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MEDIATION AGREEMENTS IN CIVIL LAW IN THE REPUBLIC OF KAZAKHSTAN

This scientific article discusses the concept and types of mediation features of the implementation of mediation based on a commission agreement. During the development of a market economy in the Republic of Kazakhstan, there is a need for a comprehensive study of the Treaty of commission, an institution of civil law, and the application of its scientific achievements in newly adopted regulations. At the same time, compiling these laws requires scientific elaboration of norms, elimination of contradictions, and additions to the existing law. Scientific work expands knowledge regarding the solution and development of legal issues of the contract of assignment, which is one of the conditions for the provision of services among civil law contracts, and mediation.

In the system of civil legal contracts of the Republic of Kazakhstan, the arrangement of the commission has its role and place as a civil legal contract providing services. In the scientific article, with an analysis of the legal status of the commission agent as an intermediary and intermediary arising based on the commission agreement, the subject of the commission obligation considers the legal basis for the provision of services. A study is carried out to analyze the practical issues arising concerning the commission agreement.

The relations based on the commission agreement are changing compared to the existing commission relations in previous periods.

Key words: commission agreement, the consignment agreement, concept of mediation, parties to the commission agreement, commission obligation.

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Қазақстан Республикасындағы азаматтық құқықтағы делдалдық шарттар

Бұл ғылыми мақалада делдалдықтың түсінігі мен түрлері, комиссия шартының негізінде делдалдықтың жүзеге асыру ерекшеліктері қарастырылады. Қазақстан Республикасында нарықтық экономиканың дамуы кезеңінде комиссияның, азаматтық құқық институтының шартын жан-жақты зерделеу және оның ғылыми жетістіктерін жаңадан қабылданған нормативтік актілерде қолдану қажеттілігі туындайды. Сонымен бірге, осы заңдарды құрастыру нормаларды ғылыми пысықтауды, қолданыстағы заңнамаға қайшылықтар мен толықтыруларды жоюды талап етеді. Ғылыми жұмысты ұйымдастыру барысында азаматтық-құқықтық келісім шарттар мен медиация арасында қызмет көрсету шарттарының бірі болып табылатын тапсырма келісім шартының құқықтық мәселелерін шешу мен әзірлеуге қатысты зерттеу аясында білімді кеңейтеді.

Қазақстан Республикасының азаматтық-құқықтық шарттары жүйесінде комиссия шартының қызмет көрсету туралы азаматтық-құқықтық шарт ретіндегі рөлі мен орны бар. Комиссионердің делдал ретіндегі құқықтық мәртебесін және комиссия шартының негізінде туындайтын делдалдықты талдайтын ғылыми мақалада комиссиялық міндеттеменің мәні қызмет көрсетудің құқықтық негізін қарастырады. Комиссия шартына байланысты туындайтын практикалық мәселелерді талдау үшін зерттеу жүргізіледі.

Комиссия шартына негізделген қатынастар алдыңғы кезеңдердегі заң аясында қолданыстағы комиссиялық қатынастармен салыстырғанда өзгереді.

Түйін сөздер: комиссия шарты, консигнация шарты, делдалдық ұғымы, комиссия шартының тараптары, комиссиялық міндеттеме.

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Посреднические договоры в гражданском праве в Республике Казахстан

В данной научной статье рассматриваются понятие и виды медиации, особенности осуществления медиации на основе соглашения о комиссии. В период развития рыночной экономики в Республике Казахстан существует необходимость всестороннего изучения Договора комиссии, института гражданского права, и применения его научных достижений во вновь принятых нормативных актах. В то же время составление этих законов требует научной проработки норм, устранения противоречий и дополнений к существующему законодательству. Научная работа расширяет знания относительно решения и разработки правовых вопросов договора поручения, который является одним из условий предоставления услуг среди гражданско-правовых договоров, и медиации.

В системе гражданско-правовых договоров Республики Казахстан соглашение о комиссии имеет свою роль и место как гражданско-правовой договор о предоставлении услуг. В научной статье с анализом правового статуса комиссионера как посредника и посреднических отношений, возникающих на основании договора комиссии, предметом комиссионного обязательства рассматривается правовая основа оказания услуг. Проводится исследование с целью анализа практических вопросов, возникающих в связи с договором комиссии.

