Formation and Development of ADR in Some Foreign Countries and in Uzbekistan

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Abstract:

The article is devoted to Alternative dispute resolution, their features and characteristics. The analysis of the emergence and development of the institution of alternative dispute resolution is carried out on the example of foreign countries and Uzbekistan, as well as its current state.

Key words: *Alternative Dispute Resolution, judicial and out-of-court dispute resolution, United States Code, The Uniform Mediation Act, community, panchayat, aksakals, biys institute, mahalla, conciliation commission, mediation*

The system of out-of-court dispute resolution or alternative dispute resolution mechanisms - ADR (Alternative Dispute Resolution) - has existed in many foreign countries for many decades. ADR refers to a wide range of dispute resolution mechanisms that do not duplicate litigation and are alternative to them. The institution of alternative dispute resolution dates back to ancient times. At certain periods of its historical development, various forms of dispute resolution arose in society, they represented a whole system of methods and procedures capable of resolving a conflict situation.

Some authors believe that alternative methods of resolving disputes are based on the principles of conciliation, and such methods without the intervention of jurisdictional bodies, outside of the formal procedure, are called alternative dispute resolution, since they act as a kind of alternative to the official justice of the state.[1, p.12]. Apparently, the application of the principle of conciliation excludes the transfer of a dispute from a given legal event to the resolution of an arbitration or arbitration court.

Traditionally, the United States has been the first country to have various programs to develop alternative dispute resolution procedures. The term "alternative dispute resolution" "Alternative Dispute Resolution" is a translation of the term "alternative dispute resolution" (international abbreviation - ADR) used in legislative theory and practice in USA. The term was used in the United States to refer to informal and flexible procedures for resolving disputes that arise, as an alternative to complex and time-consuming litigation.The main goals of such programs were aimed at unloading the law enforcement system and assisting the parties in resolving disputes.Public and religious communities, as initiators and participants, were the first to be nominated for the implementation of the programs.

"Unconventional" dispute resolution processes began to develop in the United States in the 1970s and 1980s. XX century.According to § 651 sec. 28 U.S.C., an ADR process is any procedure other than the administration of justice by a presiding judge, in which a neutral third party participates to assist in resolving a dispute[2, p20].

Thus, alternative dispute resolution in the United States appeared in the early 1970s. as an initiative "from below", which later predetermined the decentralization of legal regulation. Local governments in some states supported the programs, as a result of which the courts were involved in their implementation.The spread of mediation in the United States can be divided into three periods:

1) initially, the population needed an out-of-court dispute settlement procedure as an alternative to court proceedings;

2) then in political science and jurisprudence this need was recognized and methods of mediation were developed as an independent and clearly structured service; then this need was recognized in political science and jurisprudence, methods of mediation were developed as an independent and clearly structured service;

3) the services turned out to be interesting for those parties to the dispute who were not initially interested in alternative dispute resolution. As a result, mediation and mediation, as its professional form, have become one of the key elements of American culture [3, p86–87].

In 1990, the State of Georgia established the Joint Commission on Alternative Dispute Resolution, which was exploring the possibility of introducing alternative dispute resolution in litigation and launching programs as an experiment.These actions prompted the Georgia Supreme Court to pass rules governing the use of alternative forms of dispute resolution in the state.The Plan of Rules provided for the creation of a special body - the Commission for the Settlement of Disputes.The activities of the Commission consisted of: development of principles for certification of ADR programs and their certification, development of training standards and ethics of behavior of intermediaries.The courts were invited to adopt their own ADR programs and submit them for approval by the Commission.The plan did not establish one single form of mediation, but the courts were allowed to create programs tailored to the specific needs of local communities.

In 1972, the Society of Professional Dispute Resolution Mediators was formed in the United States.Under the authoritative association - the American Bar Association, a Special Committee (Special Committee on the Resolution of Minor Disputes) was created in 1977 [4].Today, federal regulation of ADR is carried out on the basis of the Uniform Mediation Act, which was adopted in 2001[5].

ADR is actively developing in Canada, India, that is, in countries with the Anglo-Saxon legal system.

The concept of mediation was first enshrined in Indian law in the Industrial Disputes Act.Pursuant to the Act, the designated examples were assigned "the duty of mediating and encouraging the settlement of industrial disputes".In 1987, the Legal Aid Bodies Act was passed, establishing the National Legal Aid Authority under the patronage of the Chief Justice of the Supreme Court. Among other things, the body should "encourage the resolution of disputes through negotiation, arbitration and conciliation".In 1996, the Arbitration and Conciliation Act was passed. The provisions on the ADR were introduced into the Code of Civil Procedure of 1908 [6].

