

UDC: 351.87

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DOI <https://doi.org/10.31618/vadnd.v1i13.138>



EXPERIENCE OF ADVANCED COUNTRIES IN APPLICATION OF PRE-TRIAL SETTLEMENT IN CONSTRUCTION

Abstract. The paper highlights the practice of pre-trial settlements in the sphere of construction in advanced countries of the world. Specific features of scientific theoretical approaches to dispute settlement in construction works have been substantiated. The international experience of advanced countries in application of the mechanisms for alternative dispute resolution has been analyzed, and a comprehensive research into international legal acts has been conducted. The vector of priority directions and ways to introduce the alternative mechanisms in the conditions of the Ukrainian state are determined. It is proposed to achieve the desired results by applying the discussed forms under administrative system reform.

It is noted that today the Ukrainian state is only at the stage of creating an alternative dispute resolution model in construction. It is noted that the idea of introducing this practice in the domestic legal system is supported by a wide range

of specialists. Such an interest corresponds to the desire of Ukraine to harmonize national legislation. It is grounded that the definition of priority directions and ways of introducing alternative mechanisms in the field of construction in Ukraine is to apply foreign experience in the context of reforming the modern political system, namely decentralization. It is the application of the proposed model that should be implemented at the state, regional and local levels, legally consolidate it and solve urgent problems. Such a systematization, in my opinion, will lead to a more objective and perfect settlement of disputes over a short period of time. It is noted that nowadays there is a considerable scientific interest in this issue, the expediency of using alternative mechanisms in the Ukrainian state is solved. However, this is a rather controversial issue, so there is a need for a comprehensive study of experience in foreign countries and the identification of priority areas and ways of applying experience in modern conditions in Ukraine.

Keywords: pre-trial settlement, alternative dispute resolution, mediation, arbitration, Dispute Review Board, Dispute Adjudication Board.

ДОСВІД ЗАСТОСУВАННЯ ДОСУДОВОГО ВРЕГУЛЮВАННЯ СПОРІВ У СФЕРІ БУДІВНИЦТВА В РОЗВИНЕНИХ КРАЇНАХ

Анотація. Висвітлено досвід застосування досудового врегулювання спорів у сфері будівництва розвинених країн світу; обґрунтовано особливості науково-теоретичних підходів щодо врегулювання спорів у сфері будівництва; проаналізовано світовий досвід розвинених країн у застосуванні механізмів альтернативного вирішення спорів, а також здійснено комплексне дослідження міжнародно-правових актів зарубіжних країн; визначено вектор пріоритетних напрямів та шляхів впровадження альтернативних механізмів вирішення спорів в умовах української держави; запропоновано досягнення бажаних результатів шляхом застосування розглянутих форм в умовах реформування системи управління.

На сьогодні українська держава перебуває лише на етапі створення моделі альтернативного вирішення спорів у будівництві. Зазначено, що ідея запровадження даної практики у вітчизняній системі права підтримується широким колом спеціалістів. Подібне зацікавлення відповідає прагненню України до гармонізації національного законодавства. Обґрунтовано думку про те, що визначення пріоритетних напрямів та шляхів впровадження альтернативних механізмів у сфері будівництва в Україні полягає у застосуванні зарубіжного досвіду в умовах реформування сучасної політичної системи, а саме децентралізації. Саме запропоновану модель слід впроваджувати на державному, регіональному та місцевому рівнях, законодавчо закріпити її та вирішувати нагальні проблеми. Подібна систематизація, гадаємо, приведе до більш об'єктивного та досконалого врегулювання спорів за максимально короткий період часу. Зазначено, що нині спостерігається неабиякий науковий інтерес до даної проблематики, вирішується доцільність застосування альтернативних механізмів в українській державі. Однак, це досить дискусійне питання, тому

постає необхідність у комплексному дослідженні досвіду зарубіжних країн та визначенню пріоритетних напрямів, а також шляхів застосування досвіду в сучасних умовах в Україні.

Ключові слова: досудове врегулювання спорів, альтернативне вирішення спорів, медіація, арбітраж, колегія з розгляду спорів, рада з розгляду спорів, рада з врегулювання спорів, держава.

