of its application. However, professor M. Suleimenov as one of the most prominent scholars in Kazakhstan in the field of private law and dispute resolutions and as the Chairman of the Kazakhstani International Arbitrage dedicated a number of his publications to the notion of mediation, analysis of the Mediation Law and its perspectives. In this Report there are references made to the following articles of professor M. Suleimenov which, no doubt, can be considered as the most authoritative scholarly contributions (single or jointly) to the topic until today:

(i) Suleimenov M.K. Development of Mediation as Alternative Way of Disputes Resolution. Can be found on the website of the Kazakhstani International Arbitrage: www. arbitrage.kz/461;

(ii) Suleimenov M.K. Mediation in Kazakhstan: Current Status and Perspectives for Development. Published in: The Law Monthly Bulletin «Yurist» (the Lawyer). - Almaty, 2009 (#12);

(iii) Suleimenov M.K. The Private Procedural Law (the Law of an Alternative Dispute Resolution). Published in: The Law Monthly Bulletin «Yurist» (the Lawyer). - Almaty, 2011 (#2);

(iv) Basin Yu. G., Suleimenov M.K. Arbitration Tribunals in Kazakhstan: Problems of Legal Regulations. Published in: Arbitration Tribunals in Kazakhstan: Problems of Legal Regulations (materials of the international scientific and practical conference held in Astana on February 3,2003). Responsible

editor- M.K. Suleimenov. /Almaty: KazGYuU, 2003 (306 pages);

(v) Suleimenov M.K., Duisenova A.E. Whether an Independent Mediation will Exist in Kazakhstan. Can be found on the website of the Kazakhstani International Arbitrage: www. arbitrage.kz/461.

A number of publications concerning practical issues of mediation and training for mediators in Kazakhstan were made by S. Romanovskaya, I. Vigovskaya and some other practicing lawyers. But they cannot be considered as scholarly contributions. Nevertheless, attention should be also paid to published results of the conference organized by the Ministry of Justice of the RK in 2012 and dedicated to mediation: «The Status and Perspectives for Development of the Institute of Mediation under Conditions of Social Modernization of Kazakhstan: materials of the international scientific and practical conference October 19, 2012». - Astana: «Institute of Legislation of the Republic of Kazakhstan», 2012 (172 pages) (can be also found in its electronic format on the Institute's website www.izrk.kz/ images/stories/mediacia8 6 .pdf).

I.3 . The mediation agreement / agreement to submit the dispute to mediation:

A . As the general rule set forth in Article 20(1) mediation can take place if there is a mutual agreement of the parties to settle a dispute (conflict) between them in mediation. Conclusion of a mediation agreement is the mandatory prerequisite for conduct of mediation in any out-of-court mediation, court-annexed mediation or criminal proceedings.

The Mediation Law includes legal definition of the mediation agreement ('dogovor o mediatsii'). According to sub-clause 7) of Article 2 of this Law such agreement means «a written agreement of parties [to it] which is concluded [by them] with a mediator before mediation starts with the purpose to settle a dispute (conflict)». Those individuals and/or legal entities who/which are in conflict or disputes between them, if such disputes (conflicts) can be settled in mediation according to Article 1 of the Mediation Law, are defined as the parties of mediation, and together with a mediator they are defined as participants of mediation (sub-clauses 6) and 8) of Article 2 of the Mediation Law respectively).

The Mediation Law does not specifically regulate whether mediation agreement can be entered into to settle a specific dispute (conflict) only, or whether the parties to any contractual arrangement can agree in principle and with binding effect that once a dispute arises it would be solved in mediation. Professor M. Suleimenov proposes that «if the parties to a contract wish to apply mediation as part of the procedure for settlement a dispute on the contract, they can include into the contract the following clause on mediation: ....». He also believes that they can include even more procedural and organizational provisions into the contract.

However, it appears that the Mediation Law proposes that a mediation agreement can be entered into only when a specific dispute (conflict) has already taken a place. This understanding follows from the definition of the mediation agreement (as mentioned above) and from the requirement of Article 21(2 (1)) stating identification of a matter of the dispute as one of essential terms of any mediation agreement, as well as from the content of Article 23 requiring settlement of the dispute within 30 days after conclusion of the mediation agreement. Some other provisions of the Mediation Law also consider a mediation agreement to be entered into in connection with a particular dispute.

B . As mentioned above, any mediation agreement must be entered into in the written form. No oral agreement on mediation can be valid. At the same time, no registration or notarial verification of mediation agreement is required.

Article 21(2) of the Mediation Law establishes what terms and conditions of the mediation agreement shall be considered as essential to it. The list of such essential terms includes 11 items. Having such regulation analyzed, one should remember that indication of essential terms of a contract in respective laws allows to identify the type or nature of each particular contract and to decide whether the respective contractual arrangement can be viewed as enforceable contract under related legal provisions. The legal effect of this requirement is that if any of these terms and conditions is not included

into a mediation agreement, than under Article 393 of the RK Civil Code such mediation agreement will not be considered as concluded (entered into) by the parties to it, and the parties may not have a perspective to seek protection of their rights and interests under the agreement. M. Suleimenov and A. Duisenova have reasonably criticized such solution claiming that this list is unnecessary extensive and a greater part of such terms and conditions, in principle, could not be defined as essential terms of mediation agreement.

One of such called essential term of a mediation agreement sounds especially unreasonable. Particular, sub-clause 8) of Article 21(2) of the Mediation Law requires that mediation agreement includes «grounds and volume of liability of the mediator who participates in the dispute settlement for his/her actions (inaction) which entailed damage to the parties of mediation». Such provision contradicts to the nature of mediation and regulated status of mediators. As the term «mediation» is defined in Article 2 of the Mediation Law, mediator only assists the parties to achieve a mutually acceptable solution. In addition, as per Article 27, any settlement agreement shall regulate a settlement between the parties and it becomes a contractual arrangement between the parties subject to performance by the parties voluntary without involvement of the mediator. Thus, no mediator can be liable for any damage of any party since no mediator can force the parties to enter into a settlement agreement, as well as to enter into it on any specific terms. Nor the mediator can control the parties in their performance under the settlement agreement.

C . A mediation agreement is a contract entered into by the parties of a dispute (conflict) with a mediator concluded voluntary with an intention to find acceptable solution of the dispute. Until the mediation agreement is in force it binds the parties to it.

However, there are no so much responsibilities of the parties to a mediation agreement to be enforced against any of them. No one can be forced/enforced to choose mediation for dispute resolution, to elect specific person as a mediator, to continue participating in mediation or to enter into a settlement agreement. And mediators can act only with the consent of the parties of a dispute (conflict). At the same time mediators can be subject to claims for breach of his/her duties, including any related damage claims.

