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THE APPLICATION OF ADR IN DIFFERENT AREAS IN CHINA: CONSUMER PROTECTION, THE LABOR DISPUTES, ENVIRONMENTAL PROBLEMS AND FAMILY DISPUTES

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**THE APPLICATION OF ADR IN DIFFERENT AREAS IN CHINA:
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PROBLEMS AND FAMILY DISPUTES**

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Yang Chunping♦

Abstract:

This paper, using the methods of literature analysis, theoretically inductive analysis, as well as cross-disciplinary approach, analyses the present conditions and problems of the application of ADR in specific areas in China, such as in the protection of consumers` rights and interests, the labor disputes, environmental pollution disputes, and marriage and family disputes. And it also discusses the further development and improvement of ADR in the relevant fields.

Keywords: China; special areas; disputes; ADR.

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1. Introduction

ADR (Alternative disputes Resolution) is a collective term for non-litigation dispute resolution mechanism other than the civil litigation mechanism, which is commonly used in modern countries. In the process of civil justice reform in China, ADR, for its specificity and unique advantages, gets more and more attention from the public. Traditionally, ADR usually refers to various dispute resolution methods other than litigation, such as consultation, negotiation, conciliation, mediation, arbitration and so on. In other words, ADR is a general alternative term of methods for various dispute resolutions other than litigation. ADR is now adopted in many countries because it does not need a complex process, and does not harm the relationship between the parties.

2. The general situation of ADR in China

2.1 The Definition and features of ADR in China

ADR is a general alternative term of methods for various dispute resolutions other than judicial litigation and arbitration. In China, ADR generally refers to dispute resolution mechanism except for the litigation mechanism. So the mediation chaired by a judge in civil litigation is not considered as a form of ADR and it is just a way of the judge-trying.

The main features of ADR in China are as follows:

- A. it is a dispute resolution method for the parties to reach a voluntary agreement.
- B. the dispute settlement body is non-professional. ADR is different from the trial in litigation by the professional judges and it can be chaired by the non-legal professionals.
- C. the basis for the dispute resolution is not limited to the substantive law.
- D. It is of informality and flexibility in the procedure.
- E. the relationship between the dispute solver and the parties is of equality.
- F. the dispute settlement reached through ADR doesn't have a directly legal enforcement.
- G. ADR can either be applied alone, or be applied in the procedures of litigation and arbitration.
- H. the cost of the dispute settlement is low.

2.2 Types of ADR in China

Based on the above definitions and features, types of ADR in the practices of dispute resolutions in China are as the following:

- A. ADR with civil nature, such three ways as people's mediation, arbitration and notary.
- B. ADR with administrative nature, that is, administrative mediation and administrative solution.

- C. ADR in specialized fields, including ADR in the consumer protection, labor disputes, environmental problems, marriage and family disputes, health care disputes and real estate disputes and so on.

2.3 The existing problems of ADR and its improvement in China

China is still in a full exploring stage of ADR from the modern legal perspective. In the process of building up ADR in accordance with China's national conditions and cultural backgrounds, we have found out lots of problems. For example, the number of accepted cases in the mediation and arbitration agencies is small, and the court is still facing such an embarrassing situation as "litigation explosion". ADR cannot fully play the role of complementing or easing the pressure on litigation. In addition, the civil mediation is lack of authority and the parties often unilaterally break the mediation agreement. What is more, the mediation agency, arbitration agency and courts hang separately rather than together and they are lacking in effective communication and coordination. These problems arise from many respects: some are from the over-reliant mood of the party on litigation; some are from the current imperfect and unreasonable ADR institution in China; some are from the lack of ability to resolve disputes of the mediation and arbitration agencies themselves and so on. To solve these problems is not easy, which asks for the necessity to correct the deep-rooted "litigation totalitarian" in China and at the same time seeks of a way out through the specific institution design of ADR and needs a further study on the relationship between ADR and trial.

Presently China is trying to improve the alternative dispute resolution mechanism. The People's Mediation Law implemented in January 2011 stipulates that upon the formation of the mediation settlement agreement through People's Mediation Committee and once validated by the court, it can be used as the basis for applying for enforcement to the court. This provision changes to a great extent the situation that a settlement agreement lacks authority, playing a very important role in promoting ADR through people's mediation.

That is the brief summary of the present situation of ADR in China. Now, I will fix the attention on the practice of ADR in the specialized areas in China.

