

Artículo de investigación

**Alternative dispute resolution procedures using information technologies:
legal regulation in the European Union and the USA****АЛЬТЕРНАТИВНІ ПРОЦЕДУРИ ВИРІШЕННЯ СПОРІВ З ВИКОРИСТАННЯМ
ІНФОРМАЦІЙНИХ ТЕХНОЛОГІЙ: ПРАВОВЕ РЕГУЛЮВАННЯ У
ЄВРОПЕЙСЬКОМУ СОЮЗІ ТА США**

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The article is devoted to the research of legal issues of protection of the violated rights, determination of the effectiveness of the mechanism of ensuring the rights, investigation of alternative ways of protection of rights, analysis of the functioning of ODR platforms and prospects of their functioning. The article notes that with the widespread use of the Internet, legal institutions are changing, especially with regard to dispute resolution. The emergence of e-commerce has led to the emergence of online dispute resolution platforms that are already in use on all continents. The e-commerce market in Ukraine and in the world is gaining momentum, so Ukraine's desire for closer interaction with EU Member States and integration into the common market necessitates a detailed study of the experience of the EU and foreign countries to introduce the most effective and advanced mechanisms for securing the rights of e-commerce participants. The study concludes that it is advisable to use online dispute resolution (ODR) procedures, which are a cross-border alternative dispute resolution, as a fast and versatile way to resolve disputes, as a substitute for the ineffective existing forms of IPR protection. Based on the analysis of the existence of alternative dispute resolution methods, it is

Анотація

Статтю присвячено дослідженню правових питань забезпечення захисту порушених прав, визначенню ефективності механізму забезпечення прав, дослідженню альтернативних способів захисту прав, аналізу функціонування ODR платформ та перспектив їх функціонування. У статті зазначається, що з широким використанням Інтернету змінюються й правові інституції, особливо щодо вирішення спорів. Поява електронної комерції зумовила виникнення платформ з онлайн вирішення спорів, які вже застосовуються на усіх континентах. Ринок електронної комерції в Україні та в світі набуває значних обертів, тому прагнення України до більш тісної взаємодії з державами – членами ЄС та інтегрування до спільного ринку зумовлює необхідність детального дослідження досвіду ЄС та зарубіжних країн запровадження найбільш ефективних та досконалих механізмів забезпечення прав учасників електронної комерції. У результаті дослідження зроблено висновок, що на заміну малоефективним існуючим формам захисту порушених прав доцільно застосовувати процедури онлайн вирішення спорів (ODR), які є позасудовим альтернативним способом вирішення спорів,

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established that online dispute resolution due to its specific legal nature is an independent way of resolving disputes.

Keywords: Online dispute resolution, alternative dispute resolution procedures, international practice, protection of rights, extrajudicial order, mediation.

Introduction

Ukraine's orientation towards EU integration implies a commitment to the international community to ensure that the national legal system conforms to the standards of the European community, including the creation of an effective mechanism for the protection of human rights and citizens.

In the current law enforcement practice, the realization of the right to judicial protection is complicated by a lengthy and cumbersome procedure, and there are widespread cases where due to the length of the litigation, the issues from which the claims are filed lose their relevance and the parties bear moral and material damages. The workload of judges, the unjustifiably high costs of hearing the case, the inability to obtain quality and affordable legal assistance hinder the protection of the rights or legitimate interests of citizens that are violated, unrecognized or contested. As a consequence, in most cases, the primary objective of justice, which is the restoration of violated rights, is not achieved. It should be noted that all these negative factors cause impediments to the realization of rights, and adversely affect the mechanism for securing rights.

Today, there are more than 750 alternative dispute resolution (hereafter – ADR) schemes in the EU, differing in their nature, subject matter and content in dispute resolution. They cover different areas. In some countries, they apply only to certain consumer disputes, in others to all consumer disputes.

In most EU countries, ADR is a national and rarely decentralized system or scheme at regional or local level. The procedures are based on the willingness of the parties to participate in the process. Most schemes are free of charge to the

мають транскордонний характер, є швидким та універсальним способом вирішення суперечок. На основі проведеного аналізу існування альтернативних способів вирішення спорів встановлено, що онлайн вирішення спорів через особливу правову природу є самостійним способом вирішення спорів.