D . Mediation represents an attempt to resolve a dispute without submitting a suit to the court. If mediation fails, nothing prevents to seek judicial resolution or resolution in arbitration.

However, one should note that conclusion of a mediation agreement does not suspend the course of the limitation period established by the law (Article 182 of the RK Civil Code). At the same time, under Article 183 of the Civil Code if the parties of the dispute enter into the mediation agreement, that fact interrupts the course of the limitation period and if the parties fail to resolve the dispute, the course of the limitation period starts to count again and the time before the mediation agreement was entered into cannot be included in the new period.

If, in contrast, a dispute has been already submitted for the courts resolution, conclusion of the mediation agreement represents a ground for suspension of the respective civil judicial proceedings on the case (Article 23(3) of the Mediation Law). However, the parties of the dispute in this case become responsible for certain notifications addressed to the respective court with respect to the course and results of mediation (please see below). In addition, participants of mediation are responsible to complete mediation in such time as prescribed in Article 23(2) of the Mediation Law since expiration of the respective time period terminates mediation (sub-clause 5 of Article 26 of the Mediation Law). According to Article 242 of the RK Civil Procedural Code the court is obliged (not simply entitled) to suspend respective judicial proceeding in the case when the parties have entered into the mediation agreement. Such suspension shall take place until mediation terminates (Article 244 of the Civil Procedural Court)

No specific rules are established with respect to dispute resolution in arbitration on this matter. However general rules on suspension and interruption of the limitation period apply.

E . Some specific regulation is provided for in Article 24 of the Mediation Law with respect to mediation taking place in course of criminal proceedings. Particularly, it is established that conclusion of a mediation agreement does not suspend the proceeding with respect to a criminal case, and mediation itself should be completed within the timeframe established by the criminal procedural law for pretrial and judicial proceedings.

Two other provisions of this Article 24 are also important in terms of consideration of any effect which mediation agreement may (or may not) have on future proceeding sand status of the parties of mediation. First of all, it is clearly set forth that «the fact of participation in mediation may not be considered as an evidence of admission of guilt by a participant of the proceedings who also acted as the party of mediation». And the second provision include the statement that «refusal to sign a settlement agreement on the conflict may not impair (worsen) position (standing) of the participant of the judicial proceeding who also acted as the party of mediation». It all corresponds to the presumption of innocence and principles of judicial proceedings declared by the RK Constitution (Article 77) and the Criminal Procedural Code (Article 19).

I.4 . The mediator:

A . According to the definition included in Article 2 of the Mediation Law, the term «mediator» means «an independent individual involved by the parties for conduct of mediation on the professional and non-professional basis in accordance with requirements of this Law». Articles 9 through 11 of Chapter 2 of the Mediation Law relate to the status of mediators.

Particularly, according to Article 9 of the Mediation Law, an independent, impartial individual who is

(i) not interested in the outcome of affair

(ii) who is chosen by the parties of mediation at their mutual consent and

(iii) agreed to perform the mediator's functions provided that

(iv) he/she has been included in the register of mediators, can be elected by the parties to a dispute (conflict) as the mediator.

In its turn, an individual may not be a mediator if any of the following (as established in Article 9(7)) is applicable to him/her:

(i) the person is authorized to perform state (governmental) functions or has a similar status (for example, if the individual occupies a position at any central or local governmental bodies, some of state owned organizations, elected as deputy to the Parliament of the RK or local representative bodies);

(ii) the person is recognized by the court as being legally incapable or restricted in his/her capability;

(iii) with respect to such person a criminal prosecution is carried out; or

(iv) the person has a criminal record remaining not cancelled.

As it is set forth in Clause 8 of Article 9, «an agreement between the parties of mediation may establish additional requirements with respect to mediator». The meaning of this provision is not clear. On one hand, if the term «an agreement between the parties of mediation» is meant to relate to a mediation agreement, there is a little sense on establishing any additional requirements concerning a mediator because exactly by the mediation agreement a particular mediator is considered to be appointed and such mediator shall be logically considered to meeting all the requirements. On the other hand, if any other type of agreement between the parties of mediation is meant, there is even less sense in this provision, since there will be no mediator appointed if the parties fail to agree on a particular person and/or such person refuses to sign respective mediation agreement.

B . According to Article 9 (5 and 6), activities of mediators (performance of the mediator's functions) do not constitute an entrepreneurial activity and those who perform as mediators are entitled to be engaged in any other business and activities that are not prohibited by the legislation of the Republic of Kazakhstan.

C . As it follows from the legal definition of mediator, there are two acknowledged categories of mediators. Under the first category there professional mediators fall under. The second category includes those mediators who perform their functions on the non-professional basis.

The Mediation Law is not sufficiently clear in setting criteria on which this two categories are distinguished. However, it appears that the drafters of the Mediation Law proposed such criteria as entitlement of professional mediators to be paid for performance of the mediation functions. In this respect Article 22(2) of the Mediation Law provides for that professional mediators conduct mediation both for consideration (a fee for mediation) and gratis. In turn, Clause 6 of this Article 22 sets forth that non-professional mediators shall be reimbursed with their expenses (allowed for such reimbursement by the Mediation Law) incurred in connection with mediation. Similarly, Article 21(1) of the Mediation Law proposes that the fee payment terms and conditions shall be essential term of the mediation agreement concluded with a professional mediator. However, there is no prohibition for non-professional mediators to be paid for their performance as mediators. And in general, there is no any rational to prohibit receiving of a consideration for mediator's services. Eventually, the choice of a mediator and terms of the mediation agreement falls under sole discretion of the parties to the mediation agreement and there is no ground to restrict the freedom-of-a-contract entitlement that the parties enjoy under respective provisions of the RK Civil Code.

In connection with this we see the only reason to separate mediators into these two categories which is to offer to the parties of any dispute (conflict) a choice between specially trained mediators who fall under provisions of any professional code of conduct and those individuals who have extensive life experience and gained authority in the society.

D . Under Article 9(3) of the Mediation Law a person can carry out activity of mediators on a professional basis if he/she meets the following requirements:

(i) he/she is in the age of 25 or older, (

(ii) he/she has the higher education,

(iii) he/she has a document (certificate) confirming the he/she has completed a training under the program of preparation of mediators, and

(iv) he/she is included into the register of professional mediators.

For non-professional mediators no special certification is required, but, apparently, a certain life experience is expected, since according to Article 9(3) the activity of mediator on a non-professional basis can be carried out by those persons who

(i) are at the age of 40 and older, and

(ii) are included in a register of nonprofessional mediators.