ОПЫТ ПРИМЕНЕНИЯ ДОСУДЕБНОГО УРЕГУЛИРОВАНИЯ СПОРОВ В СФЕРЕ СТРОИТЕЛЬСТВА В РАЗВИТЫХ СТРАНАХ

Аннотация. Отражен опыт применения досудебного урегулирования споров в сфере строительства развитых стран мира, обосновано особенности научно-теоретических подходов урегулирования споров в строительной деятельности; проанализирован мировой опыт развитых стран в применении механизмов альтернативного разрешения споров, а также осуществлено комплексное исследование международно-правовых актов зарубежных стран; определены вектор приоритетных направлений и пути внедрения альтернативных механизмов в условиях украинского государства; предложено достижения желаемых результатов путем применения рассмотренных форм в условиях реформирования системы управления.

Отмечено, что на сегодня украинское государство находится только на этапе создания модели альтернативного разрешения споров в строительстве. Отмечено, что идея введения данной практики в отечественной системе права поддерживается широким кругом специалистов. Подобный интерес отвечает стремлению Украины к гармонизации национального законодательства. Обосновано мнение о том, что определение приоритетных направлений и путей внедрения альтернативных механизмов в сфере строительства в Украине заключается в применении зарубежного опыта в условиях реформирования современной политической системы, а именно децентрализации. Именно применение предложенной модели следует внедрять на региональном и местном уровнях, законодательно закрепить ее и решать насущные проблемы. Подобная систематизация, по моему мнению, приведет к более объективному и совершенному урегулированию споров за максимально короткий период времени. Отмечено, что в настоящее время наблюдается большой научный интерес к данной проблематике, решается целесообразность применения альтернативных механизмов в украинском государстве. Однако, это достаточно дискуссионный вопрос, поэтому возникает необходимость в комплексном исследовании опыта в зарубежных странах и определении приоритетных направлений а также путей применения опыта в современных условиях в Украине.

Ключевые слова: досудебное урегулирование споров, альтернативное разрешение споров, медиация, арбитраж, колегия по рассмотрению споров, совет по рассмотрению споров, совет по урегулированию споров, государство.

Problem statement. Today there is an increasing number of necessary decisions to settle conflicts or to prevent them, as well as to develop a variety of private legal relations arising during the construction of new buildings. Therefore, improving the application of alternative means of dispute resolution, designed to ensure effective and efficient dispute settlement in the construction industry, is one of the priorities in the construction sector in the developed countries.

This question remains relevant to all countries of the world. In this regard, it is obvious that as of today the experience developed and accumulated in the developed and emerging countries is used to carry out certain reforms in the industry and use mechanisms for obtaining positive results. The experience can become the basis for similar reforms in Ukraine and significantly facilitate reforming process by avoiding the mistakes of others. It is true that at present the global trends of the use of pre-trial settlement of disputes in this field is a sort of guarantee of implementing the constitutional right of every citizen.

To be able to directly apply this experience in the territory of the Ukrainian state there is a need in comprehensive study of the guidelines and methodological features of the most effective ways of resolving disputes which are defined in the law of many countries. A thorough study of mediation, arbitration, application of amicable settlement and expert determination, and conducting a more detailed analysis of the main directions of functioning of the Dispute Review Board (DRB) and of the Dispute Adjudication Board (DAB) are seen as a direction of priority research.

Recent research and publications analysis. As of now, the ability of legal entities to set their own rules of conduct and to monitor their implementation are getting a particular importance in the regulation of social relations. Increasing responsibility of the parties and the growth of civil participants' activity allow the state to transfer a part of its powers in certain fields to the various civil society institutions. International experience clearly demonstrates that adjudication and resolution of legal disputes is one of such areas.

Forms of alternative dispute resolution, particularly negotiation, mediation, arbitration, and mixed forms, based on the theory combined with the strategies, ethics and laws are presented in "Resolving disputes. Theory, practice and law" by J. Folberg, D. Gollann, L. Kloppenberg, T. Stipanowich [1]. Among other foreign scientists who researched on alternative dispute resolution in their scientific works are M. Vitoria [2], L. Kleye, I. Nikiforov [3], K. Kovach K. [4], C. Moore [5]. Also, these issues are reflected in the works of the Ukrainian researchers as follows: N. Daraganova [6], Z. Krasilovska [7], O. Spektor [8] and other outstanding scientists and practitioners.

Purpose of the article lies in substantiation of the peculiarities of scientific and theoretical forms regarding the application of pre-trial settlement of disputes in the construction sphere, the implementation of a comprehensive study of international legal acts in foreign countries, as well as the application of experience and definition of priority directions and ways of implementation of alternative mechanisms in Ukraine.