Ключові слова: онлайн вирішення спорів, альтернативні процедури вирішення спорів, міжнародна практика, захист прав, позасудовий порядок, медіація.

consumer or the dispute is considered for a total of no more than 50 euros and the requirements are met within 90 days on average (Polatay V., 2015). Decisions can be made collectively by, for example, assisting individuals - mediators or ombudsmen, and the nature of these decisions varies from optional recommendations to decisions binding on all participants.

Differences in ADR across Member States have been a significant impediment to the further development of the common market and one of the reasons why many consumers refrain from buying overseas, as potential disputes with traders can be resolved in a simple, fast and inexpensive way.

Therefore, given the existence of so many different ADRs, and given the need to resolve numerous cross-border disputes that could not actually be resolved through ADR, it was proposed to initiate the preparation and implementation of effective procedures that would reduce the differences in ADR in different Member States. In order to enable consumers to fully exploit the potential of the common market, it was proposed to use the latest information and communication technologies, including the Internet, to protect consumer rights in all types of internal and cross-border disputes.

The legislative initiatives were the result of the implementation of the ideas proposed in the scientific community on the introduction of the latest information and communication technologies and their application for the protection of rights. Scientific research on the use of the Internet and other advanced information and communication technologies for the protection of rights has been significantly updated around the turn of the millennium and,

as a consequence, has been proposed to use Online Dispute Resolution (hereinafter ODR) procedures.

Nevertheless, it should be noted that a single approach to defining the concept of "online dispute resolution" has not been formed so far, and such concepts as "online dispute resolution", "electronic dispute resolution", ODR / ODR are used. However, it is commonly accepted by the European community to call this procedure abbreviated - ODR, so the same term should be used for the accuracy of the wording.

Theoretical framework

The topic of the study is complex, within its scope is to study the legal issues of protection of violated rights, determine the effectiveness of the mechanism of protection of rights, the study of alternative ways of protection of rights, analysis of the functioning of ODR platforms and prospects of their functioning.

In the legal literature, attention was paid to the study of individual components of this topic, in particular the issues of the mechanism of rights were studied by Bigun V.S. (Bigun V., 2009), Kashanina T.V. (Kashanina T., 2012), the peculiarities of the legal content of the legal categories "protection" and "defence" in the mechanism of ensuring human rights were investigated by Temchenko V.I. (Temchenko V., 2007), researches of alternative ways of protection of rights were carried out by Romanenko M.A. (Romanenko M., 2008), Polatay V. Yu. (Polatay V., 2015). However, there is no comprehensive study of the peculiarities of securing violated rights through alternative dispute resolution procedures using information technology, developing new and effective forms of securing rights.

Methodology

The research was carried out on the basis of formal-logical, comparative-legal, historical methods and purely legal techniques.

Using the formal-logical method, the provisions of the legal acts in the field of protection of human rights and interests have been analyzed. The formal-logical method gave the opportunity to study the provisions of the legal acts of Ukraine, United States, legal acts of the European Union on the protection of human rights and interests in general and particularly with help of online platforms.

The historical method was used to study the formation and development of the mechanism of protection of human rights and interests.

The current situation and needs in the field of online dispute resolution regulation were revealed using dogmatic and legal methods.

On the basis of the comparative-legal method, a comparison of the provisions of the laws of Ukraine and other countries is made, which allows to define the concept of online dispute resolutions, to distinguish not only common but also different in regulation of legal protection of human rights and interests with help of information technologies, to identify gaps in civil legislation of Ukraine.

Results and discussion

The legal regulation of ODR originates from the introduction of consumer protection standards in e-commerce dispute resolution processes.

In view of the provisions of the founding treaties of the EU, in particular, Art. 169 of the Treaty on the Functioning of the EU (consolidated version of 26.10.2012), which reinforces the obligation of the EU to promote a high level of consumer protection, and in accordance with Art. 38 of the EU Charter of Fundamental Rights of 2000, according to which the EU must provide a high level of consumer protection, the EU's attention was logically drawn to e-commerce relations.

Ensuring that consumers have access to simple, effective, fast and inexpensive ways to resolve internal and cross-border disputes arising from sales or service relationships has been driven by the need to create an effective mechanism for securing the rights of e-commerce participants.