Into the later category of non-professional mediators there members of local community can be also included is they are chosen to conduct a mediation. As Article 15 of the Mediation Law reads, such people can perform as mediators «along with» mediators performing on the non-professional basis. However we see no ground to extinguish another category of mediators in addition to those two that are already described above. Such members of local communities should be better considered also as mediators performing on the non-professional basis: their status is regulated by the same set of rules which regulate all non-professional mediators and they are also subject to inclusion in the same registers as all other mediators acting on the non-professional basis.

The only difference is that under Article 15 of the Mediation Law such members of local communities can be elected for their inclusion into the respective mediators' register as non-professional mediators by a meeting (gathering) of respective local community, whereas other non-professional mediators are expected (obliged, according to Article 16(2) of the Mediation Law) to apply for their inclusion into such registers on their own.

One provision of Article 15 of the Mediation Law with respect to setting forth criteria for

those people who can be elected as non-professional mediator sounds ambiguous. Particularly, it establishes that a local community can elect to be mediators those members of the community who «have a great life experience, authority and impeccable reputation». As such these criteria can be accepted. However all of them are of a subjective nature and can be differently assessed by different people. What is the sense to include these criteria if there is no provision in the Mediation Law allowing to challenge the election and no legal consequences established for proposing people to be non-professional mediators if to someone's opinion they do not match the criteria? Inclusion of this and similar provisions into a law are not in compliance with generally accepted requirements of legal technique.

E . Regardless of whether it is out-of-court or court-annexed mediation it is the sole discretion of the parties to a dispute (conflict) to choose a mediator who would help them to resolved the dispute (conflict). It is only mutual agreement of the parties is required to elect particular mediator(s).

The parties' choice of particular mediator(s) shall be reflected in their mediation agreement as its essential condition (Article 21(2) of the Mediation Law). The parties are free to voluntary elect the mediator(s) (Articles 9(1) and 20 (7) of the Mediation Law), to decline a mediator (Article 11(1) of the Mediation Law) and to replace the mediator with other chosen mediator (Article 12(1) of the Mediation Law). In all cases of election and replacement of mediator(s) the parties' mutual agreement is required. However the right to decline a mediator under Clause 1(2)) of Article 11 can be implemented by any of the parties of mediation: in such a case it will mean rejection from the entire mediation and, subject to such declination is made in writing, that will terminate mediation as it is set forth in Article 26 of the Mediation Law.

No one can force the parties to agree on having mediation and to make a choice of a mediator(s). However, when mediation takes place in the course of civil or criminal judicial proceeding the parties are required to notify the court or prosecuting agency (as the case may be) about the person(s) they choose as mediator(s) (Article 12(1) of the Mediation Law).

F . Article 10 of the Mediation Law establishes what are rights and duties of mediator. Basically, the content and extent of such right and duties are established due to the purpose and nature of mediation.

For example, there are only two specific rights of mediators are set forth in this Article 10. The first one entitles mediator to meet the parties of mediation within the course of mediation (with both of them simultaneously and/or with each of them separately) and to give them oral and written recommendation concerning settlement of the dispute (conflict).

In addition, mediators are permitted, and they are given a respective right, to inform the public about his/her activity, but with observance of the confidentiality principle established in Article 4 and explained in Article 8 of the Mediation Law. The meaning of this principle is described in more details later in this report. It, however, becomes obvious that formulation of this right of mediators is slightly controversial: from one hand, mediators are entitled to disclose information about their activity as mediator, but, from the other hand, they cannot disclose anything they knew in the course of mediation if they failed to obtain a written permission of a party of the mediation who presented this information in the course of mediation. Under Article 8(3) of the Mediation Law, mediators shall be liable according to respective legislative provisions for unauthorized disclose of the respective information. And, under such regime, it becomes logical that there can no duty of disclosure exist for mediator.

According to Article 10(4) of the Mediation Law mediators may have other rights provided for by the RK legislation. There are no specific rights additionally expressed in other legislative acts of regulations at this moment, though some other rights of mediators are provided for in the Mediation Law itself. For example, under Article 12(3) mediator has the right to decline from conduct of mediation, if he/she believes that further efforts in the course of mediation will not lead to settlement. Mediator may also terminate mediation with the consent of the parties of mediation formulated in writing.

G . The following duties of mediators are established in Article 10 of the Mediation Law:

(i) within the course of mediation mediator is responsible to act only with the consent of the parties of the dispute, and

(ii) mediator must (before mediation starts) explain to the parties purposes of mediation and rights and obligations of the parties.

Besides, under Article 12(2) of the Mediation Law a mediator must decline to be mediator if certain circumstances preventing performance of the mediator's functions arise. It should be also considered as a duty of mediators.

In addition, according to the aforementioned Article 10, any professional mediator must observe a Code of Professional Ethics of Mediators to be approved by an association (union) of mediators. Mediators may carry out other responsibilities provided for by Kazakhstani legislation. It would be logical to expect any liability established or provided for in Kazakhstani laws for violation of the codes of conduct. However, for example, in the Code of Rules of Conduct for Professional Mediator of the United Center of Mediation and Peacemaking «Mediation» there is no any relevant provision found.

At the same time, according to Article 14(7) of the Mediation Law, if a professional mediator violates requirements of this Law, participants of mediation may submit their complaint to the respective organization of mediators which, «upon confirmation of the violation shall suspend activity of the mediator with respective indication of the suspension in the register of professional mediators for the term of six month». This provision can be considered as kind of liability of mediators for breach of their duties. However it appears to have been formulated incorrectly. First of all, it does not indicate how the violation could be confirmed and who is expected to confirm it in order for such confirmation to be reasonable and reliable. Secondly, no any organization of mediators can suspend a mediator's activity by definition, because each mediator is an independent person to be elected by the parties of mediation without any influence from any side. The organization can only delete the mediator's data from its register or make other relevant record in the register.

Although there are no any additional specific duties or responsibilities of mediators established in other laws and regulations of Kazakhstan, all mediators should observe general responsibilities of any participants of social relations, such as to act reasonably, fairly and in good faith, refrain from causing harm to others, misuse or abuse his/her rights (Article 8 of the Civil Code).

H . In contrast, there less responsibilities are set forth in the Mediation Law for the parties of the dispute. They are not obliged to settle their dispute (conflict) in mediation and they can refuse to participate in mediation at their own discretion at any moment (Articles 5(2) and 11(1(3)) of the Mediation Law). They are also entitled, at their mutual agreement, to replace a mediator with another one (Article 12(1) of the Mediation Law). As said above, no one can be force/enforce to choose mediation for dispute resolution, to elect specific person as a mediator, to continue participating in mediation or to enter into a settlement agreement.