Presentation of the basic material.

No doubt that pre-trial settlement of a dispute in the construction industry is an open question in the current situation. Unfortunately, today there is a growing number of cases concerning non-performance of financial obligations, which also leads to increasing of accounts receivable, where late penalty results in losses for construction companies. To overcome these conflicts there is a need in solving the problem through a system of alternative dispute resolution.

“The term “Alternative Dispute Resolution” (ADR) was first used in the USA to refer to the informal conflict resolution processes. The existence of separate legal regulations in the legislation of many developed countries and the European Union legislation provides the opportunity to consider the ADR as an interdisciplinary legal Institute” [ibid, p. 5].

Alternative dispute resolution is a wide range of dispute resolution mechanisms that are of priority compared to the judicial settlement of disputes. The term “alternative dispute resolution” can be used to refer to a variety of dispute resolution mechanisms, for instance, negotiating an amicable settlement where the parties to the dispute are encouraged to conduct direct negotiations before turning to other legal mechanisms for resolving disputes.

The system of alternative dispute resolution is a set of tools and mechanisms that make up the resolution and extra-judicial procedure for settlement of disputes arising between actors of legal relations. While the ultimate goal of ADR is conflict resolution at the lowest possible cost for all parties.

As one of the forms of actor rights protection, aimed at resolving arguable issues in legal matters before referring a claim to the court, pre-trial settlement can be both mandatory and voluntary. Some laws may oblige the parties to the dispute to conduct negotiations, to undergo conciliation or mediation before referring to court. As mandatory ADR may also include cases where the parties have agreed to negotiate, undergo conciliation or mediation in the contract. In voluntary ADR referring to alternative dispute resolution mechanisms is completely dependent on the will of the parties.

Extra-judicial dispute resolution in the field of construction can be implemented in various forms. In particular, scientists distinguish:

- mediation;
- reconciliation (amicable settlement);
- expert determination or expert evidence;
- Dispute Resolution Board (DRB);
- Dispute Adjudication Board (DAB);
- Arbitration.

It should be noted that in different countries the procedure of reconciliation is enshrined in the procedural law as a stage of the proceedings.

The first attempts to make mediation mandatory were made by the supreme judicial bodies of Great Britain, the United States and some other common law countries. However, the introduction of compulsory mediation has not brought the desired effect, since the parties and their representatives considered pre-trial settlement not as a means of resolving contradictions, but

as one of the mandatory bureaucratic procedures, which should be passed additionally for further referring the case.

Mediation came to Ukraine as a tried and tested technology in mid 90-ies. Mediation centers have started to operate since 1997 in Odessa, where mediation has been applied in civil proceedings [9]. It was piloted by public “Mediation Groups” of Donetsk, Luhansk, Odesa, Kyiv, Crimea, Kharkiv in various spheres – in labour, family disputes, disputes between neighbors, civil proceedings, etc [10].

The word “mediation” itself originates from Latin and means *mediatio* – intermediation; the word “*mediation*” (eng.), “*médiation*” (fr.) have similar meaning. Mediation is commonly understood as one of the alternative ways of solving the dispute by the parties with the participation of a third party – mediator, who, by carrying out the general procedural guidance helps the parties to reach the most effective decisions on their own [11].

In the European countries the definition of mediation is based mainly on the provisions of the EU Directive on mediation. Thus, according to the Standards of conduct for mediation adopted by the Social Council on alternative methods of resolving conflicts and disputes under the Ministry of justice of the Republic of Poland of 26 June 2006, “mediation” means a voluntary and confidential process where professionally trained independent third party assists the parties by their agreement in resolving the conflict” [12].

The essence of this approach lies in imposing court costs and the costs of the party that refused from mediation, even if the decision is in its favor. As a result

of activity of the Centre for effective dispute resolution as an average only one in ten cases received for settlement were referred to the court. The result of other procedures is the conclusion of an amicable settlement agreement.

Starting from the beginning of the XXI century English courts began to apply new procedural rules. Innovations were introduced to encourage parties to resort to any alternative procedure for the resolution of their disputes, as a rule, to the assistance of a mediator. In some cases, such stimulation takes the form of punitive sanctions.

The term “mediation” is commonly used for the resolution of disputes at the conclusion of an agreement with a third, neutral party that takes up an obligation to facilitate in resolving the conflict [13].