Against this background, Recommendation 98/257 / EU of 30 March 1998 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes and Recommendation 2001/310 / EU of 4 April 2001 on the principles of the out-of-court settlement of consumer disputes were adopted in the EU.

The main legal provisions governing the basics of the functioning of the ODR are those laid down in Directive 2013/11 / EU [76] and Regulation (EU) No 524/2013 of the European Parliament and of the Council on the online resolution of consumer disputes and amendments to Regulation (EU) No 2006 / 2004 and Directive 2009/22 / EU (ODR Regulation) [34] (hereinafter Regulation (EU) No 524/2013).

Directive 2013/11 / EU guarantees that consumers will be able to make alternative arrangements for all types of contractual disputes (except disputes relating to health and higher education) that arise with sellers (traders), in their country or abroad; and Regulation (EU) No 524/2013 specifies the specificities of dispute resolution regarding services purchased online through ODR.

In this regard, for the first time in Art. 1 of Regulation No 524/2013 defines its objective: by contributing to a high level of consumer protection, to contribute to the proper functioning of the EU market by creating a European online dispute resolution platform (ODR platform).

The provisions of Regulation No 524/2013 also provide assistance to EU Member States in creating a transparent and effective system of alternative dispute resolution between consumers and online sellers.

However, EU law defines the scope of ODR platforms, namely that online dispute resolution should be limited to consumer and other private disputes not related to administrative or commercial disputes.

These acts offer a simple, quick and inexpensive out-of-court review of dispute resolution between consumers and sellers (e-commerce entities) under which Art. 4 of Directive 2013/11 / EU understands any natural or legal person, whatever the form of ownership, including through any person acting on its behalf or for its own sake, for trade-related purposes, business, craft or profession.

According to Part 2 of Art. 2 of the Directive, its provisions do not apply to medical services, education, disputes between traders, during procedures initiated by the trader against the consumer, etc.

Directive 2013/11 / EU and Regulation (EU) No 524/2013 provide full coverage of alternative dispute resolution between consumers and traders at EU level. This means that alternative dispute resolution is made available to all disputes in every sector of the market (e.g. tourism, banking, e-commerce) and in each Member State. In addition, alternative dispute resolution and ODA solutions must meet the quality criteria, with mandatory guarantees of efficiency, fairness and transparency.

Summarizing the above, it should be noted that EU law proposes such a model of ODR using

services to resolve ADRs (mediators, arbitrators and others).

It is stipulated that ODR platforms should exist in the form of an interactive website that allows consumers and sellers to resolve their disputes quickly and without going to court.

According to the model proposed by the EU, all complaints from the ODR platform should be referred to the ADR entity responsible for the dispute. The ODR platform should offer an electronic case for management tools that allow ADR organizations to conduct dispute resolution with parties through the ODR platform.

The ODR platform proposed in Regulation No. 524/2013 provides for secure communication with ADR organizations and reflects the fundamental principles of the European Interoperability Framework, the only pan-European eGovernment program for businesses and individuals.

This ODR platform should offer an electronic document sharing feature that allows the parties to the dispute and the ADR entity to obtain all necessary information to resolve it. The translation of all required documents must also be ensured.

As G.B. Hutchinson emphasizes, the ODR online platform will assist consumers and businesses with a single point of entry to resolve online disputes over purchases made online in another EU Member State, which will automatically send consumer complaints to ADR competent authorities and facilitate dispute resolution using the platform within 30 days (Hutchinson G.B., 2007).

The development of an effective ADR and ODR system certainly enhances the confidence of consumers in the common market, including in the field of e-commerce, and enables the potential and opportunities of cross-border online commerce to be realized.

However, it should be noted that ADR and ODR procedures have not yet been established in the world, as to cover a single definition of all possible mechanisms of alternative dispute resolution is impossible and impractical given the progress that accompanies the development of information and communication technologies. ADR and ODR dispute resolution procedures are available in the EU today, and their quality levels vary significantly across Member States in conflict resolution mechanisms.

However, the legal doctrine has developed different approaches to determine the features and place of ODR in the system of dispute resolution.

