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«ВЕСТНИКУ ИНСТИТУТА ЗАКОНОДАТЕЛЬСТВА РК» - 10 ЛЕТ

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ALTERNATIVE DISPUTE RESOLUTION IN THE USA: ANALYSIS OF MAIN ADVANTAGES AND DISADVANTAGES

Abstract

Alternative dispute resolution (ADR) is a dispute resolution approach, which is peculiar to democratic and legal countries. ADR has a long history of development and it is used in many countries. However, the modern concept of ADR has been developed in the USA. Therefore, current analysis focuses on the ADR system of this country. Some key characteristics of such way of civil right protection have been identified through an analysis of ADR advantages and disadvantages in comparison with court trial.

Introduction

It is generally accepted that court procedure is the most effective, fair and reliable. However, nowadays, all spheres of life are intensively developing and consequently conflict of interest has become more frequent. A significant number of these social conflicts become legal disputes and lead to court trials. The number, complexity and scope of disputes are increasing, so that a judicial system is not able to resolve all conflicts properly. The practice in the United States of America (USA) shows that legal disputes might be effectively solved via Alternative Dispute Resolution (ADR) to reach agreement between disputants without applying to the court. This approach has changed the traditional view of civil rights protection in the USA and became attributable for legal and democratic countries all over the world.

This analysis contains main advantages and disadvantages of ADR concerning the legal practice of the USA. The structure of analysis will consist of two main parts. The first part includes the definition of ADR and the history of its development. The second part mainly deals with analysis of ADR strengths and weaknesses in comparison with a court trial.

The history of ADR development in the USA

There are different ways to resolve legal conflicts and ADR is one of these approaches. ADR might be defined as a complex of private dispute resolution methods which encourage disputants to find a solution with support of a neutral person who might participate in some procedures as a facilitator, arbiter, mediator or expert [1]. The term "alternative" means existence of a choice and so ADR also might be explained as a different or other way of conflict resolution which might be chosen by disputants. The term "ADR" covers a variety of procedures the most well-known of which are arbitration, mediation and negotiation.

The practice of ADR has a long history of usage all over the world. However, its current concept mostly has been created by legal practice in the USA. There are several significant predispositions of ADR development which took place in the USA history. First of all, at the beginning of the twentieth century the mass production, development of communication and transport caused an increase in the number of civil disputes. The first consequence of this phenomenon was the growing importance of the judicial system and its development. Gradually, the courts, unable to cope with a significant number of disputes, became involved in the crisis. Primarily, this situation swept most industrialized countries in which legal cultures were prone to litigation. The first country which faced this problem was the USA. After World War II effectiveness and productivity of the USA economy were improved markedly, causing high economic activeness and numerous monetary disputes. Also, social conflicts in that period were caused by strong racial segregation, which was widespread in the USA. Thus, in 1960 the government of this country started a revision of traditional approaches of dispute resolution in

order to improve civil rights protection system. Thus, optimization of dispute resolution system was started in the US.

Since that time, the US has initiated the reform aimed at the optimization of dispute settlement. Within the framework of this reform, in 1964 Congress issued the Civil Rights Act by which the Community Relation Service of the Justice Department was established to support courts [2, 8]. The Community Relation Service mainly dealt with complicated racial and community conflicts [3]. This service was helpful for people from the middle social class who could not pay for the expensive court trial. Thus, ADR became popular because it allowed reaching an agreement between disputants without competitive and expensive public trials.

Another crucial moment in the history of ADR development was the speech of Harvard Law Professor Frank Sander "Varieties of Dispute Processing" which was presented in 1976 at an academic conference. According to Sander if people deal with legal disputes, they should have an opportunity to settle judicial lawsuits through a diversity of procedures such as negotiation, mediation, arbitration, conciliation and others [4]. This idea inspired the legal community, triggering implementation of a pilot project in the US court practice. After a successful probation, Sander's idea led the creation of the federal Alternative Dispute Resolution Act in 1998 which obliged each federal district court to integrate ADR in their practice [5]. As a result, nowadays, if the disputants apply to the US court, the judge might advise them to use nongovernmental dispute resolution centres or highly qualified professionals who can effectively settle their conflict. In some legal cases, judges themselves use ADR procedures which are most suitable for resolving relevant type of conflict [2]. Therefore, ADR might be used not only independently from the state court system, but also additionally to trial. For instance, "mediation has emerged as the primary ADR process in the federal district courts" [6, 104].

ADR system has changed the traditional view of civil rights protection in the USA and became widespread. The USA experience shows that ADR was implemented into the legal system of this country by the combined efforts of government, legal society and law researchers. ADR is likely the main force which deals with the majority of property and monetary disputes which are inherent in countries with fast growing economy such as the USA. The popularity of ADR, probably, has been caused by the advantages of this method of dispute resolution.