The first special laws governing alternative procedures in Western Europe appeared only in the 1990s. The process of introducing alternative institutions is developing in almost all countries.

Until the late 1990s in Germany, interest in alternative dispute resolution was significantly low, and mediation was mainly used in divorce disputes. Interest in an alternative dispute resolution procedure arose in 1979 at the annual Congress of Judges in Essen.In 1981, the Supreme Court noted that the high efficiency of the judiciary can be enhanced through alternative dispute resolution procedures, in particular through mediation[7].

Alternative dispute resolution legislation in Italy is relatively recent.The basis was the law that regulated mediation in corporate and insurance disputes No. 38 of January 17, 2003. The provisions of the law were developed by two decrees of the Ministry of Justice of 23.07.2004 No. 222 and No. 223, which regulated the system of maintaining a register of mediators and paying for compulsory services for public intermediary organizations. On July 24, 2006, a decree was adopted, which determined the conditions under which intermediary organizations were entered into the register of mediators [8].

In Spain, there was no legal regulation of alternative dispute resolution until 2012. The Civil Procedure Act 2000 stipulated that within one year of the entry into force of this Act, the Government would submit to the Cortes General a Voluntary Jurisdiction Bill (Leysobrejurisdicciónvoluntaria). In 2002, an editorial commission was created under the General Commission for Codification, which developed the draft law. Its text was submitted as a draft by the Ministry of Justice and published in October 2005. When the bill passed through the Justice Commission and the Senate, more than 500 amendments were proposed, and as a result the law was withdrawn by the government [9, p.112]. Today in Spain there are a number of normative legal acts that regulate the institution of mediation, the specificity of which depends on the nature of the delimitation of powers between the central and regional authorities.

The development of alternative procedures in some countries took the form of an appeal to the traditional system of conflict resolution.For example, in India, the panchayat activity is seen as a prototype - organs composed of the richest, most influential or oldest members of society, called upon to resolve differences.The Panchayats sought to resolve disputes on the basis of tribal laws and common interests of the clan, while maintaining harmony and prosperity [9, p.112].

In Kyrgyzstan, in 2002, the Law "On the courts of aksakals" was adopted, which in particular emphasized the connection of this institution with "the customs and traditions of the peoples of Kyrgyzstan" [9, p. 113]. The importance of this institution is due to its remoteness from the centers of rural areas of the region, where there are no qualified lawyers and the public does not have access to legal information.Minor disputes in rural areas, if not resolved in a timely manner, can lead to large-scale conflicts in which relatives can be involved, which can ultimately develop into intolerable enmity between families with all the ensuing consequences. Therefore, in the early stages of the development of a conflict, especially in rural areas, it is very important to organize the informal activities of aksakal courts to resolve all conflicts through persuasion, public influence, achieve reconciliation between the parties and make a fair decision that does not contradict the law, although, of course, the activities of these bodies are not devoid of and some shortcomings [9, p.112].

As Z.O. Madybaeva points out, the settlement of inter-tribal disputes and conflicts, according to an unwritten law, was traditionally inherent in Kazakhstani society as well. The biys institute, which existed in the 18th century for several centuries, is considered a historical prerequisite for the development of alternative methods of resolving disputes in Kazakhstan, in particular mediation.The court of biys, as a court of high morality, is built on such principles as the integrity of a judge, justice, as the essence and moral orientation of a court decision, openness and transparency of the court, the ability of a judge to speak, that is, mastery of public speaking as a means of proving and substantiating court decisions, assistance court to reconciliation of the parties and full compensation for damage caused by the violation. The biys court was characterized by a peculiarity - in its spirituality: when resolving disputes, biys strove, first of all, to adhere to the moral foundations prevailing in society.

Thus, new alternative methods of dispute resolution have appeared (mediation and participatory procedures), settlement agreement as a traditional method has received a more detailed legislative

regulation. Against this background, arbitration is successfully developing, which after the adoption of the new Code of Civil Procedure of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan dated April 8, 2016 "On Arbitration" became the only non-state jurisdictional body that has the right to make binding decisions [10].