Отношения, основанные на договоре комиссии, меняются по сравнению с существующими комиссионными отношениями в предыдущие периоды.

Ключевые слова: договор комиссии, договор консигнации, концепция посредничества, стороны договора комиссии, комиссионное обязательство.

Introduction

Among the legal issues and intermediary agreements arising concerning the legal regulation of the commission agreement under the current legislation of the Republic of Kazakhstan is the determination of the place of the commission agreement. The system of legal norms is aimed at the legal regulation of the intermediary activity of the commission agent and the study of ways to resolve controversial issues arising in connection with the practical application of the commission agreement.

The normative legal basis of scientific work is the Constitution of the Republic of Kazakhstan, the laws and acts of the Republic of Kazakhstan, and the president's decrees having legal force.

The conclusions in the scientific work allow us to solve the problems of improving the norms aimed at the legal regulation of commission relations. Scientific work expands knowledge regarding the solution and development of legal issues of the contract of commission, which is one of the conditions for the provision of services among civil contracts, and mediation.

Moreover, no unique scientific research has ever been fundamentally provided for in domestic legal science around this issue. Therefore, the results of this scientific work can serve as a methodological basis for future scientific work on these issues.

Materials and results

The chosen direction as one of the ways of developing the economy of the Republic of Kazakhstan is the development of entrepreneurship. Today, the types of entrepreneurial activities growing in the country are diverse. One of them is the intermediary service. National legislation, which is moving to market relations, is becoming more critical to regulating mediation. There are established historical periods of the establishment and development of general intermediary ties with the formation of new elements (Zinchenko 1999: 210). Intermediary activity occupies an important place in the activities of many business entities. It plays a unique role in the development of free market relations, which have a significant impact on the development of the country's economy. However, the legal definition of intermediary activity, even though it is often used in society, is not given in the Civil Code of the Republic of Kazakhstan.

However, scientists conducting research in economics and jurisprudence give different definitions of mediation (Dal 1994:350, Skorokhodov 2003 a:250).

In economic terms, an intermediary is an auxiliary person connecting two persons. At the same time, some scientists argue that the concept of the economic meaning of mediation is more extensive than the concept of legal (Skorokhodov 2003 b:250).

Mediation as a concept in the economic sense is widely used in practice (Novitsky 1950: 660). As noted by the scientist M.K. Suleimenov, any legal relationship, including mediation, has an economic prerequisite. From a financial point of view, mediation is the establishment of any economic relationship between two or more persons through the mediation of a third party.

And there is a controversial opinion on the legal meaning of mediation. Since some scientists recognize the commission as a condition of mediation, the concept of mediation in the legal sense is still not able to adhere to the same point of view. Here, disagreements arise regarding the classification and non-classification of the commission agreed as an intermediary agreement.

Intermediary activity is a type of entrepreneurship, but until now, a clear legal definition of mediation has not been given in the Civil Code of the Republic of Kazakhstan.

Following the new requirements of market relations, subjects of economic relations in carrying out entrepreneurial activity face many serious problems. A commercial intermediary has a special place in solving these problems. The movement of a commercial intermediary is: firstly, the activity of an intermediary; secondly, the operation between the manufacturer of the goods and its delivery to the consumer; thirdly, the service that promotes the emergence of a contract connecting the parties to the supplier of the goods and the consumer; fourth, the service that supports the conclusion of a trade agreement between the seller and the buyer for a certain fee. In our opinion, we can highlight the characteristic feature of this mediation, which is inherent in all of the listed signs and allows us to come to a single stop. This sign is a service, a way of communication that promotes the conclusion of the main contract between the consumer and the product manufacturer.

Farming can be brokered or direct. It is shown that the direct relationship is the one that arises between the producer and the consumer, and the intermediary connection, with the participation of an intermediary, makes the economic relationship more complicated than ever.