The main advantages and some disadvantages of ADR system are analysed in the next section.

General advantages and disadvantages of ADR

Nowadays ADR is the preferred way of dispute resolution because this system gives an opportunity to cope with a legal conflict effectively. The practice of ADR in the USA, as well as in other countries, demonstrates the advantages and disadvantages of this approach. This article is focused on such advantages of ADR as: collaboration, voluntariness, finality, flexibility, economy and confidentiality. Also, there are some disadvantages of ADR are analysed. Particularly, ADR cannot be used for all types of legal cases; it does not guarantee dispute resolution and enforcement of the final agreement as well, also ADR might led to creation of incorrect decision.

One of the most significant advantages of ADR is collaboration. ADR inclines disputants to collaboration from the beginning up to the end of certain procedure. The usage of ADR starts from making an agreement by disputants about all important conditions of dispute resolution. The contract about ADR application typically contains a mutual decision by disputants about:

- Neutral participant, who should be chosen by disputants to facilitate dispute resolution;
- Type of ADR procedure;
- Place, where the procedure should be held;
- Duration of procedure and time, when it would take place;
- Language, which should be used during the procedure;
- Requirements about ADR confidentiality;
- Order and terms to enforce the final agreement
- Allocation of procedure costs.

During ADR, participants analyse legal conflict via constructive dialogue and try to find ways of solving it. Such collaboration makes disputants closer to each other, improves their relationships and create prerequisites for future partnership. At the ADR completion, the parties themselves try to create final mutual agreement, which might be made only via the full collaboration of parties [7, 2]. Unfortunately, litigation has the opposite effect. Even if disputants do not have animosity towards each other, the competitive trial will negatively impact parties' relationships and make them worse by keeping disputants away from each other. The legal conflict escalates due to adversarial trial, in

which conditions exist for clash of parties' interests and intense emotional turmoil [8, 8].

The most important predisposition of collaboration in ADR is voluntariness. There are three main aspects of voluntariness which can be considered in the ADR system. Firstly, voluntariness means that all ADR procedures should be used only if both disputants agree to resolve conflict by certain ADR procedure. The mutual agreement of the disputants is reflected in a written contract. So that, any compulsion is unacceptable in ADR. On the contrary, in trial one participant is involuntarily involved in litigation and parties have not an opportunity to withdraw from the trial. Another aspect of voluntariness within the ADR system, is that disputants not only voluntarily use the chosen procedure, but are also free to leave this process at any time. The ADR concept permits termination of the procedure by the request of the parties, if they do not consider that dispute resolution worth continuing for any reason it lead to dispute resolution by using another approach. Thirdly, voluntariness of ADR implies voluntary enforcement of an agreement which has been achieved as a result of dispute resolution. Therefore, there is no need to force the parties in order to fulfil the agreement as is usually done when necessary to execute a judgment .

Parties who voluntarily participate in ADR procedure are involved in the process of creating solutions. The third neutral participant (particularly, mediator or conciliator) does not evaluate evidence and not aimed at making judgments with identifying responsibility as a judge. A neutral participant helps disputants to collaborate in creating their mutual agreement, which might be gained only through identifying disputants' needs and interests. The agreement, which is constructed by taking into account needs and interests of both parties is equally beneficial for them. Therefore, such kind of agreements is called a win-win solution, because there are no losers and winners [8, 1].

Inasmuch as the win-win solution corresponds to disputants' needs and expectations, there is no necessity to appeal against this decision. Also, the ADR final agreements (decision) might not be revised, because there is no supervisory authority over the ADR. ADR system is totally independent from the state court system and government in whole, hence the state court system cannot be recognized as a supervisory authority over the ADR. Due to the impossibility to appeal final agreements (decisions) of ADR this dispute settlement system is characterized with such advantage as finality.

An opportunity to establish the main rules of a certain procedure by harmonized consent of the parties makes ADR more flexible in comparison with strictly formalised court trial. Flexibility of ADR helps parties adapt an ADR procedure to specifics of legal conflict and create comfortable conditions for dispute resolution. Disputants have a right to choose the place, language and time of ADR procedure that is convenient for them. Furthermore, the modern trend of ADR development in the USA is saving time of disputants by the online dispute resolution (ODR) [9]. It should be noted that, ADR might save not only time, but also the expenses of dispute resolution because generally ADR procedures are less expensive than the litigation. Therefore, one of the ADR's strengths is the economy [7, 2].