Article 11(1) of the Mediation Law lists rights of the parties of mediation corresponding to the general approach mentioned in the preceding paragraph. In the line with implementation of this principle of voluntariness of mediation no specific duties for the parties of mediation is set forth in the RK legislation. However, once a settlement agreement is reached, the parties are obliged to implement it according to its terms and conditions (Article 11(2) of the Mediation Law).

I . According to Article 13(6) of the Mediation Law an association (union) of mediators is entitled (not obliged) to develop and approve a Code of Professional Ethics of Mediators. Under it legal definition, such association (union) can be created «with the purpose of coordination of activities of organizations of mediators, as well as for protection of their rights and legitimate interests» (sub-clause 3 of Article 2 of the Mediation Law). It is not clear which rights and interests(of mediators or organizations of mediators) are referred to in this legal definition. It seems that the most correct understanding is that it relates to rights and interests of organizations of mediators because according to Article 110 of the RK Civil Code an association(union) is defined as the form of a non-commercial organization created by

legal entities (not by individuals) for the purpose of representation and protection of interests of its members/founders only. In general, it seems to be not reasonable to creating any structure to protect rights and interests of mediators as they perform special function to assist in dispute resolution. In connection with this we believe that attaining any special status to mediators to protect such status would not promote the entire idea of mediation.

To the extent we are aware there has been no any association (union) of mediators created in Kazakhstan yet. And, therefore, no any Code of Professional Ethics of Mediators approved by such an association (union) exists at this time in Kazakhstan.

J . At the same time, the Mediation Law in its Article 2 includes the definition of «organizations of mediators» which are defined as «noncommercial organizations created for association of mediators on a voluntary basis for achievement by them of common aims with respect to development of mediation, provided that such aims do not contradict to legislation of the Republic of Kazakhstan».

Article 13 of the Mediation Law provides more detailed regulation with respect to status and the role of such organizations of mediators. Particularly it is set forth that, as noncommercial, nongovernmental, self-financed and self-governed organizations created under the initiative of mediators, such organizations of mediators shall be created for the purpose to provide material, organizational and legal and other conditions for rendering service of mediators related to carrying out mediation. For this purpose organizations of mediators are entitled to provide professional training and improvement of professional skill for mediators with delivery of the document (certificate) certifying completion of corresponding courses related to mediation.

No special provision providing for adoption of any Code of Conduct for Mediators by any organization of mediators is included in the Mediation Law. However, in absence of an association (union) of mediators which can be set up by organizations of mediators, some of such organizations have adopted their codes of conduct. Above it has been already mentioned such a code adopted by the United Center of Mediation and Peacemaking «Mediation». However this document cannot have its legal effect with respect to professional mediators in the context of their duty to observe a Code of Professional Ethics of mediators as established in Article 10 (4). On websites of other organizations of mediators like the Center of Mediation and Alternative Dispute Resolution or the Kazakhstani Center of Mediation and some others, no any similar code is found at all.

K . Mediation centers established in Kazakhstan are set up as organizations of mediators(those which has been already mentioned above and the most of other) play an important role with regard to development of mediation in Kazakhstan. This role is based on respective provisions of the Mediation Law which establishes for such organizations the purpose to promote development of mediation (Article 2) and empowers them with such rights as training and certification of mediators (Article 13(3)), organizational support of mediation (Article 13(2)) and maintenance of registers of professional mediators.

If to address available websites of any of such organizations of mediators, one can find out the following services offered by the aforementioned mediation centers:

(i) services on organization and conduct of mediation: mostly, it means organizational support at all stages from election of mediators until mediation completes; the centers can also recommend a candidate to be chosen as mediator if the parties request for such recommendation (Article 20(8) of the Mediation Law);

(ii) consulting services to identify a level of proneness to conflict in a company;

(iii) accreditation: this means confirmation of compliance of professional level of a specialist to be included into the register of professional mediators maintained by the respective center of mediation. According to Article 14(1) of the Mediation Law each organization of mediators shall form and maintain its register of professional mediators for mediation on the territory of Kazakhstan. This Article 14 sets forth provisions concerning requirements to be met for a person to be included in the register of professional mediators, data which shall be reflected in the register, procedures for inclusion into the register, conditions and procedures for removal form the register, requirements as to public accessibili-

ty of the register. It seems that this Article is written with unnecessary details that could be moved down to the level of internal rules of each of the mediators' organization. But there one of its provisions is of real legal significance and it is reasonably included into this Article. This provision states that, if the organization rejects to include an applicant into its register of professional mediators or excludes him/her from the register, such rejections or exclusion, as the case may be, can be appealed before the court;

(iv) training and certification: according to Article 9(4)of the Mediation Law such training must be provided in accordance with programs to be approved in procedure determined by the Government of Kazakhstan. Such Procedure has been approved in the form of the Rules For Undergoing a Study on Programs for Mediators' Training approved by the Resolution of the RK Government dated July 3, 2011 #770. Model training curriculums on three different programs (such as «General Course of Mediation» for 48 teaching hours, «Specialized Course of Mediation» for 50 teaching hours and «Course for Training Trainers for Mediators» for 32 hours) and a model form of the Certificate to confirm completion of a course has been also approved by this Resolution.

L . In addition to existence of registers of professional mediators formed and kept by organizations of mediators (mediation centers) there also registers of nonprofessional mediators can exist. Such registers shall be formed and maintained by local executive authorities, namely by akims of each respective town, settlement or a district in a city. Inclusion into such register shall be done by way of notification, though (at the same time) it is established that each non-professional mediator is obliged to apply to respective local authority to be included into such register. All these requirements together with other rules concerning formation and maintenance of registers of non-professional mediators are established in Article 16 of the Mediation Law.

I.5 . The procedure of mediation:

A . There the following five principles are set forth in Article 4 of the Mediation Law to serve conduct of mediation:

(i) voluntariness;

(ii) equality of rights of parties to mediation;

(iii) independence and impartiality of a mediator;

(iv) inadmissibility of interruption in a mediation procedure, and

(v) confidentiality.

Each of these principles is explained in respective Articles of the Mediation Law.

