ČLOVEK A SPOLOČNOSŤ
Internetový časopis pre pôvodné teoretické a výskumné štúdie z oblasti spoločenských vied
ISSN 1335-3608

Modern international Tendencies for improving the Non-judicial Protection Forms

Kateryna Tkach, CivilProcedure Department, Yaroslav the Wise National Law University, Kharkiv, tkach@uriffm.org.ua

TKACH, Kateryna. Modern international Tendencies for improving the Non-judicial Protection Forms. Individual and Society, 2015, Vol. 18, No. 1.

The author reports the peculiarities of alternative (non-judicial) dispute resolution in the article. The influence of worldwide tendencies to widening and improvement of non-judicial forms of the rights protection on national legislations by way of the civil procedure reform of England and Wales example is researched. The development of alternative procedures on the international level is analyzed.

Alternative dispute resolution (ADR). Civil Procedure Rules (CPR) 1998 for England and Wales. Non-judicial forms of rights protection. Mediation in civil cases.

In the current context of general globalization, cooperation between national and international civil procedure deepens substantially that causes diffusion of certain legal institutes. The processes of globalization are manifested not only in the standardization of legislative activity, but also in increasing the *"processing in legal regulation, resulting in expanding the scope of the procedural regulation, increasing the amount of procedural rules, complication of procedure of perfection of judicial form"*.[1] At the national level in Europe, gradual modernization of civil procedural legislation started based on fundamental principles of civil procedure that improve access to justice which include: the principle of independence and impartiality of judges, the principles of publicity, discretionary, competitiveness, procedural equality of the parties; existence of alternative ways of resolving civil cases with further control over the correctness of the decisions of the judiciary[2] through the mechanisms of differentiation and simplification of judicial procedures;[3] proportionality and availability of court costs for citizens; timeliness of cases resolution, reduction of procrastination; introduction of alternative capabilities for resolution of cases,[4] law fixation of independence of existence for conciliation procedures and for the possibility of discretionary application for meditative consideration of the case by parties,[5] and others. Thus, the Recommendation No R (81) 7 of the Committee of Ministers of the Council of Europe to member states on ways to facilitate access to justice on May 14, 1981 proposes to facilitate or encourage, where appropriate, conciliation or amicable settlement of the dispute before taking it to the proceeding or pending.[6] Thus, the occurrence of extra-judicial review and resolution of disputes was a logical response to the growing influence of globalization on civil procedure both on transnational and local levels.

The concept of ADR (Alternative dispute resolution) appeared in the American legal doctrine and viewed as a form of non-state disputes consideration, some analogue to existing court. ADR includes both arbitration proceeding of cases and independent dispute resolution by the parties or by third party involved. In the USA there are about 2500 normative acts that regulate the activity of ADR both at national level and specifically for each of the states. The Federal Rules of Civil Procedure state that pre-trial dispute settlement procedure may be conducted both by judges and by persons appointed by the

court for that purpose.[7] In 1998, the USA adopted the Law on alternative dispute resolution indicating that the alternative dispute resolution includes a procedure (in addition to case proceeding and adopting the decision by the court), in which a neutral third party is involved to assist in the consideration and resolution of the dispute. The forms of such participation include independent expert examination, mediation, mini-court, and arbitration.[8]

In England and Wales, enhancing the role of alternative dispute resolution procedure in the event of a dispute was caused by extensive reform of civil procedure and the Civil Procedure Rules 1998 implementation. Lord Woolf, who is considered the developer of the Rules, declared that one of the goals of reforming the civil justice system is a creation of the new system that would not only allows the parties to resolve their dispute without the use of judicial proceedings and also pinned their obligation to try to reach an agreement on early step through mutual cooperation.[9]

In recent years, the use of alternative dispute resolution procedure in England and Wales has spread considerably. In his interim report on justice accessibility Lord Woolf noted, that perception of the fact that disputes resolution through the courts is not the only way to obtain the expected result became the main reason for a detailed study of alternative procedure, determining the limits of its application and forms of existence. Also important is a practical significance for court of such dispute resolution.

Alternative dispute resolution procedure has absolute advantages over the court one, which is manifested not only in significant parties' cost and time savings, but also in the ability to avoid, if the parties wish, the publicity. An alternative procedure promotes joint efforts of the parties and facilitates obtaining the compromise result that will satisfy them, unlike the court's decision that will be unprofitable for one of the parties at least.