The parties are entitled to resort to the mediator at any stage up to the court's decision. Until then, with the consensus not being reached and an amicable settlement agreement not being signed, the parties are completely free in regard to conciliation procedures with the participation of a mediator. They may terminate it at any time by referring the matter to court, refuse the services of a specific mediator by entering into an agreement with another one, suspend the negotiations.

The amicable settlement in the context of judicial proceeding acts as a mechanism, the functioning of which is possible only within a judicial process, that is, in this case we are not talking about a pre-trial resolving of the situation, but about the conflict settlement at the preparatory stage of the trial.

It is important to keep in mind that the order of entry into force is single – a

text developed by the parties is submitted for the approval of the court, then a decision is made, by which the court either approves the agreement, or rejects it and continues the hearing under the general procedure.

However, in the framework of pre-trial conclusion of the so-called amicable settlement agreement, the provisions of the FIDIC contracts expressly provide for an obligation of the parties to attempt to settle the dispute amicably (by concluding settlement agreement) not only prior to referring it to the authorised Dispute Review Board, but also after obtaining the decision of this Board.

It is true that the Dispute Review Board (DRB) implements the objectives and principles of legal proceedings operating in arbitration courts, as well as it forms the judicial practice of reviewing disputes arising in the construction sector. It is in this area where quite often there are irreconcilable contradictions and conflicts observed, which then have to be resolved during the arbitration. Parties to the arbitration agreement should be capable to act as a party to the arbitration agreement, to act in the arbitration agreement *sui juris* or on behalf of and by order of an individual or entity. These requirements can be collectively called “subjective arbitrability” [14, p. 8].

Conditions of arbitrability in foreign countries include:

- the possibility of monetary evaluation of the dispute, the availability of monetary or commercial interest (Switzerland, Germany, Greece, etc.);

- no connection of a dispute with personal and family or testamentary

relations (Italy, China, Taiwan, France, Latvia, etc.);

- no connection of a dispute with corruption or “fraud” (Hong Kong, the USA, etc.)

Formation of the Dispute Adjudication Board (DAB) as a procedure for the dispute settlement which arises out of relations relating to performance of construction works, is settled by FIDIC standard forms of contract and other construction contracts. Early editions of FIDIC standard forms of contract published before 1995 provided that authority to resolve disputes between the parties to the contract is given to the Engineer – an independent specialist or organization that not just monitors but manages the process of performance of works under the contract. Providing the Engineer with this authority was not entirely successful decision, as the Engineer, in view of his functions, is unable to act as an impartial person in resolving the dispute.

However, some scientists have different opinion regarding the appropriateness of granting the Engineer the authority in resolving the dispute. Thus, according to L. Kleye and I. Nikiforov, the Engineer is considered by the so-called FIDIC “Red” and “Yellow” Books as the first instance, which considers the dispute, makes the decision on the basis of demands (claims) of one of the parties to the contract. And the second instance is the Dispute Adjudication Board. The party dissatisfied with the engineer’s determination in accordance with the provisions of the contract may refer the dispute to the Dispute Adjudication Board [5, p. 205].

Results of law-making of some national law systems, as well as decisions

of international organizations contributed to strengthening of the role of the DAB among rights protection in the field of investment and construction activities. In mid 90^{ies} of the last century Great Britain adopted the Housing Subsidies Act and The Scheme for Construction Contracts (England and Wales) Regulations 1998 which introduced the DAB as an officially recognized procedure for the resolution of disputes arising from construction contracts. A huge contribution to promoting this procedure was also made by its recognition by the World Bank, which indicated that the use of the DAB is mandatory for the parties to the contract where construction work is financed by the Bank and its affiliates.

So, since mid 90^{ies} of the last century DAB has become a regular procedure of dispute resolution under FIDIC Standard Forms of Contract. The possibility of referring to the DAB is essential for any such contract.

The DAB is formed by agreement of the parties to the contract and may comprise from one to three members who are elected from among the most qualified professionals in the field of engineering, design and construction, and are experienced in interpreting contractual documents. Depending on the time of its formation, there is a Standing and Ad-Hoc (temporary) Board: the first one is formed by the parties to the contract at the stage of its conclusion, the second one – after a dispute arises in the course of the contract.