In practice, mediation is carried out under such conditions as an assignment agreement, a commission agreement, a transport expedition, and simply mediation, an agency. The Civil Code of the Republic of Kazakhstan reflects the terms of the assignment, Commission, Transport expedition, and the terms of the agency agreement and simple mediation. However, in practice, using the analogy of the law, it is not forbidden to conclude these conditions.

In general practice, the concept of mediation is interpreted in three different meanings:

1) Intermediary in the literal sense-an intermediate link of various participants in a business association;

2) In the economic sense, mediation is a mechanism for establishing communication between subjects of economic activity with the participation of a third party;

3) In the legal sense, mediation is economic transactions carried out by an intermediary on his behalf and at his own expense or on his behalf and at the cost of one of the parties, aimed at creating civil legal relations between the parties.

Now, scientists give the legal meaning of mediation in a narrow and broad sense. According to it, in the most general sense, mediation is a legal way of entering subjects of civil circulation into civil legal relations. Under it, issues ensure their ultimate economic interests by entering into indirect or direct legal contact with the help of real or legal actions of a third party – an intermediary. And mediation, in a narrow sense, is establishing a legal relationship between the client and a third party by the intermediary performing specific actions on his behalf and at the client's expense.

Following the new requirements of market relations, subjects of economic relations in carrying out entrepreneurial activity face many serious problems. A commercial intermediary has a special place in solving these problems. The activity of a commercial intermediary is: firstly, the activity that is carried out from the actions of an intermediary; secondly, the operation between the manufacturer of the goods and its delivery to the consumer; thirdly, the activity that promotes the emergence of a contract between the supplier of the goods and the consumer parties; fourth, the movement that encourages the conclusion of a trade agreement between the seller and the buyer for a specific fee (Korelsky 2005: 450).

In our opinion, we can highlight the characteristic feature of this mediation, which is inherent in all of the listed signs and allows us to come to a single stop. This is a sign of a contract, operation, or service that promotes

the conclusion of the main agreement between the consumer and the manufacturer of products. The direct relationship is the one that arises between the producer and the consumer, and the intermediary is involved in the intermediary relationship, making the economic relationship more complicated than ever.

The economic theory emphasizes three different advantages of commercial intermediation: situational advantage, that is, creating the possibility of consuming the production set of goods; reduction of costs from the spatial gap; temporal advantage, that is, saving time from the temporal interval of production and consumption (Egorov 2002: 121-125). All these advantages are provided from an economic point of view.

According to one of the research scientists, an intermediary in a legal sense, based on an intermediary agreement, on his behalf at his own expense, performs only specific actions to establish business relations between the client and a third party. In addition, he says that he does not have the right to make a deal but only plays a supporting role, succeeding both parties in making that deal.

And one of the scientists believes that the intermediary carries out any action to establish a connection between the two parties on his behalf at the client's expense. This action may or may not cause inevitable legal consequences for the parties. Under this concept, mediation gives a broad interpretation of mediation in a legal sense, indicating that the intermediary performs only specific actions and other legal actions in the interests of the transaction, the client (Ioffe 1975: 584).

The term mediation is used not only in civil law but also in financial law. Regarding intermediary transactions, intermediary transactions are found in tax payment legislation. However, it does not matter to the tax inspector whether the parties have concluded an assignment or commission agreement. Still, the tax rate charged about the intermediary activity of interest to him.

The legislation of Kazakhstan does not contain a single legislative act regulating intermediary activities. However, it cannot be said that the institution of mediation has not been formed because these services are widely used in practice. The proof of this is the adoption of legal norms regulating the activities of some professional intermediaries, the creation of associations of professional intermediaries, etc. Therefore, it will be more interesting to consider this institution's path of formation and emergence.

Intermediary service agreements, intermediary agreements, are also called intermediary transactions in a professional environment.

It occurs as a result of the implementation of intermediary activities. In practice, several contracts form the basis for the emergence of intermediary activities and a commission agreement. They are carried out under the conditions: assignment, commission-free action in the interests of others, paid services, transport expeditions, financing with a monetary claim, Agency Agreement, and commercial concession.