However, despite the marked qualities of ADR, it should not be an obligatory preparatory condition or prerequisite when applying a claim to court. Binding of such procedure in the United States of America is the result of lack of judicial resources in dealing with civil cases.[10]

Forms of alternative dispute resolution procedures include very similar to court's ones (and judicial decisions of which shall be obligatory for the parties) and forms which offer more flexible approach to dispute resolution. The scope of alternative procedures is varied, from small domestic disputes to disputes arising in international business. An appeal to ADR is possible before the proceeding of cases in court, and in the process. The main forms of alternative dispute resolution procedure, as noted by Lord Woolf, are: arbitration, administrative tribunals, mini-court, ombudsman, and mediation.

Activities of arbitration are defined by law and have a close relationship with judicial activities. Arbitration is usually resolves commercial disputes, and its decisions are obligatory for the parties.

Administrative tribunals are subordinated to courts and are not a form of alternative dispute resolution in the sense of additional opportunities for the parties to resolve the conflict, because their jurisdiction usually precludes judicial one. Administrative tribunals however provide a fast, affordable and less formal procedure for disputes resolving.

Mini-courts which first appeared in North America can be both private and judicial authorities. They will be presided over by employees of the judicial system or by independent experts. This process would involve simplified procedure for offer of proof made by the authorized representatives of the parties.

The duties of the Ombudsman (Parliamentary Commissioner for Administrative Commission, appointed by the Parliament) include investigation of complaints about public institutions, about providing services in both the public and private sectors, providing recommendations. Complaint submission to the Ombudsman does not preclude the possibility of access to the court.

Mediation is the procedure of case proceeding by private or voluntary organizations (58). Since 1980 there were discussions of the mediation. The supporters of mediatory dispute resolving stressed its advantages over court proceeding. Despite this, the Government and the judiciary have drawn attention to the features of mediation only in the 1990s, when the analysis of practice has shown that mediation can not only reduce the costs of the parties and speed up proceeding of cases, but also significantly reduce the burden on the courts.[11] Unlike other forms of alternative conflict resolution, mediatory proceeding of cases does not lead to compulsory adjudication, but rather is a means of motivation to negotiate where an independent and impartial arbitrator helps parties to find a decision advantageous for them, which sometimes cannot be obtained under strict compliance with the law.[12] Mediatory

proceeding of the cases is the ideal mechanism to resolve disputes between relatives and in the family business. Companies applying for dispute resolution to the Commercial or the Trade Court, to the Technology and Construction Court to obtain an equitable and acceptable decision does not often intend to scrupulously comply with the passing of each stage of the trial.[13] The efficiency of the institution of mediation affected by voluntariness of application, level of parties' preparation to mediation, impartiality and independence of mediators and transparency of the procedure, professional quality of mediators who should not raise doubts for each of parties.[14] Mediation becomes the popular way for proceeding of disputes, leading to a significant reduction of the burden on the court and receiving mutually beneficial decision for parties.

According to Art 1.4. (2) (e) of the Civil Procedure Rules,court bears now liabilities for stimulating the parties on appeal to the alternative dispute resolution (if the court finds the possibility of the application and support) and for assistance to the parties if alternative procedure is used. In resolving the issue related to costs distribution, the court should take into account, among other circumstances, the parties' attempt to pre-trial dispute resolution (Art. 44.5 (3) CPR). In the case of Dyson and Field v Leeds City Council (22 November 1999), The Court of Appeal has reminded the parties that incurred costs can be much lower when using the alternative proceeding procedures.[15] In the case of Dunnett v Railtrack (2002, EWCA Civ 302),[16] the Court of Appeal dismissed the recovery of legal costs in favor of the party which had won the case, because the party did not agree to try to resolve the dispute out-of-court. The court found that the parties and their representatives should be aware that approval of alternative procedure is their duty, especially in cases where the court indicates to it directly.[17] These cases demonstrate the role of alternative dispute resolution and accordingly the possibility to detach out-of-court disputes proceeding in a separate stage.