The choice of a particular type of Board depends on the financial situation of the parties, implementation conditions of investment construction project, the chosen Contract form and

other factors. However, foreign experts give preference to “standing DAB”. Firstly, if the Board is formed in the beginning of the investment construction project, in the event of a dispute the Board will be duly informed of the whole background of the dispute, which will result in resolving the dispute faster and more efficiently. Secondly, DAB functions are not limited to the consideration of disputes: in the implementation of the Contract the Board holds regular meetings to assess the progress of work under the contract, resulting in recommendations to the parties to the contract. Thus, DAB preventive function is basic and is aimed at preventing disputes.

Among the drawbacks associated with the creation of “standing DAB” is that considerable costs for its functioning are born by the parties.

DAB as the procedure for dispute resolution consists of several stages. In the event of a dispute, a party shall give a notice to the other party of its intention to submit the dispute for a decision of the DAB. In case the parties did not appoint the DAB at contract negotiation (standing DAB), they must do so within 28 days after a Party gives notice to the other Party of its intention to initiate the dispute resolution procedure. At this stage the parties by mutual agreement choose one specialist or shape the composition of the Board in the following order: if the parties have agreed that the Dispute Adjudication Board is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chair-

man. When appointing members of the Board, the parties may use the list of experts, established by FIDIC or by the parties themselves in the contract. However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB. The dispute shall be settled on the merits within 84 days from the date of its submission for the decision of the DAB.

According to the results of the dispute DAB makes the decision. By its nature the decision is a set of recommendations addressed to the parties of the dispute. The decision must be made unanimously; in the absence of unanimity in the decision the detailed substantiation of the opinion of a relevant Board member shall be given.

According to some foreign authors, the parties to the contract can determine that the expiry of the term to submit the notice of dissatisfaction with the DAB's decision terminates a party's right to submit to litigation or arbitration. The specified aspect is opposed to the view of the World Bank experts in the field of alternative dispute resolution procedures: the Board's decision is not final, i.e. it can be disputed regardless of conditions of the contract.

Thus, the analysis indicates the absence of barriers to the use of the DAB to resolve disputes in the form of restrictions and prohibitions enshrined in legislation. However, problems may exist at the level of law enforcement.

In general, the DAB is one of the procedures of pre-judicial dispute settlement that is applied in the sphere of investment and construction acti-

vity, which is implemented through the formation and functioning of the Board consisting of experts in the field of engineering, design and construction, which accompanies the implementation of the project since the contract conclusion and until Taking over (standing DAB) or can be formed upon occurrence of the dispute for its resolution. Having examined the issue of possibility for applying the procedures for dispute resolution specified in this article in Russia, the authors came to the conclusion about availability of such possibility due to the absence of direct legislative prohibitions on its use. However, the application of the procedure may run into obstacles that exist in law enforcement. Consequently, pre-trial dispute settlement in construction starts with the quality of drafting provisions of the Contract, their interconsistency, elimination of ambiguities in its provisions, and is not limited to drafting a legally competent and valid claim under the contract.

For today the Ukrainian state is only at the stage of creating models of alternative dispute resolution in construction. It should be noted that the idea of introducing this practice in the domestic system of law is supported by a wide range of specialists. Such interest meets the aspirations of Ukraine to harmonize the national legislation.

Determining priority directions and ways of implementation of alternative mechanisms in the sphere of construction in Ukraine lies in the use of foreign experience in the conditions of reforming of the current political system, namely in decentralization. It is the application of the proposed model that should be implemented at the na-

tional, regional and local levels, should be enshrined on the statutory level and to solve urgent problems. Such systematization, in my opinion, will lead to a more objective and complete settlement of the disputes in the shortest possible period of time.

Conclusion. The analysis of research regarding the use of alternative dispute resolution has shown that conflict resolution in the construction industry contributes to the discharge of the judicial systems of foreign countries from a significant number of cases that can be successfully solved in a more efficient and effective manner. Appropriate fixing in the current legislation of such mechanisms in Ukraine will be a decisive step towards the formation of solutions to conflicts in the sphere of construction and will certify on the formation of a new strategy of our state in the direction of improving the legislation by applying the experience of foreign countries and of compliance with the international standard at the appropriate level. It is proposed to achieve the desired results by the application of the considered forms in the conditions of administration system reform.

Prospects for further research include more detailed analysis of the introduction of dispute settlement mechanisms in the system of public administration of Ukraine in the conditions of administration system reform.

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