Секция «Юриспруденция»

Court- connected mediation:pros and cons

Жибитаева Аян Куанышбековна
Студент
University of Aberdeen, Aberdeen, UK, School of Law, Алматы, Казахстан
E-mail: ayana_ zanger@mail.ru

Court-connected mediation: Pros and Cons

Mediation is the one of the alternative dispute resolution methods, which is widely used and recognized as an effective tool for settling disputes. It is a process where third neutral party called mediator assists disputing parties to come to mutually beneficial agreement. The main advantages of mediation over litigation or arbitration are that disputing parties control the outcome; process is confidential, speedier and cheaper [1]. The process enables the resolution of the dispute under the terms designated by the disputants themselves, which means that the outcome is likely to be mutually acceptable, beneficial and satisfactory. This is in turn makes possible continuation of the healthy relationships which in some disputes like business and family are of utmost importance. Apart from this, mediation helps to overcome court congestion and concomitant to it delays and dissatisfaction with justice services.

Practicing mediation can be accomplished on the bases of two approaches: institutionalized and non-institutionalized. Institutionalization is one of the six main trends in the field of mediation. According to Sharon Press this term means not only the use of mediation in an organized manner, but also the awareness about the process and its regular and significant use by the public as its own institution [2].

When mediation first emerged in USA in late 1970s, it was promoted mainly by non-institutionalized mechanisms, ie independent Alternative Dispute Resolution centers. The reference to the process was absolutely voluntary, predominant role of disputants and infrequent presence of lawyers, characterized process, and distinguished it from other dispute settlement mechanisms and made it truly alternative to litigation.

Due to the increasing congestion of courts and potential of the process to achieve high rates of settlements, US courts started the process of implementation of mediation. As a result many US courts initiated referrals of wide categories of cases into mediation with the purposes of reducing caseloads, and correspondingly improving the quality of the justice system [3]. These court-connected programs caused considerable debates in the academic world. This mode of institutionalization of mediation is being criticized on the basis that it negatively affects the nature of mediation. On the contrary the supporters of mandatory mediation propagate its benefits, such as the raise of process utilization.

One of the arguments advanced for the benefit of court-annexed mediation is that programs enable successful institutionalization of mediation, which was defined above as the use of process on the regular basis, whereas voluntary mediation suffers from considerably lower caseload.

Another positive aspect of mandatory mediation is that it allows overcoming problems that exist in the field of mediation practice, namely lawyer-client relationships. These problems occur because lawyers tend to display reluctance for embracing mediation and express preference to litigation. They favor litigation for a number of reasons: they are familiar with the process; they consider litigation as the best option for protection disputants' interests;

and finally, they believe that in mediation they lose controlling position over proceedings, and are "*forced to give away some of what both sides see as their client's 'full entitlement"* [4].

Furthermore, some authors believe that the mediation process placed more trust when provided by courts rather than "*private schemes established by providers with vested or economic interests and which depend on repeat business*" [5].

Notwithstanding the apparent benefits of mandatory mediation schemes some authors seriously concerned with these programs' effect on flexible nature of the process. They argue that the process is a private and voluntary initiative, and making it compulsory is incompatible with its purposes. The cornerstone of mediation is negotiations between disputants with the mediator assisting to come to the creative decision based on the needs of parties. For mediation, as a real alternative, the settlement is albeit desirable outcome of the process; however is not a central value. Compromise is only one of many possible products of the process. Other valuable outcomes comprise: the opportunity to be heard, understood and discuss issues that are of importance to disputants but irrelevant at court hearings [6]. This is exactly what differentiates mediation from adjudication and makes this process so valuable.

It is argued that with the involvement of courts into the mediation, the process has become less 'alternative' and more compatible with the needs of courts. Now the participation of the attorneys at the process is commonplace, as well as the fact that they select mediators for their clients. In making choice they are guided with criteria such as legal expertise, capability to evaluate and test legal consequences for both parties. Nowadays communications and negotiations are conducting through a mediator, in a way of description of offers and counteroffers, mainly on private sessions. Mediators mostly just uncover to parties what will happen if the case will go to court. Thus the process now is more evaluative rather than facilitative.

Furthermore, the proponents of truly alternative mediation do not favor the use of mediation only on the base that it helps to unload courts, but for the reason of positive changes that it brings to dispute interaction. Mediation should be considered not only as a move away from negative aspects of litigation, but also as move towards a perception of the value that process can give [7].

Additionally, opponents of institutionalization of mediation in a 'shadow' of courts believe, that court-annexed programs are not needed since parties may voluntarily opt to mediation if it is appropriate to their dispute. However, as practice shows disputants rarely choose to mediate unless mandated to do so. There are numbers of potential reasons for this trend: parties are merely unaware about the process and its benefits [8]; bargaining power is very sensitive issue in a conflicts management area, some parties might be concerned that suggesting their opponents to mediate, may be perceived as an indication of weak position in case, that is why they are likely to stay away from demonstrating strong interest in conciliation [9].Sometimes mediation does not take place, also because of the reluctance of one of the parties to mediate. For the process to occur all parties' consent is necessary. One more possible ground advanced by scholars is that parties, when frustrated by conflicts, tend to choose adversarial rather than cooperative processes [10]. Finally, since historically mediation has not been dispute resolution mechanism by default, as litigation, thus disputants need to be aware of the process and encouraged to take part in it [11].

All above mentioned reasons can be the possible explanation of insufficient voluntary use of mediation, and application of court-connected mediation programs can help to avoid these obstacles.

To sum up, notwithstanding all critics, "*the mediation field would not be growing at such a fast pace without the institutionalization of mediation within the courts, which has exposed millions of citizens to mediation who otherwise would not have known about the process*" [12].

Литература

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8. Referring parties to the mediation helps to overcome this problem, and as empirical research illustrates it also triggers further voluntary use of the process. This is explained by obtained knowledge about mediation, and parties' satisfaction with it. See: Nancy A. Welsh 'Stepping back through the looking glass: Real conversations with real disputants about Institutionalized mediation and its value',(2004) 19 Ohio State Journal on dispute resolution, p.23

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