However, in spite of all the advantages of mediation, it is only an additional means of protection of violated rights, and it cannot in any way serve as a substitute for judicial trial as mediation sometimes takes a lot of unnecessary costs and prevents further judicial recourse. Effective functioning of alternative dispute resolution is possible only if there is a kind of established court "safety" with its influence and enforcement mechanisms.[18]

The role of alternative dispute resolution mechanisms is also indicated by the Pre-Action Protocol admitted by the Civil Procedure Rules, which records the basic conduct of parties to share information on trial planned and whose main purpose is to help the parties to ascertain the full circumstances of the case for further pre-trial resolution of the dispute.[19] The Rules provide the definition of the pre-action protocol as *"an agreement between the lawyers and other persons on pre-trial operations which provided by Practice Directions"*. Pre-action protocol provides discussion to the parties on the possibility of out-of-court resolving the dispute. The approved pre-action protocols for specific areas of practice are annexed to the Rules. The CPR defines the protocols as statement of intentions of lawyers or other persons over a certain dispute and future case. Thus, the CPR contains a list of cases where the parties are advised to conclude pre-action protocols. Basic and common forms of certain procedural documents are also annexed to the Rules.[20]

It is necessary to pay attention to the studies conducted by the Advisory Services Alliance regarding alternative forms of dispute resolution. The report highlights that the application efficiency and the number of appeals to the alternative procedures depend on many factors, total progression of which influences the citizens' choice of form for protection of their rights. Before contact a lawyer, a person should know the amount of information at this stage. Upon consultation important is to provide detailed information on availability of out-of-court mechanisms for conflict resolution. If, however, a person decides to go to a court, one should be provided with information on availability of pre-action protocols, as some of them (e. g., protocols for disputes in the medical field) oblige the parties to refer to alternative procedures. Most pre-action protocols require the parties to negotiate for economic resolution of dispute without the use of judicial procedures. When applying to the court, an important role is plaid by court's initiative in the development and offering of mediation procedures to participants. If, however, there is a trial, even at this stage, the court assessing the prospects for further proceedings may propose an alternative method of dispute resolution to the parties or encourage the parties to negotiate independently giving them the time.[21] Thus, the competence of lawyers in the specified range of issues, initiative of judges at all stages of the proceedings, and therefore public awareness about the algorithm to use out-of-court methods of protection are the main components of the efficacy of alternative dispute resolution.

Analysis of non-judicial proceedings allows to set the following general rules for alternative dispute resolution procedure: the parties are obliged to discuss variants for non-judicial conflict resolution;

parties should really be aware of the possibility of alternative proceeding that must be supported by both parties' attempt to resolve the dispute before go to court; the judge decides whether the rejection of mediation is reasonable and justified, which further would affect the possibility of the parties to avoid penalties imposed by the wanton disregard for alternative methods.[22]

In summary, we can distinguish general characteristics of alternative dispute resolution mechanisms. One of the main features is voluntary, combined with control of the court for the implementation of legally provided mechanisms of pre-trial reconciliation and with further consideration the conduct of parties when making a decision. The next features are the effectiveness and immediacy of the proceedings that, against the general procedural defects of procrastination and expensiveness of the trial, is the best way to overcome the problem. Alternative procedures are also characterized by efficiency and conflict-free relations.

The strengthening of the role of alternative dispute resolution is specified in the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. The objective of this Directive, as stated in Article 1, is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. The Directive provides criteria for cases where a court refers parties to mediation, lists the basic principles of proceeding and resolution of disputes using mediation.

Alternative dispute resolution procedures are becoming more widespread at the global level, as evidenced by a number of legal acts permanently adopted in this field both nationally and internationally, the diversity of such cases, the study of the efficiency and effectiveness of programs for the introduction of non-judicial forms of rights protection.

References:

Advice Services Alliance. Alternative Dispute Resolution. Recent Developments in Alternative Dispute Resolution. Update No. 27 May 2009. 9 p. Available at: http://www.asauk.org.uk/fileLibrary/pdf/adr27.pdf

Alternative Dispute Resolution Act of 1998. Available at: http://www.epa.gov/adr/adra_1998.pdf

Alternative Dispute Resolution. Policy Consultation Paper, June 2003. Available at: http://www.asauk.org.uk/fileLibrary/pdf/adrcons002.pdf

BURYI, A. – VASYUTA, M. – TARATULA, R. *Monitoring dostupnosti sudu. Raport z monitoringu.* [Monitoring of the availability of court. Monitoring Report]. Lviv, Regionalnij gromadskij fond Pravo i Demokratiya, 2007. 82 p.

CAPPELLETTI, M. – GARTH, B. Access to justice: the Worldwide to make rights effective. In *Access to justice.* CAPPELLETTII, M. (general ed.). Milan : Alphenaandenriin, 1978, vol.1.

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Available at: http://zakon3.rada.gov.ua/laws/show/994_a95

Dunnett v Railtrack (2002, EWCA Civ 302) Available at: http://www.civilmediation.org/files/pdf/Dunnett%20v%20Railtrack%20plc.pdf

Evropejskij forum po dostupu k pravosudiyu [The European Forum on Access to Justice, Budapesht, 5. – 7. 12. 2002]. (Forum materials). Budapesht, 2002. Available at: http://www.pili.org/ru/content/view/20/36/.