However, there is no clear list of general intermediary conditions. The agency agreement is included among those listed in the civil laws of the Republic of Kazakhstan. And there is a controversial issue as to whether the contract to act in the interests of the other without an assignment belongs to the intermediary conditions or is not mediated. Some scientists do not attribute this condition to an intermediary state and emphasize three different grounds for it. First, the so-called intermediary is unaware that he is acting in the interests of someone and is providing intermediary services. The second does not require remuneration, the third does not seek to establish a civil relationship between the acting parties without assignment in the interests of the other, and it prevents damage to himself or his property.

Therefore, even according to the legislation, the obligation to act in the interests of another without a task does not have an entrepreneurial character and does not consider an intermediary contract (Sekerin 2000: 157). However, the legislation does not specify that this agreement is not an intermediary. Therefore, it is sufficient to provide a comparative consideration of the contract of the assignment set in the Civil Code of the Republic of Kazakhstan and acting in the interests of another.

According to Article 846 of the Civil Code of the Republic of Kazakhstan, «contract of assignment» means that under the contract of assignment, one party (principal) undertakes to perform a particular legal action on behalf of and at the expense of the other party (principal). The principal determines the steps and issues him a power of attorney. According to the norms of the Civil Code, the principal is obliged to pay remuneration to the principal if legislative acts or a contract provides for it.

Intermediary agreements also include a dealer agreement. The dealer contract is not specified in the essential civil legislation of the country. However, the concept of a dealer is a concept that is familiar

to all of us in practice. Significantly, the idea of a dealer is often found in the laws governing the securities market in our country. The dealer and the commission agent enter into the contract on their behalf, so the legal consequences for the transaction do not arise with the client but with the agent and the dealer.

Both must report to the client about their transactions (Skorokhodov 2007: 2-3). However, the dealer receives not only the right of ownership of the property received from the seller, like a commission agent. The commission agent always acts at the client's expense, and the dealer works at his own cost and risk (Sidorova 1999: 29). It does not allow dealer relations to apply the provisions relating to the commission agreement. The dealer agreement provides not only for the seller to sell the goods to the dealer but also for the dealer to undertake to distribute these goods to end users in the event of a specific definition.

The dealer undertakes to report information about the recipient of the goods since the seller organizes his activities per this information, having the opportunity to control the chapter of his product. So, the final economic effect for the seller will appear after this distribution by the dealer. Under the commission agreement, the financial interest of the principal is satisfied through the action of the commission agent, who, as a separate economic entity, makes a transaction in the interests of the principal on his behalf.

A feature of these conditions is the following. Here, direct legal and economic relations between the final buyer and the consumer and the seller are not established, and the result to the principal seeks the sale of his product or the possession of the goods with inevitable legal and economic consequences as a result of the activities of the dealer and commission agent.

In other words, both the dealer and the commission agent are considered intermediaries. The absence of direct contact of the commission agent or dealer with the counterparty is not a reason not to attribute the relationship arising from the commission or dealer agreement to the intermediary agreement.

One of the controversial issues regarding the types of Intermediary Services is the reasonable question of whether the activities of distribution (commercial concessionaires) are intermediary or not. At first, from the economic side, distribution activities are attributed to trade intermediation (Tynel 1999: 407). The distribution service does not act based on any task. Still, it operates independently at its own risk, and producers act as commercial intermediaries in this connection node, helping to constantly deliver the goods produced by distributors to the consumer.

Mediation includes, but is not limited to, the mentioned relationship since the intermediary can also carry out specific actions to establish a legal relationship (Parkhacheva 2002: 415). Here we are talking only about contractual representation. And in compulsory legal representation, the legal representative participating in the transaction on behalf of an adolescent child and an incapacitated person is not an intermediary; firstly, no civil legal relationship can arise between the legal representative and this person.

Secondly, a child and an incapacitated person cannot exercise their civil legal capacity due to them; therefore, their legal representatives dispose of their property in a Marginal Way, concluding and executing transactions. Thirdly, all transactions are made by legal representatives at their own expense. Thus, there can be no mediation between legal representatives and these persons.

