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Application of forms of alternative dispute resolution in Ukraine

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Abstract: Resolving legal conflicts is one of the main tasks of any state. This function is in most cases entrusted to the judiciary, but as experience shows, the court alone cannot ensure the effective functioning of the legal dispute resolution system. For every democratic state, the availability of an alternative is important, and the subject of law must be able to choose the ways of resolving legal disputes. Today in the world there are such alternative ways of resolving disputes as: arbitration, mediation, consultation, negotiations, intersession, conciliation procedure and others. The purpose of the article is to identify the advantages and disadvantages of alternative dispute resolution methods. The article analyzes the literature on this topic, and also presents the features of alternative ways of dispute resolution, which allows us to identify their advantages and disadvantages as a legal procedure. The existence in most countries of the world of alternative dispute resolution is to some extent positive for the parties to the conflict, because dispute resolution through arbitration, mediation, negotiation,

consultation and other alternative dispute resolution allows to resolve it without state intervention and they can be solved much faster. Alternative dispute resolution can to some extent be a source of savings money for the state, as they exist independently and do not require funds to provide them from the state, while in Ukraine the system of commercial courts annually requires a fairly large cost of maintaining such courts.

Keywords: Judiciary; civil law; arbitration; conflict resolution; state legislation

Summary: **1** Introduction – **2** Approaches to Understanding Alternative Dispute Resolution – **3** Key Features of Alternative Dispute Resolution – **4** Conclusions – References

1 Introduction

In the world today there is a large number of conflicts, the emergence and cessation of conflicts, most of which are transformed into conflicts of a legal nature. At the same time, the basis for all conflicts in most cases is the following reasons: restrictions in the field of rights, deprivation of certain rights or non-compliance with relevant legal norms. Resolving legal conflicts is one of the main tasks of any state. This function is in most cases entrusted to the judiciary, but as experience shows, the court alone cannot ensure the effective functioning of the legal dispute resolution system.[1] For every democratic state, the availability of an alternative is important, and the subject of law must be able to choose the ways of resolving legal disputes.[2] Today in the world there are such alternative ways of resolving disputes as: arbitration, mediation, consultation, negotiations, intersession, conciliation procedure and others.[3]

However, in the scientific literature in Ukraine there is also another approach, according to which the state judiciary and alternative dispute resolution are the only dispute resolution system used in the complex of the parties of the dispute. Following this approach, it is impossible to talk about alternatives, because together the court and alternative dispute resolution are of a single entity.[4,5] Thus, the definition of the method of resolving legal disputes not as an alternative, but as a state is debatable, because the system of alternative dispute resolution does not exclude the judicial order, but may precede it and supplement it.[6] State proceedings and alternative ways of resolving disputes differ significantly in their essence, features and principles of operation. An alternative way of resolving

1 LYUBCHENKO, 2018.
2 MATVIEIEVA, 2021.
3 BENEDIKT; SUSŁO; PAPLICK; DROBNIK, 2020, p. 235-239.
4 KRESTOVSKAYA; ROMANADAZE, 2019.
5 GAIDUK; SENYUTA; BIK; TERESHKO, 2007.
6 KISLYI; STETSIUK; KOVALENKO, 2018.

disputes cannot replace the judicial procedure for resolving legal disputes. Judiciary is the main institutional element of the system of state dispute resolution, so each state in its legislation determines which disputes can be resolved exclusively by courts, and which - using alternative dispute resolution.