3. The application of ADR in the field of consumer protection

With the economic development and prosperity of the market, the number of consuming disputes substantially grows. In order to maintain the market stability and social harmony, we must resolve consuming disputes in a proper way to safeguard the legitimate rights and interests of consumers. The Article 34 of Law on the Protection of Consumers' Rights and Interests provides that for the disputes between consumers and operators, they can be settled through the following five ways: negotiations with the operator; requesting for mediation through the consumers' association; appealing it to the

relevant administrative agencies; submitting it to the arbitration agency for arbitration in accordance with the arbitration agreement with the operator; pursuing a litigation to the people's court. Except litigation, the first four solutions are part of the applications of ADR in the fields of consumer protection under the current legal system in China.

3.1 Settlement by negotiation

Consuming disputes can be settled by the negotiation between consumers and operators, that is, for their controversies, the two sides can reach a voluntary agreement to eliminate the disputes through direct and equal negotiation in the spirit of fairness and justice. This approach has such features as timely, direct, moderate, and etc. For some small disputes or those in which the operators stress their own credibility and quality, the adoption of this approach can ensure a more satisfactory result.

When consumers seeking for a settlement directly by a negotiation with the operator, the following three aspects should be paid special attention to: firstly, detailed and sufficient evidences and the necessary materials need to be prepared; secondly, the principle of being fair and reasonable, and practical and realistic should be adhered to and in consultation with the operators, consumers should clarify the actual process of the conflicts and make a reasonable request and refer to the specific legal provisions when necessary in order to get the dispute resolved quickly; thirdly, the requirement of timeliness should be followed. Some disputes have certain time requirement, so the consumers can not be fooled by the delay of the operator to blindly wait for an answer. Like those regarding food and beverage quality, once it is delayed, the inspection agency can not verify it. Therefore, if the operator deliberately prevaricate and evade responsibility when the evidence and the facts are clear, consumers must take other means to decisively resolve the dispute.

3.2 Mediation by the Consumers' Association

Consumers can also request mediation from the Consumers' Association. According to the summary of statistics from National Consumers' Associations, the total number of consumer complaints in 2010 was 666,255, an increase of 4.6% over the previous year, of which 627,271 were resolved through mediation, an increase of 6.6% over the previous year. It can be seen that the mediation of Consumers' Associations is playing an increasingly important role in protecting the interests of consumers and becoming one of the important means to resolve consuming disputes.

3.3 Administrative mediation

Consumers can appeal to the relevant administrative authorities. In reality, consumers may appeal to the industry and commerce agency, pricing agency, health agency and quality supervision agency based on the nature of the disputes and the actual situation. According to the postal notice of consumer complaints by the State Post Bureau, in November 2010, the State Post Bureau and the provincial(regional and municipal) Postal Service received a total number of 3288 consumer complaints and 326 consumer inquiries through the consumer complaint hotline "12305" and the website of the

State Post Bureau. The consumer complaints have been properly handled through mediation, restoring an economic loss of 314,307 RMB and keeping a consumer complaint handling satisfaction rate of 93.5%. It can be seen that the executive agency has its unique advantages in the settlement of consuming disputes because of its certain punishment authority and the corresponding management powers.

3.4 Consuming arbitration

Consumers can apply for arbitration from the arbitration body under the relevant arbitration agreement. Currently, arbitration bodies have been set up to specially resolve consuming disputes in many provinces in China, such as Chongqing, Hebei, Zhejiang, Liaoning, Shandong, Henan and so on. Branches of the Arbitration Commission based on the consumer associations are set up to specially accept consuming disputes, especially the disputes of small consumption.

4. The application of ADR in the field of the labor disputes

4.1 The present situation of ADR in the labor disputes

ADR in the field of labor disputes in China refers mainly to negotiation, mediation, administrative mediation and arbitration.