The peculiarity of intermediary activities based on a commission agreement is that some authors indicate that this is a trade intermediary, describing the commission agreement and determining the economic and legal nature of commission relations. Other authors define mediation as an economical category that regulates ties unrelated to commission relations that have nothing to do with the commission agreement. It should be noted that both definitions do not disclose the content of the concept of mediation. Therefore, it was first necessary to determine the content of the category of mediation. Then, considering this, we thought about the specifics of the implementation of mediation based on the commission agreement.

Intermediary services, carried out based on a commission agreement, are paid at all times because the contract of commission is a contract that is carried out on a paid basis at all times, unlike the arrangement of a similar assignment. The commission agent has the right to receive remuneration from the principal at all times, and even on the day when the payment is not specified in the contract, he may have such a right.

Direct mediation-by determining the contractual legal relationship between the first subject and the second subject, the intermediary establishes a contractual relationship only with one issue. And the intermediary of indirect mediation is in a mandatory contractual legal relationship with both entities.

This means that mediation is carried out based on a commission agreement and is considered indirect mediation. However, there is little need to divide the intermediary connection into this type. After all, mediation refers to indirect communication if the subjects enter a civil relationship directly or indirectly.

The importance of the place of the commission agreement in intermediary agreements is growing not only in Kazakhstan but also around the world, so the intermediary business activities carried out on its basis undoubtedly occupy a vital place.

Therefore, in addition to studying the legal issues of the commission agreement under the laws of the Republic of Kazakhstan, it is necessary to analyze the legal regulation under the laws of the superpowers concerning these intermediary agreements. Thus, we consider it appropriate to conduct a comparative legal analysis of the civil legislation of the Republic of Kazakhstan in the scope of these treaties with the laws of these superpowers.

The main task of the commission agent in the commission agreement should be to conclude a transaction with a third party in the principal's best interests. Suppose the transaction was made by the commission agent on more favorable terms than indicated by the principal. In that case, the received trophy is divided equally between the parties unless otherwise provided by the contract.

Another characteristic feature of the commission agreement is the consensus of the deal. Peace of the contract of a commission-the contract is considered concluded from the moment the parties have clearly expressed their will to terminate the contract in the manner prescribed by law and have reached an agreement on the significant provisions of the contract. From a legal point of view, the emergence of a contract of transfer or non-transfer of an item constituting the subject of commission trade is not affected. But from the giant, on the one hand, it may not seem like this.

The principal and the commission agent may refuse to conclude the contract at any time, and if there is a concluded contract, the contract can be canceled without explaining the reason. In addition, if the principal does not provide and delays the goods at the right time, it is not indicated to apply such a measure of punishment as the payment of any forfeit since the principal is first interested in concluding the commission contract. In most cases, the acceptance of the property at the time of the conclusion of the agreement does not affect the consensus of the contract.

The conclusion and execution of the commission agreement, in turn, gives rise to two binding relationships – internal and external. The basis for the birth of an internal relationship is a commission agreement, which consists of the mutual rights and obligations of the principal and the commission agent. External relations in the commission arise from transactions that are concluded during the execution of the committee assignment. The commission agreement does not regulate these relations directly (Bezruk 1955: 156).

The subject of External Relations is the commission agent and the third party. The content of the obligation, which consists of External Relations, is formed from the scope of the transaction concluded by the commission agent. By exercising the duties and rights in these relations, the commission agent achieves the commission assignment.

The commission agent enters into external relations as a separate economic entity on his behalf. All rights and obligations arise with the commission agent directly to the superficial relationship. Therefore, since there is no direct connection between the principal and a third party, he cannot claim it now from the principal. Accordingly, the commission agent is responsible for the execution of the concluded transaction to a third party. This responsibility remains even after the transfer of the subject of the transaction to the principal, even if the principal himself performs the transaction.

If the principal also commits an offense during the execution of the transaction, the commission agent is responsible to the third party, respectively. According to it, the commission agent submits a claim against the principal only after reimbursing the losses caused to a third party. In turn, the principal cannot directly file a claim with the commission agent to the third party making the transaction.