The possibility of adapting the certain ADR to the needs of the disputants also infers the election of a neutral participant. A neutral third party is selected from professionals whom the parties equally trust and whose characteristics meet parties' requirements. Additionally, each ADR organization has a list of professionals in different fields of study whom selected by using specific parameters and parties could easily elect a neutral participant from this list. For instance, the famous American Arbitration Association includes, in the list of neutral participants people who have educational degree and/or professional licenses; at least 10 years experience in business, industry or certain profession; membership in professional or business association [10]. Careful election of a neutral participant from highly qualified professionals contributes effective dispute resolution.

Another beneficial feature of ADR is confidentiality. The principle of confidentiality protects the reputation of the parties via nondisclosure of the conflict existence and its resolution. This principle of ADR is important for disputants therefore it is guaranteed by the Administrative Dispute Resolution Act, which was issued by the USA government in 1996 [11].

Thus, ADR has numerous advantages but this method of dispute resolution. However, an analysis of ADR's strength shows its probable disadvantages as well. Coyle identifies a number of ADR weaknesses which are listed below [12].

- ADR does not guarantee a dispute resolution. If the parties do not come to consensus they cannot create a mutual agreement, so they probably will waste time and money;
- Provided that ADR participants do not explore evidences and facts which are significant for a lawsuit, they likely could get an incorrect decision;
- The enforcers of ADR decision are

holistically depends on parties' responsibility. There is no procedure to pressure party, who responsible to maintain ADR decision, therefore an obligor might not easily enforce it;

- ADR cannot be used for all types of legal cases. ADR will not be appropriate when a person needs an injunction and if there is no dispute which should be resolved. In this case, person aimed at recognition of certain facts by court decision.

To sum up, the practice of the ADR system in the USA has identified numerous strength of this system. ADR is more informal, faster, cheaper, less hostile and stressful for disputants than traditional litigation [13]. Nevertheless, in certain cases ADR is useless and might lead to negative consequences for disputants.

Conclusion

Analysis of ADR development in the USA shows that this approach of civil rights protection was developed as a result of collaborative efforts of the government, legal society and researchers in law. In order to reduce the workload of state courts, the system of civil rights protection was entirely reviewed. Consequently, in the USA reformation and the creation of legislative base for ADR took place, which included rules not only about usage of ADR but also concerning its development and comprehensive support. These measures have been effective and have led to wide use of ADR in the USA.

The practice of ADR application in the USA indicates advantages and disadvantages of such approach of dispute resolution. The main strength of ADR is that disputants try to resolve conflict via collaboration and voluntariness. They are involved in the process of solution creation, so that parties tend to make consensus. As parties are satisfied with the ADR result, there is no necessity to appeal and therefore ADR is final. Flexibility of the ADR process helps to meet needs and expectations of disputants and give them the opportunity to make this process more comfortable without formal rules. The confidentiality of ADR protects the reputation of disputants and prevents disclosure of information related to the dispute.

However, ADR is not a perfect way of dispute resolution and sometimes it might be useless or ineffective. Nevertheless, if USA government and legal society had not implemented alternative procedures of conflict solving like ADR, the state court system as well as system of civil right protection would not be able to cope with the diversity of modern conflicts and owing to negative impact on state development. Hence the benefits of ADR are highly significant.

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Мақалада Америка Құрама Штаттарындағы дауларды балама жолмен шешудің даму тарихына талдау жүргізілді. Ретроспективалық талдау арқылы автор американдық дауларды балама жолмен шешу үлгісінің негізгі сипаттамаларын анықтады және оның елеулі артықшылықтары мен кемшіліктерін айқындады.

Түйін сөздер: *дауларды балама жолмен шешу, Америка Құрама Штаттары, дауларды соттан тыс тәртіппен шешу, азаматтық-құқықтық даулар, құқықтық конфликт, құқықты қорғау.*

В статье произведен анализ истории развития альтернативного разрешения споров в США. Посредством ретроспективного анализа автором определены основные характеристики американской модели альтернативного разрешения споров и выявлены ее наиболее существенные преимущества и недостатки.

Ключевые слова: *альтернативное разрешение споров, Соединенные Штаты Америки, внесудебное разрешение споров, гражданско-правовые споры, правовой конфликт, защита права.*

In the article the analysis of the history of the alternative dispute resolution development in the United States of America has been conducted. The author has determined the main characteristics of the American model of the alternative dispute resolution and identified the most considerable advantages and disadvantages of it.

Keywords: *alternative dispute resolution, United States of America, of-court dispute resolution, civil disputes, legal conflict, rights protection.*

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Америка Құрама Штаттарында дауларды балама жолмен шешу: негізгі артықшылықтары мен кемшіліктеріне талдау

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Альтернативное разрешение споров в США: анализ основных преимуществ и недостатков

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Alternative Dispute Resolution in the USA: Analysis of main advantages and disadvantages