In Ukraine there was an attempt to determine the ways of solving the disputes and a law on arbitration courts was adopted,[7] but soon the situation changed and now we have only state economic courts to solve the disputes. The subjects of legal relations can use the methods of alternative dispute resolution as an additional option to protect their rights, to defend their interests. This possibility is particularly relevant due to the inefficiency of the judiciary, the growing number of cases in the courts, or the presence of other factors of an objective or subjective nature, which is to some extent observed in Ukraine. However, in Ukraine the issue of introduction of alternative dispute resolution methods, their proper legal regulation, expansion of the range of disputes that can be resolved using alternative dispute resolution methods is not on the agenda. As elements of the legal dispute resolution system, alternative dispute resolution and public justice are interdependent and competitive. Interdependence is that alternative dispute resolution may precede or supplement litigation (for example, negotiations between the parties) (for example, concluding a mediation agreement at the enforcement stage). At the same time, the practice of resolving legal disputes by the judiciary and the use of alternative dispute resolution methods indicates the existence of such competition. Legal dispute resolution is a kind of service, the customers of which are the parties to the dispute. Usually, those who provide a better service are approached. The purpose of the article is to identify the advantages and disadvantages of alternative dispute resolution methods.

2 Approaches to Understanding Alternative Dispute Resolution

Alternative dispute resolution can be used in different areas of law, depending on the purpose of the parties. Disputes that are resolved through alternative dispute resolution are impressive both in terms of subject composition and amount. Institutions that provide alternative dispute resolution services, interested in their own development, are concerned about their authority, and therefore are constantly improving the rules of procedure, recommendations on conflicts of interest, gathering evidence, reservations in the contract, precautionary measures. They care about their own reputation, as evidenced, for example, by the fact that during the entire period of the International Chamber of Commerce's arbitration, there have been no cases of arbitrators being accused of corruption scandals.[8] Therefore,

[7] Resolution of the Verkhovna Rada ..., 1991.
[8] Model Law on International Commercial Mediation ..., 2002.

alternative dispute resolution and public litigation in a kind of competition must be constantly improved, which will benefit the subjects of law. In general, the use of alternative dispute resolution should help to improve the legal dispute resolution system in Ukraine.[9]

In the scientific literature there are various definitions of alternative dispute resolution.[10] Black's Law Dictionary[11] defines alternative dispute resolution as a procedure for resolving disputes in ways other than judicial, such as mediation and arbitration. The Swiss Arbitration Association's Dictionary defines alternative dispute resolution as:

1. optional amicable settlement of the dispute by a third party, not including arbitration (in Europe);[12]
2. any settlement of a dispute involving a third party, with the exception of litigation, including arbitration (in the United States)[13]

Another legal dictionary defines alternative dispute resolution as a unifying term that describes methods that parties can use other than litigation, including negotiation, mediation, and many types of arbitration. Some researchers identify alternative dispute resolution as a way to resolve a dispute without going to court. One of the reasons for the large number of approaches to understanding alternative dispute resolution is that scholars and practitioners include different dispute resolution methods. For example, some researchers do not consider arbitration as an alternative way of resolving disputes. After all, arbitration has certain responsibilities for the parties involved. Other researchers point out that negotiations are not an alternative way to resolve disputes because only the parties' lawyers are present during the negotiations and there is no third party. Lord Wolfe, the founder of the reform of the English civil process, identified arbitration, administrative tribunals, pseudo-judicial proceedings, ombudsman proceedings and mediation as the main forms of alternative dispute resolution.[14] At the same time, many researchers do not refer to administrative tribunals and the ombudsman as a variety of alternative dispute resolution.[15]

Some scholars mistakenly call alternative dispute resolution pre-trial dispute resolution. This approach is incorrect, as it provides for litigation as a mandatory part of resolving a dispute. However, in different countries, many disputes are not resolved at all in national courts due to the fact that the agreement concluded on

9 Alternative Dispute Resolution …, 2017.
10 GARNER, 2019.
11 GARNER, 2019.
12 BLAKE; BROWNE; SIME, 2014.
13 KARRER, 2009.
14 ARESTOVA, 2021.
15 Alternative conflict management, 2021.

the implementation of certain actions provides for the settlement of the dispute through negotiation, mediation or Arbitration.[16] Of particular importance are the issues of alternative dispute resolution in civil law. It should be noted that alternative dispute resolution is not always less costly than litigation. In addition, they are used not only to resolve commercial disputes. Other types of disputes can be resolved through arbitration, mediation, and negotiations.[17] Due to their universality, alternative dispute resolution allows for a wider range of disputes than national courts.