However, the above procedure is not subject to either rule. First of all, it should be noted that the commission agent Acquires Certain rights from the transaction concluded by the commission agent, for which a contract has been concluded between a third party and the commission agent in the interests of the commission agent. The commission agent submits a claim to the committee on an obligation with a third party. As the scientific literature indicates, all the rights and obligations arising under the concluded transaction must be transferred by the commission agent to the committee. The reason for it firstly, the rights and obligations in respect of the transaction concluded between the commission agent and a third

party cease if it is carried out accordingly between the parties.

Therefore, the commission agent gives the result of the transaction to the committee and not the rights and obligations under the transaction. Secondly, the commission agent transfers the rights to a transaction with a third party to the committee only in case of improper execution by a third party. In other cases, the transfer of duties and rights to the committee for claims that occurred with a third party by the commission agent is not specified.

Here, seeing the relationship of the contract with the significant circumstances that occur in the individual, it is impossible to unanimously say that the contract of commission is a contract of personal reliability. However, we can agree that the entrepreneurial nature of the contract eliminates the personal-trust nature of the contract. Because although the commission agent acted in the interests of the intermediary principle, it cannot be said that there was a relationship of «trust».

Suppose the commission agent cannot foresee that the agent will not be able to make a profitable transaction for him. In that case, the commission agent's actions in the interests of the commission agent are dictated by the content of the commission obligation. In addition, the principal may terminate the contract from one party if they are convinced they do not fulfill the assignment given to the commission agent. And the commission agent is not responsible for non-fulfillment of the obligation of a third party to the principal, except in cases where he undertakes to fulfill the commitment by a third party.

In addition, the commission agent has the right to receive remuneration even if the contract is not executed by third parties, respectively, since the contract is paid. Under article 882 of the Civil Code of the Republic of Kazakhstan, the rights and obligations are transferred to the heir if the principal dies. In case of death of a citizen-principal, recognition of him as incapacitated, limited in a legal capacity, missing, as well as in case of liquidation of a legal entity-principal, the commission agent is obliged to continue performing the assignment assigned to him until appropriate instructions are received from the heirs or representatives of the principal.

In addition, in case of reorganization of a legal entity-commission agent, if within one month from the receipt of reorganization, the principal has not been notified of the termination of the contract, his rights and obligations are transferred to his successors. On the contrary, with the commission agent's death, if the commission agent's insolvency occurs, the contract is terminated, and the succession is not carried out.

Here it is to establish whether the commission agreement has a personal reliability nature. Here, the individual reliability nature of the commission agreement is not as evident as in the assignment agreement, so it cannot be fully included in the fact that it has a personal reliability nature.

Thus, if we draw our conclusions, a commission agreement is a contract in which a commission agent from one party makes a transaction on his behalf, but at the expense of the principal, in the interests of the other party. The commission agreement is a bilateral, consensual, paid agreement. The commission agreement does not have a personal reliability character. The contract of commission is the obligation to provide services. In this case, an activity is an action of a legal nature aimed at making a transaction by a commission agent that does not have a material result. Still, changes terminate and appear the rights and obligations of a person.

Conclusion

In conclusion, we examined and studied the ideas of other authors formed in the theory of civil law regarding the contract of commission, domestic and foreign legislation, experience concerning the agreement of commission in civil law, one of the conditions for the provision of services in civil law, determined the compliance of this institution with the socio-economic situation in the Republic.

It should be noted that the commission agreement is one of the oldest institutions of contractual law. This is why the contract has been in practice for a long time: due to the many valuable properties of the contract of commission. Commission the price of the contract includes the special remuneration received in the case of commission remuneration. And when the commission agent executes the transaction in very favorable conditions, the profit from the income is not included in the price of the commission agreement.

Suppose, due to the fault of the commission agent, the property of the committee was destroyed or damaged due to the expiration of the assignment results, the risk of accidental destruction of the property. In that case, this should be transferred to the commission agent.

First of all, of course, the commission agent is interested in setting the deadline for payment of

remuneration to the commission agent. From the moment of expiration of this period, an increase in the monetary obligation can be established. In this case, these deadlines will be a significant contract provision.

Suppose the commission agent is responsible to the principal for a third party and performs a third party transaction in the principal's interests. In that case, the principal may not refuse to pay remuneration.

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