Particularly, according to Article 5 of the Mediation Law the principle of voluntariness means, first of all, that no mediation procedure can be started and/or conducted unless all the parties to it express their voluntary will to settle their conflict or dispute by means of mediation: such wills of all parties to mediation shall be declared in a particular agreement on mediation to be entered into by the parties. In addition, this principle means that the parties to mediation are entitled to reject the mediation at any stage of the respective procedure, and although this provision is not so clear, there is no doubt that either party can make such rejection and respective mediation can terminate in both cases when (i) both parties agreed to terminate the procedure and (ii) when either party rejects the mediation. Again, in absence of clear regulation, it appears to be correct point of view that any rejection of mediation shall be made in the express form by either an agreement on termination of mediation or, at least, by formal notice of a party rejection of mediation. And, finally, this principle of voluntariness includes entitlement of the parties to mediation to dispose, at their own discretion, of their material and procedural rights, to increase or decrease amounts of their claims or to refuse of the dispute (conflict), as well as it means the parties' freedom to choose matters for their discussion of options for mutually acceptable agreement between them (solution).

Under Article 6 of the Mediation Law, parties to mediation have equal rights when choosing a mediator, a mediation procedure, their position under such procedure, ways and means to uphold

their positions, as well as when receiving any information within the mediation, valuating acceptability of terms and condition of an agreement on settlement of the dispute (conflict). This principle of equality of the parties to mediation also means that the parties have equal obligations associated with respective mediation.

The principle of independence of a mediator is explained in Article 7 of the Mediation Law. In particular, it is established that «when conducting mediation a mediator is independent form the parties to the mediation and state authorities, as well as from other legal entities, officials and individuals». This principle also means that each mediator is independent when choosing means and methods of mediation and determining, provided however that such means and/or methods are acceptable under the Mediation Law. To support observance of this principle of mediators' impartiality, Article 7(2) of the Mediation Law also sets forth such duties of each mediator as (i) to be impartial, (ii) to conduct mediation in interests of both parties to it and (iii) to provide that both parties equally participate in the mediation procedure. A mediator must reject to conduct mediation if there are any circumstances precluding the mediator's impartiality.

According to Article 7(3) of the Mediation Law any interference in a mediator's activity from the part of persons and entities mentioned in previous paragraph is prohibited with the exception of those cases when such interference is provided for in the laws of Kazakhstan. As an example, such interference is possible when a mediator is suspected of a crime or administrative violation.

The principle of confidentiality of conduct of mediation is developed in Article 8 of the Mediation Law. This Article 8 prohibits all participants of mediation (including parties to it and a mediator(s)) to disclose any information they have known in the course of mediation unless they receive a written permission to such disclosure from the party to mediation who provided this information. Any disclosure without such permission of a respective party to mediation entails a liability as provided for by the laws of Kazakhstan. In order to support confidentiality of mediation Article 8(2) of the Mediation Law also sets forth that mediators may not be interrogated as a witness with respect to information they knew in the course of mediation, with the exception of cases provided for by the RK laws. No such case can be identified in the law at this moment.

All other provisions of the Mediation Law are construed in compliance with these principles.

B . Articles of Chapter 3 of the Mediation Law contain provisions to regulate conduct of mediation. Specific provisions relate to choice of place and time for mediation, language requirements for conducting mediation, conditions for conduct of mediation and some other related issues.

According to Article 17 of the Mediation Law, as the basic rule it is set forth that mediation shall be carried out in accordance with the procedure agreed by the parties of mediation which procedure shall not contradict to requirements of the Mediation Law. The parties may agree to apply a procedure (regulations) for conduct of mediation adopted by organizations (any particular one) of mediation.

The parties are free to choose a place for mediation and language on which mediation will be carried on. With the parties consent mediator appoints a date and time for mediation (Articles 18 and 19 of the Mediation Law).

Among the rules of significant legal importance there are those provisions of the Mediation Law related to duration of mediation and established time frame for mediation to be conducted.

C . Again, the general rule is that a time period for mediation shall be defined by respective mediation agreement, and when mediation is carried on as the out-of-court procedure (i.e. beyond the civil-law or criminal proceedings) all participants of mediation (i.e. the parties and mediator) should do their best to complete the procedure within the period not exceeding 60 calendar days(Article 20(9) of the Mediation Law). In an exceptional case when the dispute (conflict) is very complicated or there is a necessity to gather additional information/documents this time period for the out-of-court mediation can be extended by agreement of the parties and with consent of the mediator. However it cannot be

extended for more than another 30 calendar days.

A kind of controversial regulation is established in Article 23(1) of the Mediation Agreement according to which when a dispute arisen out of civil-law, labor, family or other relationships with participation of individuals and/or legal entities is brought to be settled in mediation, the mediation should be completed not later than in 30 calendar days after the mediation agreement was entered into. This period can be extended by mutual decision of the parties for another 30 calendar days in case if it is necessary. In total the period for mediation to be completed may not exceed 60 calendar days. Inclusion of this provision into the Mediation Law means that general provision of Article 20(9) of the Mediation Law in terms of respective time limitation can apply to mediation for settlement disputes which cannot be identified as «disputes arisen out of civil-law, labor, family or other relationships with participation of individuals and/or legal entities». But it is difficult to imagine what could be such disputes beyond those arisen out of «other» [which in this case may be understood as any] relationships.

It also worth to mention that parties of a dispute are not limited in their attempts to settle the dispute in a number of mediations following each other and, to the extent it is reasonable, even taking place simultaneously. For each of such separate out-of-court mediations separate time limits would apply.

D . InArticle23(1)of the Mediation Agreement according to which, when mediation is chosen to settle a dispute arisen out of civil-law, labor, family or other relationships with participation of individuals and/or legal entities which has been already brought to court, the mediation should be also completed not later than in 30 calendar days after the mediation agreement was entered into. This period can be extended by mutual decision of the parties for another 30 calendar days in case if it is necessary. In total the period for mediation to be completed may not exceed 60 calendar days. In any case of such extension the parties must jointly inform the court in writing about the extension.

Special regulation of time limits are establishes in the Mediation Law for mediation conducted within the course of criminal proceedings. These specifics have been already mentioned in Section E. of Part I.3 of this Report above.

There is no provision in the Mediation Law which would expressly prohibit to have a number of mediations within the same judicial of criminal prosecuting procedures, provided that all that takes place and should be completed or otherwise terminated within established time period for completion of the respective proceedings.

E . There certain specifics are established in Article 25 of the Mediation Law with respect to settlement disputes in the sphere of family relationship allowing mediation to resolve controversies between spouses concerning continuation of their marriage, implementation of parental rights, determination of place of residence for children, parents' contributions to support children and any other disputes which may occur in family relations. Some special rules to protect interests of children have been also introduced to this Article 25.

F . The Mediation Law contains very few provisions concerning, to a limited extent, relationships existing between the mediation and the mediator with public authorities, both judicial and non-judicial (notaries, land registrars, commercial registrars, etc.) during the mediation procedure.