There is a point of view on the definition of alternative dispute resolution as "non-state procedures for the settlement of civil disputes", the main feature of alternative dispute resolution is that they are not carried out by public authorities. In general, an alternative dispute resolution is the application (for example, by an arbitral tribunal) of legal norms and the adoption of a binding decision for the parties, based on legislation and other possible sources of law. The "dispute resolution" method is used when resorting to alternative dispute resolution methods such as arbitration and international commercial arbitration. When using the "dispute resolution" method, the problem is resolved in relation to the existing rights and obligations of the parties (legal relations of the parties), and in the case of "settlement of the conflict" the parties seek to reconcile their interests and achieve mutually acceptable termination of the conflict. Thus, dispute resolution and conflict resolution are fundamentally different methods used in alternative dispute resolution.

3 Key Features of Alternative Dispute Resolution

According to research, there are the following signs of non-governmental procedures for settling civil disputes:

- no state intervention;
- recognition by public authorities;
- contractual nature of application;
- voluntary application of procedures;
- cooperation of the parties;
- confidentiality;
- relative formality;
- variability of procedures, their variety;
- participation of a third neutral participant, elected or appointed by mutual consent of the parties (this approach is generally correct, but some of these features are debatable).

[16] SMYRNOVA, 2021.
[17] PIRES FERREIRA, 2021, p. 21-36.

In general, alternative dispute resolution in most cases has the following features:

- non-state character;
- contractual nature of application, based on mutually agreed definition of procedures and implementation of decisions;
- universality, the disputes can be resolved both between individuals and legal entities, as well as between international organizations, states, or unions of states;
- legal nature, the dispute resolution is based on certain legal norms;
- flexibility in resolving disputes, various methods, means, procedures are used, which are independently determined by the parties, as well as they determine the conditions and procedure for their implementation;
- confidentiality, only the parties to the proceedings and the invited persons take part in the alternative dispute resolution.[18]

Comparing alternative dispute resolution and litigation, we can identify their commonalities and differences. The common ones include:

a) systematization – disputes are considered by the system of judicial authorities in accordance with the established jurisdiction, however, there is a system of alternative dispute resolution, as well as various institutions operating in this field and international organizations;
b) independence, the dispute is considered by an authorized person who is independent of the conflicting parties and acts impartially;
c) the plurality of parties;
d) the possibility of involving experts and specialists.

However, there are differences between the resolution of disputes by public authorities and alternative dispute resolution methods mentioned earlier. Thus, we can say that alternative ways of resolving disputes exist in most countries abroad.[19] In Ukraine, from the very beginning of independence, an attempt was made to introduce an arbitration system to resolve legal disputes.[20] In 1991, the Arbitration Court Act was passed,[21] which to some extent introduced one of the main types of alternative dispute resolution that exists around the world. However, 10 years later, in 2001, a new law was passed that abolished the existence of arbitration courts in Ukraine and introduced the so-called commercial courts, which are state-owned and resolve all disputes arising on behalf of the state.[22]

[18] KATERYNIUK, 2021.
[19] SCHMIDT, 2021, p. 69-92.
[20] Holovatyi, 2015, p. 4-8.
[21] Resolution of the Verkhovna Rada ..., 1991.
[22] Law Of Ukraine "On commercial courts", 1991.

In order to implement the issue of arbitration courts to some extent, the Law of Ukraine "On arbitration courts"[23] was adopted in 2004, which is in force, but it is practically ineffective, as the vast majority of legal disputes are resolved by commercial courts. These courts are determined as the most corrupt branch of the judiciary in Ukraine. Thus, the state deprived the business entities of the opportunity to resolve disputes to use alternative ways of its resolution. As for other alternative ways of resolving economic disputes, such as mediation, negotiations, and consultation, they are also used to a rather limited extent in Ukraine. Commercial courts have thus established a kind of memorandum that only they have the right to resolve commercial and other property disputes.