Under the provisions of Labor Contract Law and Labor disputes Mediation and Arbitration Law in China, when employers and employees have a labor dispute, the parties may resolve it through internal consultation or apply for mediation from the mediation organization. The parties must go through the labor dispute arbitration commission for arbitration before appealing to the courts, that is to say, arbitration has a feature of being prefixed and non-final. At present, the labor dispute arbitration charges nothing in China and most of the parties choose to submit their disputes directly to the arbitration bodies. But because of non- finality of labor dispute arbitration, parties can appeal to the courts after the arbitration out of various reasons, thus resulting in an increasing trend of labor dispute cases to the courts in China. A large number of labor disputes turning to the courts after arbitration greatly increases the judicial cost of the Court without playing an alternative function of arbitration. On the one hand, the resulting accumulation of lawsuits in the courts makes some courts have to set up labor dispute divisions to resolve the blockbuster litigations of labor disputes; on the other hand, the work of the arbitration commissions producing no value is a huge waste of national human resources.

All those show that ADR has not played its greater practical role in the labor disputes in China and ADR cannot play an active and effective role in labor disputes. Another reason that ADR cannot fully play its advantages should be attributed to the unqualified professional quality of personnel in the mediation agencies and the low efficiency of mediation.

4.2 The improvement of ADR in the labor disputes

All circles in the society are now starting to focus on the further improvement of labor disputes settlement mechanism to fully play the advantages of ADR in the labor disputes. Some regions started to attempt to establish a docking mechanism between the labor dispute mediation and arbitration and the people's mediation. For example, after the filing of the case in the labor dispute arbitration commission, the parties are led to first select the people's mediation for the disputes so that the case can be solved by mediation, if succeeding, a conciliation statement can be made by the arbitration commission. The mediation and the arbitration can also be distinguished to achieve the professional applications of both means of the disputes resolutions. Some regions started to intensify efforts to deal with labor disputes, for example, the Chongqing Municipal People's Government began to strengthen and standardize the management of labor dispute arbitration organizations and arbitrators and improve the staff's quality. It also comprehensively spread a kind of grass root mediation.

5. The application of ADR in the field of environmental problems

5.1 The present situation of ADR in environmental disputes

5.1.1 Consultation

In environmental disputes, environmental infringers are often reluctant to undertake the liability for their environmental tort, so very few environmental disputes in China are solved through consultation.

5.1.2 Mediation

Mediation is a major way to resolve environmental disputes in China. Up to now, 75% of the environmental disputes in China have been solved through various forms of mediation. There are two main ways of mediation in China: people's mediation and administrative mediation.

5.1.3 Administrative solution

Administrative solution refers to the activities that the environmental protection administrative agencies or other authorities empowered by law exercise the powers of environmental supervision and management to resolve the environmental disputes at the request of the parties in accordance with law. The specific forms include administrative mediation and administrative adjudication.

5.1.4 Environmental petition

Environmental petition refer to such activities that the citizens, legal entities and other organizations report the environmental conditions and provide comments, suggestions and requests to the environmental protection and administration agencies at all levels through correspondence, telephone, visits and so on, and then the environmental protection and administration agencies deal with them under the law.

5.1.5 Environmental arbitration

Environmental arbitration is such a procedure that upon agreeing in advance or reaching the arbitration agreement afterwards, the parties of environmental disputes submits the disputes to a selected arbitrator to make an award binding on both parties and both parties obey the award to finally resolve their environmental disputes. Now there are no environmental dispute arbitration regulations on the use of arbitration to resolve environmental disputes as well as specific environmental arbitration organizations in China.

5.2 The existing problems of ADR in environmental disputes

As a traditional dispute resolution, more and more shortcomings are revealed in the litigation in China and the existing ADR mechanism is extremely underdeveloped and its effect of dealing with environmental disputes is not obvious. Different dispute resolution mechanisms always conflict with one another and they are not coordinated and fail to form an organic system, which makes China's current ADR mechanism at a low level not sound enough.

5.2.1 The lack of legislation on environmental arbitration

With the deepening of China's legal construction, laws relating to environmental protection in China have been improved, but the laws on ADR in environmental disputes are rarely mentioned or have no detailed provisions, making ADR lack of operational practice in the environmental disputes resolution. There is so far no special environmental arbitration body and no special laws and regulations on environmental arbitration formally promulgated in China. In practice, except for the practice of the marine environment damage disputes, arbitration in the environmental disputes has not been really started.

5.2.2 Ambiguity of the status and force of administrative solution

A complete set of procedures to make the executive agencies handle the environmental disputes systematically and timely has not been established in China. The division of the management powers among the executive agencies is also chaotic. The key point is that the status and force of administrative mediation is not clear, which leads to a lot of problems in the process of administrative mediation.