If to consider mediator's relationships with aforementioned third parties, possibilities for such relationships are limited by application of the following principles:

(i) from one hand, all activities of mediator in the course of mediation, by definition, shall be focused to his/her communications with the parties of mediation only, and therefore it does not propose mediator's contacts with any third party. And this principle is also reflected in specific formulation of mediator's rights as set forth in Article 10 of the Mediation Law proposing his/her meetings exactly with respective parties and not anyone else. Moreover, by application of the principle of independence (as it's been already described above) mediators carrying on mediations are independent from state authori-

ties, other legal entities, public officers and individuals; and

(ii) from the other perspective, the Law does not prohibit mediators from having any contact with any third parties for purpose of mediation, but in any of his/her actions mediator can act only with the consent of the parties of respective mediation (Article 20(2) of the Mediation Law.

At the same time, in a law it can be required that mediator directly communicates to an authority or official. For example, under Article 25(3) of the Mediation Law mediator must apply to an authority entitled to protect children's rights if in the course of mediation any facts which threaten or can threaten normal growth and development of a child on seriously affect the child's legitimate interests. Yet, this is the only provision of this kind included into the Mediation Law.

G . More specifically the Mediation Law regulates when the parties of mediation should communicate with third parties. In essence, it relates to mediation agreed upon within civil-law judicial proceedings and criminal proceeding. In this case the Law specifically requires that the parties of mediation (not mediator, nor all participants of mediation) communicate to the court or prosecuting authority, as the case may be.

Such communications shall be made by the parties of mediation when, during the course of respective proceedings, they are required to jointly notify the court or prosecuting authority about their agreement to settle their dispute (conflict) in mediation or to extent initial term of mediation, as well as about results of mediation both when a settlement agreement is entered into and when mediation terminates for another permitted reason (Articles 23 (2, 3 and 4) and 24(6) of the Mediation Law).

It is important to note that in their relationships with the parties of disputes and conflicts permissible for settlement in mediation, judicial and prosecuting authorities are prohibited from forcing the parties to agree to mediation but they can offer settlement in mediation at request of one of the parties of the dispute or conflict (Article 20 (3 and 4) of the Mediation Law).

In addition, if in the course of mediation and for the purpose of the dispute resolution participants mediation or parties of it would need or would be required to communicate with any public authority, notary or other third parties, nothing prevents them from such communication subject to observance of the confidentiality principle and the other party's rights and legitimate interests.

I.6 . Termination of mediation:

A. Article 26 of the Mediation Law includes exhaustive (closed) lists of circumstances upon which mediation terminates. One of these five cases shall be qualified as successful completion of mediation: it happens when the parties of the respective dispute or conflict manage to reach a settlement agreement. In this case the purpose of mediation as formulated in Article 3 of the Mediation Law (please see below) shall be deemed achieved.

The other four grounds for termination of mediation can be qualified as failure of mediation, since its purpose is not reached. Particularly, in addition to conclusion of a settlement agreement, mediation shall terminate in either case when:

(i) mediator discovered circumstances which do not allow any possibility for settlement of a dispute or conflict in mediation (these may relate to any of the circumstances indicated in Article 1 of the Mediation Law which prevent settlement of dispute by way of mediation);

(ii) the parties made written refusal from mediation in connection with impossibility to settle the dispute (conflict) be way of mediation;

(iii) one of the parties refused its further participation in mediation having such refusal made in writing, or

(iv) when the time period allowed for conduct of mediation as established by Mediation Law in Articles 23 and 24 (as described above) expired.

There is also another ground for termination of mediation not included into Article 26 but provided for in Article 22(5) of the Mediation Law. This ground proposes that a mediator refuses to

conduct mediation by virtue of circumstances hindering his/her impartiality in a particular situation.

B . In all these cases mediation terminates when respective ground for termination is properly fixed. For example, as it is set forth in Article 26 of the Mediation Law, mediation terminates:

(i) from the day respective time period for mediation expired;

(ii) from the day when a party of mediation sent its written refusal to continue a mediation to another participants of particular mediation, or

(iii) from the day when both parties signed their written agreement to refuse mediation in connection with impossibility for the dispute's settlement by way of mediation.

With respect to termination of mediation when mediator discovered circumstances preventing mediation for settlement of a particular dispute or conflict the Mediation Law does not specifically indicate either the moment of termination of mediation or how the mediator's respective findings should be expressed. It sounds reasonable that in such a case mediation terminates from the moment when mediator announced to the parties of mediation that he/she revealed circumstances under which mediation cannot be used for settlement of the dispute of a conflict.

Similarly, when a mediator refuses to conduct mediation due to impossibility for him/her to be impartial in a particular situation, such mediation terminates from the moment when the mediator announced to the parties of mediation that he/ she couldn't be impartial.

C . The Mediation Law does not specifically address the issue of consequences of the failure of mediation for the parties involved and for the mediator. However, it looks obvious that with occurrence of any of this circumstances respective mediation agreement automatically terminates and, correspondingly, relationships between participants of mediation arisen out of this mediation agreement shall also be cancelled.

When there is a termination of mediation taking place within civil-law proceedings or criminal proceedings, such termination (failure of mediation) shall cause either renewal of civil-law proceedings or completion of criminal proceeding in due course.

If it is an out-of-court mediation set for a dispute resolution, then failure of such mediation shall cause renewal of the course of respective limitation period.

D . Apparently, effect of failure of mediation differs depending on which circumstances caused the failure. In particular, when mediation terminates due to identification of circumstances preventing settlement of a dispute (conflict) by way of mediation this would prevent the parties of the dispute from any future attempts to settle their dispute in mediation.
In all other cases, failure of mediation would, in principle, allow another attempts to settle the dispute by way of mediation, provided that for mediation agreed within the course of legal proceedings established time limits for respective proceeding allow another mediation.
There are no particular consequences of failure of mediation for mediator in the most of these cases with the exception of when mediation terminated upon the mediator's refusal due to absences of his/her impartiality. In this case such mediator will not be able to be chosen by the parties of a dispute (conflict) to settle it in another mediation to take place based on new mediation agreement (which shall be concluded with another mediator).

I.7 . Success of the mediation procedure:

A . As mentioned above, according to Article 26 of the Mediation Law, conclusion of a settlement agreement constitutes the ground for termination of mediation from the day when the parties of mediation have entered into (signed) the agreement. With the conclusion of the settlement agreement the purpose of mediation declared in the Law are achieved and, therefore, mediation is considered to finish successfully in Kazakhstan.