The new Code of Criminal Procedure in Ukraine has significantly expanded the scope of alternative dispute resolution, combining elements contained in continental systems (exemption from criminal liability) and Anglo-American systems (institution of agreements), which has led to the humanization of criminal law in Ukraine and protection of rights participants in criminal proceedings.[24] In world practice are used a sufficient number of alternative methods of dispute resolution, including such procedures as: appointment of an expert, negotiations, negotiations with a mediator (facilitated negotiations or assistance), conciliation, mediation, litigation, mini-litigation, establishment facts, dispute commissions, private litigation, timely neutral assessment, multi-door court, pre-trial settlement conference, comprehensive jury trial, etc.

Alternative dispute resolution, which in its diversity represents a whole system of methods, means, methods of private settlement of relations between the parties. It should serve the purposes of justice, provide procedural guarantees for the protection of the rights and interests of the parties and improve the resolution of disputes. The urgent task of the modern judiciary of Ukraine is the effective and rapid resolution of conflicts. The development and application of various methods of alternative dispute resolution will help solve this problem.

4 Conclusions

The existence in most countries of the world of alternative dispute resolution is to some extent positive for the parties to the conflict, because dispute resolution through arbitration, mediation, negotiation, consultation and other alternative dispute resolution allows to resolve it without state intervention and they can be solved much faster.

[23] Law Of Ukraine "On arbitration courts". 2004.
[24] ROMANOV, 2021.

Alternative dispute resolution can to some extent be a source of savings money for the state, as they exist independently and do not require funds to provide them from the state, while in Ukraine the system of commercial courts annually requires a fairly large cost of maintaining such courts. Resolving disputes through alternative methods also speeds up their resolution, but in some cases the process itself can be more expensive.

Alternative forms of dispute settlement should be based on the following international principles: the principle of cooperation, which is to identify the common interests of the parties and which is based on mutual concessions and the search for understanding; the principle of differentiation, in which the parties to a legal conflict may use alternative means individually, in combination or in a certain order; and the principle of confidentiality, which establishes the secrecy of each alternative procedure. Alternative resolution of legal disputes and conflicts can be successful only if there is constant and close cooperation with civil society institutions. Such interaction will create an active civil position, increase public confidence in alternative dispute resolution, conflict resolution and contribute to the normalization of relations in various spheres of public life.

Formas alternativas de resolução de litígios e sua aplicação na Ucrânia

Resumo: A resolução de conflitos jurídicos é uma das principais tarefas de qualquer Estado. Esta função é, na maioria dos casos, confiada ao judiciário, mas, como mostra a experiência, o tribunal por si só não pode garantir o funcionamento eficaz do sistema de resolução de litígios. Para todo estado democrático, a disponibilidade de uma alternativa é importante, e o sujeito de direito deve ser capaz de escolher as formas de resolver os litígios jurídicos. Hoje no mundo existem formas alternativas de resolução de disputas como: arbitragem, mediação, consulta, negociação, intersessão, procedimento de conciliação e outros. O objetivo do artigo é identificar as vantagens e desvantagens dos métodos alternativos de resolução de disputas. O artigo analisa a literatura sobre o tema, além de apresentar as características das formas alternativas de resolução de conflitos, o que permite identificar suas vantagens e desvantagens como procedimento jurídico. A existência na maioria dos países do mundo de resolução alternativa de litígios é, em certa medida, positiva para as partes em conflito, porque a resolução de litígios por meio de arbitragem, mediação, negociação, consulta e outras formas alternativas de resolução de litígios permite resolvê-lo sem intervenção do Estado e podem ser resolvido muito mais rápido. A resolução alternativa de disputas pode, até certo ponto, ser uma fonte de economia de dinheiro para o estado, pois existem de forma independente e não exigem fundos para fornecê-los do estado, enquanto na Ucrânia o sistema de tribunais comerciais exige anualmente um custo bastante grande de manutenção de tais tribunais.

Palavras-chave: Judiciário; direito civil; arbitragem; resolução de conflitos; legislação estadual

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