In Uzbekistan, the «mahalla» has long been an important institution for settling disputes.Mahalla is a whole system of relationships between residents of one quarter that has existed in Uzbekistan for many centuries and has had a significant impact on the development of Uzbek traditions and their daily life. In a way, it is a social institution in the form of a community, united in a small area. Elders who have lived there have long been tasked with resolving conflicts between neighbors, family members, and spouses.Today, this role is played by the conciliation commissions operating under the citizens' self-government bodies. The Law “On Arbitration Courts” [11], adopted in 2006, became the first sign in the legal system of Uzbekistan, when the institution of alternative dispute resolution was legislatively enshrined. The phased introduction of the institution of mediation into the legal system of Uzbekistan as a new way of an alternative method of resolving disputes was associated with the adoption in 2018 of the Law of the Republic of Uzbekistan "On Mediation" [12].

Thus, in countries where the state encouraged mediation, appropriate services could be created under the courts or administrative bodies. In other countries, they were not supported by the courts, but by ministries or independent agencies. Although mediation developed independently of the authorities, it was initially provided by professional counselors and social workers working in local communities, but their activities could be coordinated by the national authorities. In some states, mediation was carried out by independent services, respectively, there was no general model [13, p.113].

However, alternative dispute resolution methods cannot completely replace the judicial system. This aspect is highlighted in the Recommendations of the Committee of Ministers of the Council of Europe on mediation in civil matters. Even if the parties resort to mediation, the state must provide access to the judicial system, as this provides the parties with a final guarantee that their rights will be protected.

The legal literature indicates some restrictions on the use of the institution of alternative dispute resolution. Alternative forms are not suitable for disputes involving complex legal issues, they are more applicable in situations where facts are established rather than rights. Alternative means are ineffective in resolving disputes with a large number of persons representing one of the parties, since it is difficult to reach an agreement between the parties to the dispute, and if there are many of them, the task becomes more complicated. Sometimes the proposal of one party to use alternative forms of dispute resolution is perceived by the other party as a manifestation of weakness, admission of guilt, and evasion of consideration of the dispute in a state court. The application of these methods always requires cooperation between the parties. On the one hand, this is a virtue, on the other, a limiting fact. If the parties do not want to make contact with each other, there is no point in using alternative methods. Restraining reasons include the creation of a judicial precedent by one of the parties, the desire to draw public attention to the problem or abuse, or the need for “delayed tactics” when a delay in resolving the dispute is beneficial to any party [13, p.114].

Having analyzed the development of ADR in Uzbekistan and in foreign countries, it should be noted that the peculiarities of alternative methods of resolving disputes are that the dispute is not resolved on the merits and no decision is made by any body, the parties to the conflict voluntarily liquidate the dispute (conflict), is carried out in judicial or extrajudicial procedure, the result of which is the development of an agreement. The authors also highlighted the features inherent in ARS: 1) a certain order of implementation; 2) the goal is the settlement of the dispute (disagreements); 3) the parties

must be actively involved; 4) the initiative to use and the choice of a specific conciliation procedure depends on the parties themselves.

References:

1. Бельская И. А. [и др.]; под ред. У.Хелльманна [и др.]. Теория и практика медиации (посред ничества) в экономической сфере: учеб.метод. пособие – Минск, 2015. – С. 12.
2. Основы альтернативного разрешения споров. Учебное пособие для ВУЗов. / В. И. Самарин, О. В. Мороз, А. Г. Авдей, И. А. Бельская, А. М. Вартанян, О. Н. Здрок, В. С. Каменков, И. Ю. Кирвель, Г. М. Третьяков, Т. Г. Хатеневич. – Минск БГУ, 2015. – С.20.
3. Медиация в нотариальной практике (Альтернативные способы разрешения конфликтов) / П. Фар [и др.]. М., 2005. С. 86–87.
4. Mediation Law and Practice // Spencer D., Brogan M. Mediation law and practice. Cambridge University Press, 2007.
5. The Uniform Mediation Act // https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9b244b42-269c-769e-9f89-590ce048d0dd&forceDialog=0.
6. Bhatt Niranjan J.Court Annexed Mediation // http://lawcommissionofi ndia.nic.in/adr_conf/niranjan%20court% 20annx%20med13.pdf.
7. Funken K. Comparative Dispute Management: Court-connected Mediation in Japan and Germany // 3 German Law Journal. № 2 (01 February 2002) — Private Law.
8. Buizza R. Mediation in the Italian Legal System // http://www.cpradr.org/Portals/0/ mediation intheitail anle galsystem.pdf.
9. С.С. Сулакшин, Е.Э. Буянова, В.В. Кулаков, М.Ю. Погорелко, Е.С. Сазонова, В.Л. Толстых, С.Ю. Филиппова Альтернативные способы разрешения споров между субъектами предпринимательской деятельности. — Монография. М.: Научный эксперт, 2013.
10. З.О.Мадыбаева Медиация, как один из способов альтернативногоразрешения споров // https://online.zakon.kz/Document/?doc_id=31651042#pos=20;-35.
11. Закон Республики Узбекистан О третейских судах от 16.10.2006 №ЗРУ-64 // Национальная база данных законодательства, 30.01.2018 г., № 03/19/531/2799.
12. Ibragimova Dildora Shamsiddinovna. English for Specific Purposes/ Journal of Contemporary Issues in Business and Government//. 2021. Vol 27 №5 p 754-758.
13. С.С. Сулакшин, Е.Э. Буянова, В.В. Кулаков, М.Ю. Погорелко, Е.С. Сазонова, В.Л. Толстых, С.Ю. Филиппова Альтернативные способы разрешения споров между субъектами предпринимательской деятельности. — Монография. М.: Научный эксперт, 2013. — с.113.
14. Батирова К. ПРАВОВЫЕ ОСОБЕННОСТИ ИСЛАМСКИХ ЦЕННЫХ БУМАГ (СУКУК) //Review of law sciences. – 2020. – Т. 2. – №. Спецвыпуск.
15. Хакбердиев А. А. Понятие криминальной инсценировки, его элементы, методы обнаружения и расследования //review of law sciences. – 2020. – №. 4.

16. Хайрулина А., Хабибуллаев Д. Медиация как новый вид альтернативных способов разрешения споров в Узбекистане //Общество и инновации. – 2021. – Т. 2. – №. 3/S. – С. 494-501.
17. Асаль Хайрулина, Давлат Хабибуллаев Медиация как новый вид альтернативных способов разрешения споров в Узбекистане // ОИИ. 2021. №3/S. URL: https://cyberleninka.ru/article/n/mediatsiya-kak-novyy-vid-alternativnyh-sposobov-razresheniya-sporov-v-uzbekistane(дата обращения: 27.07.2021).
18. Xayrulina A. B. International law: legal aspects of the protection of women's rights in UN system //Review of law sciences. – 2018. – Т. 3. – №. 1. – С. 14.
19. Khayrulina A. Legal aspects of the protection of women's rights within UN system //TSUL Legal Report International electronic scientific journal. – 2020. – Т. 1. – №. 1.
20. Хайрулина А. Б. Международно-правовые аспекты защиты прав женщин в системе ООН //ЖУРНАЛ ПРАВОВЫХ ИССЛЕДОВАНИЙ. – 2019. – №. SPECIAL.
21. Мамараимова Г. М. Проблемы наследования интеллектуальных прав доменных имен по законодательству Республики Узбекистан //Журнал правовых исследований. – 2020. – Т. 5. – №. 2.
22. Мамараимова Гулрух ПРАВОВЫЕ ПРОБЛЕМЫ ТРАНСГРАНИЧНОГО НАСЛЕДОВАНИЯ ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ // Review of law sciences. 2020. №Спецвыпуск. URL: https://cyberleninka.ru/article/n/pravovye-problemy-transgranichnogo-nasledovaniya-intellektualnoy-sobstvennosti (датаобращения: 27.07.2021).
23. Мамараимова Гулрух ПРАВОВЫЕ ПРОБЛЕМЫ ТРАНСГРАНИЧНОГО НАСЛЕДОВАНИЯ ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ // Review of law sciences. 2020. №Спецвыпуск.
24. Mamaraimova G. INHERITANCE ISSUES OF NON-PROPERTY (MORAL) RIGHTS OF INTELLECTUAL PROPERTY // Norwegian Journal of Development of the International Science. 2021. №65-1. URL: https://cyberleninka.ru/article/n/inheritance-issues-of-non-property-moral-rights-of-intellectual-property (дата обращения: 27.07.2021).
25. Mamaraimova G. INHERITANCE ISSUES OF NON-PROPERTY (MORAL) RIGHTS OF INTELLECTUAL PROPERTY // Norwegian Journal of Development of the International Science. 2021. №65-1.