GENN, H.*Solving Civil Justice Problems. What might be best?*Scottish Consumer Council Seminar on Civil Justice, January, 19, 2005, p.3-4. Available at: www.ucl.ac.uk/laws/academics/profiles/docs/genn_05_civil_justice_problems.pdf

HESS, B. Verbrauchermediation. In *Zeitschrift für Zivilprozeß* 2005, 118, p. 427-459.

JACKSON, R. *Review of Civil Litigation Costs: Preliminary Report*. Volume One. The Stationery Office. May 2009. 372 p.

KUDRJAVCEVA, E. V. *Sovremennaja reforma anglijskogo grazhdanskogo processa: avtoreferat dissertacii na soiskanie uchenoj stepeni doktora juridicheskih nauk* [Modern reform of the English civil procedure: the thesis abstract on scientific degree of Doctor of Law]. Moscow, 2008. 52 s. Available at: http://www.law.msu.ru/doc/kudryavceva.pdf

LOUGHLIN, P. – GERLIS, S.*Civil Procedure*. Second edition. London : Cavendish Publishing Limited, 2004. 679 p.

NESIC, M. Mediation – On the Rise in the United Kingdom. In*Bond Law Review,*Vol. 13, Iss. 2, Article 10.

Available at: http://www.austlii.edu.au/au/journals/BondLRev/2001/20.html

Rekomendacii Komiteta ministrov Soveta Yevropy ot 14 maya 1981 goda № R(81)7 «Komitet ministrov – gosudarstvam – chlenam otnositelno putej oblegcheniya dostupa k pravosudiyu» [Recommendation No. R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice adopted by the Committee of Ministers of the Council of Europe on 14 May 1981]. Rossijskaya yusticiya, 1997, No. 6.

Robert Alan Dyson v Leeds City Council In *Alternative Dispute Resolution Law Reports*, 22nd November 1999. Available at:

http://www.nadr.co.uk/articles/published/AdrLawReports/DYSONvLEEDS1999.pdf

ROZHKOVA, M. A. – YELISEEV, N. G. – SKVORTSOV, O. YU. *Dogovornoe pravo: soglashenija o podsudnosti, mezhdunarodnoj podsudnosti, primiritel'noj procedure, arbitrazhnoe (tretejskoe) i mirovoe soglashenija* [Contract law: agreements on jurisdiction, international jurisdiction, conciliation, arbitration and the settlement agreement]. Moscow : Statut, 2008. 283 p.

VOROBYOVA, Ye. S. Razvitiye alternativnykh sposobov uregulirovaniya sporov v Rossii v usloviyakhglobalizatsii [Development of alternative dispute resolution in Russia in the context of globalization]. In *Pravo: istoriya, teoriya, praktika : materialy mezhdunar. zaoch. nauch. konf.* (Proc. Int. Sci. Conf. “Right: history, theory, practice”). St. Petersburg : Renome, 2011, pp. 6-9.

WILLIAMS, V. (Ed.) *Civil Procedure Handbook 2008/2009*. Oxford : Oxford University Press, 2008. 1168 p.

WOOLF, L. *Access to justice: Interim Report. Lord Chancellor’s Department, June 1995*.Available at: http://www.dca.gov.uk/civil/interim/contents.htm

---

[1] VOROBYOVA, Ye. S. Razvitiye alternativnykh sposobov uregulirovaniya sporov v Rossii v usloviyakhglobalizatsii [Development of alternative dispute resolution in Russia in the context of globalization]. In *Pravo: istoriya, teoriya, praktika : materialy mezhdunar. zaoch. nauch. konf.* (Proc. Int. Sci. Conf. “Right: history, theory, practice”). St. Petersburg : Renome, 2011, pp. 6-9.

[2] BURYI, A. – VASYUTA, M. – TARATULA, R. *Monitoring dostupnosti sudu. Raport z monitoringu*. [Monitoring of the availability of court. Monitoring Report]. Lviv : Regionalnij gromadskij fond Pravo i Demokratiya, 2007, p. 9.

[3] *Evropejskij forum po dostupu k pravosudiyu*. [The European Forum on Access to Justice. Budapesht, 5. –7.12.2002]. (Forum materials). Budapesht, 2002. Available at: http://www.pili.org/ru/content/view/20/36/.