5.2.3 Inadequate legal force of ADR

The application of ADR in resolving environmental disputes in China has not received its due attention, which is to a great extent related to the ambiguous legal force of ADR in handling environmental disputes.

5.2.4 The lack of effective cohesion between ADR and litigation

The prevalence of isolated disconnection between the litigation procedures and ADR of environmental disputes in China has seriously affected the overall function of the environmental disputes settlement mechanism.

6. The application of ADR in the field of marriage and family disputes

6.1 ADR in divorce disputes

Divorce disputes are civil disputes between husband and wife on whether they should divorce and how to divide the property and raise the children due to various causes. Divorce is the dissolution of marriage between husband and wife under the law during the time of the existence of spousal relationship and it involves changes of relationship in personal relationship of the couple, and property. Divorce disputes involve such social phenomena as various emotional, moral, religious, ritual, ethical and legal factors. China has its own unique way of divorce settlement with a history of several thousand years. Therefore, divorce litigation alone is not enough to the study of divorce and it must also be combined with China's tradition and reality. The application of ADR in divorce disputes at this time is undoubtedly of great significance.

Currently, the applications of negotiation, mediation, arbitration, etc. of ADR in China in divorce disputes are as follows:

First, as for negotiation, according to the provisions on the divorce registration of Article 31 of China's Marriage Law, the marriage registration authority shall issue a divorce certificate on the conditions that the two sides are completely voluntary and issues of children and property have been adequately addressed. To the issues of the amount of the children's living expenses and child support after divorce, of the visiting rights of the husband and wife after divorce and of the settlement for the joint debt of the husband and wife, Article 37, 38 and 41 respectively provide that they shall be negotiated at first by the husband and wife, so in most cases the process of reaching an agreement between the two sides is the process of negotiation and reconciliation.

For mediation, the application of court mediation in the divorce cases is common, the Article 9 of China's Law of Civil Procedure provides that: in the course of trying civil cases, the People's Court should conduct mediation under the principle of voluntariness and lawfulness and where the efforts to make a conciliation fail, the People's Court shall render judgments without delay. Article 30 (2) of Marriage Law provides that: the People's Court should conduct mediation in the course of trying civil cases. The long-standing judicial practice has also proved that mediation has played a certain role in divorce disputes. Article 43 and 44 of Marriage Law provides that: as for domestic violence or abandonment, abuse of family members, the victims are entitled to request interference from the residents' committees, village committees or their work units and those organizations should dissuade

and mediate the conflicts. It can be seen that in the legal system of marriage in China, the position of people's mediation is clearly defined.

However, although Article 2 of China's Arbitration Law states that: "disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects of law may be submitted to arbitration", the Article 3 negatively provides that: the following disputes cannot be arbitrated: (a) marriage, adoption, guardianship, maintenance, and inheritance disputes; (b) executive disputes which shall be handled by the executive agencies. Therefore, the application scope of the arbitration law in China does not cover such family disputes as marital relations. Today, the arbitration is broadly applied to solve various disputes in the world, the arbitration law passed in 1994 is apparently unable to adapt to the development trend of an increasing number of disputes and greatly affect the full application of ADR in China.

6.2 ADR in family disputes

Family disputes refer to disputes arising from inheritance of property, supports, foster care, guardianship duties and daily households among the family members of the husband and wife, parents and children, brothers and sisters, mothers-in-law/daughters-in-law, aunts/sisters-in-law, fathers-in-law/sons-in-law, sisters-in-law, and etc. Family disputes can be settled by negotiation or by mediation from people's mediation committee and so on.

7. Conclusions

Throughout the development of ADR, the worldwide legal culture is directing from "struggle for rights" to "communication for rights". The development of ADR reflects a switching concept of dispute resolutions from confrontation to cooperation and from the fight for success to the achievement of win-win.

China should learn from the advanced experience of foreign countries and fully mobilize the available resources of dispute resolution with constant innovation and exploration in accordance with its national conditions so as to develop various flexible ADRs and finally establish and perfect an ADR system of Chinese characteristics. What is more, we should improve the existing ADR system in consuming disputes, marriage and family disputes, labor disputes, environmental disputes and medical disputes. We should also continue to explore and develop the expertise of ADR to resolve specific disputes and establish convenient and flexible ADR for the traffic accident disputes, sports disputes, educational and intellectual property disputes and so on.

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