Article 27 of the Mediation Law provides for specific requirements with respect to the form

and substance of a settlement agreement.

It is required that the settlement agreement shall be made in written form and it must be signed by the parties settled their dispute or conflict. The agreement becomes effective as of the day of its signing by the parties unless this agreement is reached in mediation taken place within civil-law judicial proceedings. In this later case the settlement agreement must be forwarded immediately after its signing by the parties to the judge considering respective civil case for the agreement's approval by the judge in the procedure set forth by the RK Civil Procedural Code.

Any settlement agreement must include the following provisions:

(i) reference to the parties of mediation (parties of the respective dispute or conflicting parties);

(ii) substance of the dispute (conflict);

(iii) identification of the mediator chosen by the parties;

(iv) terms and conditions agreed by the parties to settle their dispute or conflict;

(v) ways and time limits for implementation of the agreed terms and conditions regarding settlement of the dispute (conflict), and

(vi) consequences of failure to implement or properly implement of the settlement terms and conditions.

Apparently, any failure to comply with these requirements legally established with respect to the form and content of a settlement agreement may put a question as to acknowledgement and/ or enforceability of the agreement. In addition, special provisions are established in the law with respect to conditions for enforceability of settlement agreements reached in court-annex and criminal proceedings mediation (see below).

B . With conclusion of the settlement agreement it is not only mediation terminates but also all rights and responsibilities of the mediator shall cancel. After the agreement becomes effective no any further involvement of the mediator in implementation or enforcement of the settlement agreement is proposed.

C . As general principle Article 27(3) establishes that the settlement agreement is subject to voluntary implementation by the parties to the agreement according to its terms and conditions.

This principle is fully applicable to mediation taken place as out-of-court procedure.

Particularly, Article 27(4) sets forth that «an agreement to settle a dispute entered into before consideration of a civil-law case in the court represents a transaction aimed to establish, change or terminate civil-law rights and obligations of the parties [to the dispute]».

There is the opinion that conclusion of a settlement agreement gives rise to a new relationship between the parties of a dispute which, obviously, replaces the previous relationships led the parties to the dispute and mediation. In case of enforcement of a settlement agreement in court such new relationship based on the settlement agreement would constitute the subject of respective judicial consideration.

This Article 27 also provides for that, if the settlement agreement is not implemented or is implemented improperly, the party which has violated the agreement shall be liable as established by the laws of Kazakhstan. It is proposed that if the settlement agreement is not implemented or implemented improperly, respective party to it may use the same means of protection as proposed for application when any other civil-law agreement is violated, including the right to brought a case to the court.

D . Separate provisions are established in the Mediation Law concerning status and effect of settlement agreements reached in the court-annexed mediation and criminal proceedings.

As mentioned above, the settlement agreement made in the course of civil judicial proceedings is subject to approval by a judge considering the case. Apparently, such agreement's effective-

ness is subject to the required approval and above mentioned requirement of the agreement's effect from the date of its signing would not apply in this case.

It can be also concluded that the judge is not obliged to approve the settlement agreement automatically and he/she will have to examine the agreement as to whether its terms and conditions do not contradict or otherwise violate imperative provisions of the law. According to Article 49 of the RK Civil Procedural Code the court may cancel the settlement agreement if it contradicts to the RK legislation or violates someone's rights and freedoms provided for in the laws of Kazakhstan.

Once the court approves the settlement agreement, it will come into full effect and constitute a ground for termination of the judicial proceeding with respect to the dispute settled by this agreement on a respective stage of the judicial proceedings. Particularly, under Articles 247, 342 and 383-1 of the RK Civil Procedural Code approval of a settlement agreement by the court terminates the proceeding on the 1st instance, appellation or cassation stages, as the case may be.

E . There is no other express provision requiring homologation of settlement agreements by the court or other public authority established in the Mediation Law.

However, there is a ground to believe that settlement agreements reached within criminal proceeding would also require certain acknowledgment or, at least, examination by respective prosecuting authority.

As Article 27(6 and 7) of the Mediation law defines the settlement agreement reached by the parties in result of mediation during the course of criminal proceedings as an agreement resolving a conflict by way of compensation of harm and reconciliation of a person committed a crime with the person suffered from the crime. Once the settlement agreement is reached it must be immediately forwarded to the respective prosecuting authority and, if the RK Criminal Procedural Code allows it, such settlement agreement can serve as the circumstance excluding or allowing to avoid criminal prosecution. This would mean that respective prosecuting authority or criminal court would also examine the settlement agreement of whether its essence complies with requirements of the law in order to refer to the agreement as ground for cancelling criminal prosecution.

F . It worth to mention that at the opinion of professor M. Suleimenov, there have been essential mistake of Kazakhstani legislators that there were two different phenomena mixed up in the Mediation Law and that regulation of the third phenomenon has been simply missed. He reasonably believes that out-of-court mediation and court-annexed mediation should be better regulated separately, as well as special regulation is needed for mediation under the auspice of an institutionalized arbitration, which is not even considered by existing legislation in Kazakhstan at all.

We can add that separate regulation should be also offered to regulation of mediation in course criminal proceedings. Mixing all this within the frame and content of a single Mediation Law causes incompleteness and contradicting nature of the respective legal framework and legal regime.
I.8. Costs:

A . Article 22 of the Mediation Law deals with the issue of expenses related to mediation. As such expenses there the following two categories are indicated:

(i) mediators' fee (consideration), and

(ii) the mediator's expenses incurred in connection with mediation including costs of transportation to the place of mediation, accommodation and catering.

This list of expenses is exhaustive (closed).

Parties of mediation jointly in equal parts shall cover these expenses. However in their respective mediation agreement the parties may agree on different distribution of coverage such expenses.

B . As mentioned in Section C of Part 1.4 of this Report above, regulation of the issue of payment any fee (consideration) to mediators is not sufficiently clear in the Mediation Law. From one hand, it prescribes including into the agreement the reference to an amount of the fee payable to a professional mediator, if such payment is provided at all, and it is silent as to whether any payment of consideration

to non-professional mediators can be made (which payment, at the same time, is not prohibited by law). From the other hand, it is established that non-professional mediators shall be reimbursed with the expenses he/she incurs in connection with mediation, remaining silent with respect to any possibility for reimbursement of expenses to professional mediators.

This makes the Mediation Law remaining ambiguous. Similar ambiguity is caused by the provision of Clause 5 of this Article 22 of the Mediation Law which requires that mediator must return to the parties of mediation all the money he/she received from them when the mediator rejects to conduct mediation due to circumstances preventing his/her impartiality. Such regulation sounds too strict because the participants of mediation may reveal respective circumstances after mediation started and it is not fair to leave the mediator not compensated for his/her expenses incurred before the circumstances were discovered. In principle, such issues should be better left for discretion of the parties to respective mediation agreement.