[4] CAPPELLETTI, M. – GARTH, B. Access to justice: the Worldwide to make rights effective. In *Access to*

justice. CAPPELLETTII, M. (general ed.). Milan : Alphenaandenriin, 1978, vol.1, p.41.

[5] HESS, B. Verbrauchermediation. In *Zeitschrift für Zivilprozeß* 2005, 118, p. 427-459.

[6] *Rekomendacii Komiteta ministrov Soveta Yevropy ot 14 maya 1981 goda № R(81)7* «Komitet ministrov – gosudarstvam – chlenam otnositelno putej oblegcheniya dostupa k pravosudiyu» [Recommendation No. R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice adopted by the Committee of Ministers of the Council of Europe on 14 May 1981]. Rossijskaya yusticiya, 1997, No. 6, p.4.

[7] ROZHKOVA, M. A. – YELISEEV, N. G. – SKVORTSOV, O. YU.*Dogovornoepravo: soglashenijao podsudnosti, mezhdunarodnojpodsudnosti, primiritel'nojprocedure, arbitrazhnoe (tretejskoe) imirovoe soglashenija* [Contractlaw: agreementsonjurisdiction, internationaljurisdiction, conciliation, arbitrationandthesettlementagreement]. Moscow : Statut, 2008, p. 173-174.

[8] *Alternative Dispute Resolution Act of 1998*. Available at: http://www.epa.gov/adr/adra_1998.pdf.

[9] LOUGHLIN, P. – GERLIS, S.*Civil Procedure*. Second edition. London : Cavendish Publishing Limited, 2004, p. 6.

[10] WOOLF, L. *Access to justice: Interim Report. Lord Chancellor's Department, June 1995*. Available at: http://www.dca.gov.uk/civil/interim/contents.htm

[11] GENN, H. *Solving Civil Justice Problems. What might be best?* Scottish Consumer Council Seminar on Civil Justice, January, 19, 2005, p. 3-4. Available at: www.ucl.ac.uk/laws/academics/profiles/docs/genn_05_civil_justice_problems.pdf

[12] WOOLF, L. *Access to justice: Interim Report. Lord Chancellor's Department, June 1995*.Available at: http://www.dca.gov.uk/civil/interim/contents.htm

[13] JACKSON, R. *Review of Civil Litigation Costs: Preliminary Report*. Volume One. The Stationery Office. May 2009, p.41-43.

[14] *Advice Services Alliance. Alternative Dispute Resolution. Recent Developments in Alternative Dispute Resolution*. Update No. 27, May 2009, p. 3.Available at: http://www.asauk.org.uk/fileLibrary/pdf/adr27.pdf

[15] Robert Alan Dyson v Leeds City Council. In*Alternative Dispute Resolution Law Reports*, 22nd November 1999. Available at: http://www.nadr.co.uk/articles/published/AdrLawReports/DYSONvLEEDS1999.pdf

[16] *Dunnett v Railtrack* (2002, EWCA Civ 302) Available at: http://www.civilmediation.org/files/pdf/Dunnett%20v%20Railtrack%20plc.pdf

[17] NESIC, M. Mediation – On the Rise in the United Kingdom. In *Bond Law Review*, Vol. 13, Iss. 2, Article 10. Available at: http://www.austlii.edu.au/au/journals/BondLRev/2001/20.html

[18] JACKSON, R. *Review of Civil Litigation Costs: Preliminary Report*. Volume One. The Stationery Office. May 2009, p. 43.

[19] KUDRJAVCEVA, E. V. *Sovremennaja reforma anglijskogo grazhdanskogo processa: avtoreferat dissertacii na soiskanie uchenoj stepeni doktora juridicheskih nauk* [Modern reform of the English civil procedure: the thesis abstract on scientific degree of Doctor of Law]. Moscow, 2008, p. 25. Available at: http://www.law.msu.ru/doc/kudryavceva.pdf

[20] WILLIAMS, V. (Ed.) *Civil Procedure Handbook 2008/2009*. Oxford : Oxford University Press, 2008, p.865, p.1029-1114.

[21] *Alternative Dispute Resolution. Policy Consultation Paper,* June 2003, p. 10. Available at: http://www.asauk.org.uk/fileLibrary/pdf/adrcons002.pdf

[22] GENN, H.*Solving Civil Justice Problems. What might be best?*Scottish Consumer Council Seminar on Civil Justice, January, 19, 2005, p.7-9. Available at: www.ucl.ac.uk/laws/academics/profiles/docs/genn_05_civil_justice_problems.pdf