C . The Mediation Law does not specifically address the issue of whether any legal aid is available to participants (including mediator and the parties) of mediations. However it does not mean that the parties of a mediation agreement cannot agree to cover expenses associated with receiving legal advice or other type of legal services to be received by all the participants during mediation.

And there is, certainly, no any restriction for each party of mediation to pay for its own expenses related to legal aid it receives in connection with its participation in mediation.

II . Cross-border mediation

II.1 Notion of cross-border mediation:

Legislation of Kazakhstan does not operate the notion of cross-border mediation. Accordingly, there is no any separate legal framework in Kazakhstan to specifically regulate cross-border mediation.

As mentioned above, the Mediation Law (according to its preamble) is set to regulate social relationship in the sphere of organization of mediation in the RK. Pursuant to Article 1(1) of the Mediation Law mediation can be used for settlement disputes and conflicts within the framework of Kazakhstani law. In connection with this the conclusion can be made that the Mediation Law together with related provisions of other laws of Kazakhstan (such as, for example, the Civil Procedural Code or Criminal Procedural Code) constitutes a legal framework for internal mediation only.

Please also note, that professor M. Suleimenov paid attention to the failure to regulate «mediationwithforeign element». He specifically mentioned that respective regulation assumes certain peculiarities in regulating respective relationships involving such foreign element that were missed in the draft the Mediation Law and are still missing in it after its adoption as well as in any other existing law of Kazakhstan.

II.2 . Recognition and enforcement of foreign mediation settlements:

Laws of Kazakhstan do not directly regulate those aspects related to recognition and enforcement of foreign mediation settlements.

However general rules of Kazakhstani material and procedural legislation would apply to enforce settlements reached in foreign mediation. However, there should be separate categories of such settlements differentiated, as the regimes for the enforcement differ.

If, for example, the settlement was reached in out-of-court mediation and the parties formulated respective agreement, than in order for it to be enforced in Kazakhstan directly the parties should choose Kazakhstani legislation as governing law for the respective settlement agreement and, preferably, judicial proceedings in Kazakhstani courts or Kazakhstani arbitration for disputes resolution under such settlement agreement to enable its enforcement in Kazakhstan. The RK Civil Code allows parties to a contractual arrangement with participation of foreign individuals and legal entities to

choose Kazakhstani legislation as governing law for their settlement agreements (Article 1112) where such governing law would apply to rights and obligations of the parties thereto, performance under the agreement, consequences of failure to perform or properly perform thereunder, etc.

The parties may also choose foreign courts or foreign arbitration for disputes resolutions under such settlement agreements. In this case respective provisions of the RK Civil Procedural Code will apply to identify whether a decision of foreign court or foreign arbitral tribunal would be enforceable in Kazakhstan. According to Article 425 of the RK Civil Procedural Code decisions of foreign courts and arbitration shall be acknowledged and enforced in Kazakhstan if it is provided for by the law or international treaty of the Republic of Kazakhstan and on the principle of mutuality. Particularly, enforcement of judicial decisions of courts of a particular foreign state shall be possible if there a bilateral treaty between Kazakhstan and respective state exists. If to say about enforcement of foreign arbitral awards, such enforcement can be done on the basis of the New York June 10, 1958 Convention on Acknowledgment and Enforcement of Foreign Arbitral Awards to which Kazakhstan joined in 1995 pursuant to the Decree of the RK President dated October 4, 1995 #2485.

Similar consideration, as is made in the preceding paragraph, should be taken to the account when discussing mediation settlement reached in the court-annexed procedure and in foreign arbitration provided that the foreign court or arbitration tribunal approves respective settlement agreement. Respective judicial decision of a foreign court or foreign arbitral award by which a mediation settlement is approved or otherwise homologated can be enforced in Kazakhstan according to the provisions referenced above.

III . (e) JUSTICE (Application of (e)Justice instruments to mediation):

A . The Mediation Law does not address the issue of possible use of information technologies for purpose of mediation. It allows the parties of mediation to agree on the procedure for conduct of mediation provided that any such agreed procedure does no violate this Law, including application respective regulations adopted by a mediation center (Article 17). At the same time it entitles mediators to independently choose means and methods of mediations admissible under this Law (Article 7(1)).

However this Law proposes no any particular mean or method for mediation. We can only refer to Article 10(1) where it is provided for that mediator has the right to have meetings with all the parties together or each of them personally. The conclusion can be made that the Mediation Law does neither prohibit use of electronic means of communication nor it prescribes to have only meetings in person for the mediation participants during the procedure or any stage of it (such as beginning, completion or other). Imperative provisions of the RK law or any principles of mediation (both express and, if any, implied) do not restrict this freedom of choice to use electronic devices and information technologies for out-of-court mediation in Kazakhstan.

B . Similar conclusion can be made in relation to court-annexed mediation. Moreover Kazakhstani judicial system offers quite a wide range of opportunities for use (e)Justice device in the course of judicial proceeding starting from bringing a suit before court.

The reference can be made to the one of interviews that the Chairman of the RK Supreme Court B. Beknazarov gave to mass media in 2013. He particularly mentioned the following: «Information technologies in the Republic of Kazakhstan have been used since 1999. Particularly, the integrated automated informational and analytical system of judicial bodies has been introduced in our country. Each suit is registered in the single database and this allows tracking the process on the case: to identify current stage of the proceedings, if there is any red tape. ... The system of videoconference is especially important for us. There quite a lot of judicial procedures are implemented by means of videoconference. ... Sms-messaging is used to summon witnesses for hearings. ... Special technology called 'electronic observation proceeding' is also used allowing participants of the proceedings to familiarize with a case materials being outside of the court, distantly: so, being at home a person can become familiar with all documents related to the process. This system shows positive effect. It is very convenient for citizens. Besides, a claimant may file his claim to the court in the electronic form and

to receive a decision in the same form. This makes an access to Justice easier».

The most of these technologies and means of communications are used in the judicial proceedings pursuant to respective provisions of the RK Civil Procedural Code. Among such provisions the following ones can be mentioned Article 90 (regarding use of scientific and technical means in the process of presenting evidences), Article 134 (which allows summons to the courts hearing with use of sms-messaging to a subscriber number of cellular communications or electronic mail messages), Articles 150 and 151 (which provide for submission of a suit in the electronic format as e-document).

One can conclude that these technologies and means of communication can be used for mediation taking place within the course of respective judicial proceedings.