Some scholars have argued that online dispute resolution enables existing ADR methods to be applied and resolved quickly and adequately through the Internet, and therefore ODRs can be defined as applications and computer networks for dispute resolution.

Another group of scholars define ODR solely as a way to use ADR using ICT tools, although they cover online litigation and other specific forms of dispute resolution (Lodder A., 2006).

Some foreign legal doctrines believe that ODR includes technical means and mechanisms that are not dispute resolution, and are intended solely to create the necessary conditions under which alternative dispute resolution becomes more accessible to users of relevant networks, systems, platforms, etc. calling ODRs the electronic mechanisms of ADR.

The latter definition is more supported in science because it includes all the methods used to resolve disputes, which are mainly due to the use of information and communication technologies (Kaufmann-Kohler G., Schultz T., 2004).

It is also argued that ODR emerged from a synergy between ADR and information and communication technologies and is now developing and operating independently as a means of resolving disputes that have arisen on the Internet and for which traditional means of resolution have proved ineffective or inaccessible (Petrauskas F., Kybartiene E., 2011).

However, having conducted research into the nature and legal features of ODR, there is a reason to believe that, at the time of implementation and regulation, the potential of ODR is underestimated in EU law, and most of the scholars ignore the very nature of online dispute resolution, since ODR platforms are first and foremost a qualitatively new form of alternative dispute resolution, with the possibility of applying ADR procedures.

According to some lawyers, ODR is gaining popularity through the three characteristics of the Internet itself, namely because of the low barrier for any person to enter legal relationships on the Internet; the geographical openness of e-commerce, as well as the fact that the Internet is

a global system, and therefore any person can enter into legal relationships without being restricted by the territory of a particular state (Katsh E., Rifkin J., Gaitenby A., 2000).

Some scholars believe that online dispute resolution is solely a form of alternative dispute resolution that directly serves as ancillary technology, since the dispute is resolved online through the Internet (Nekit K., Ulianova H., Kolodin D., 2019).

However, in order to properly determine the correlation between online dispute resolution and alternative dispute resolution, it is appropriate to compare the concept of "content and form", which is of great theoretical and practical importance.

Based on the general philosophical concept of the correlation of form and content, and the existence of the laws of dialectics, namely the law of transition of quantitative and qualitative changes, it is worth noting that each object, phenomenon, process constitutes a certain integrity, consisting of many structural elements interconnected between itself, has distinctive features that characterize the subject as a separate entity, that is, they all have their content and form. Content is a system of connections and relationships between elements that unites them in integrity, with its inherent properties, features, qualitative certainty, and form, in turn, is a way of organizing content, its expression and existence. Content is always bound by a certain form, and the form is filled with certain content. Form, as a social and philosophical category, has traditionally been used to characterize the external expression of content, the relation between the way in which a thing or phenomenon is organized, and the actual content, the essence that fills this form.

To summarize the above, if considered online solely as a form of dispute resolution, then ODR is a form of alternative dispute resolution. However, when assessing the intrinsic nature of online dispute resolution, it should be noted that the latter is a qualitatively new type of alternative dispute resolution.

The mass development and diffusion of modern technologies and the Internet has directly led to the use of online tools to create a qualitatively new and powerful institution, which in many respects has more advantages than existing legal institutions such as court, arbitration, mediation and others.

The use of online dispute resolution technology, which is inextricably linked to the use of computerized algorithms and data documentation, contributing to the emergence of high-capacity dispute resolution in a relatively small amount of time, which is generally impossible for a physical courtroom using human resources to handle and resolve complaints and disputes.

In addition, if earlier online dispute resolution technologies were used solely to resolve conflicts that occur on the Internet, the trends of the last decade indicate that ODRs can resolve so-called "offline disputes", that is, disputes that arise outside the Internet. For example, the French ODR platform Demander Justice resolves disputes that arise not only in e-commerce over online purchases, but also labor, family, financial and corporate disputes.

The change in the concept of the existence of online dispute resolution as a social and legal phenomenon facilitated the use of ODR technologies not only by private commercial organizations but also by public authorities. For example, in British Columbia, an ODR platform and, at the same time, an online court, the Silver Resolution Tribunal, operate.

Usually changing the form or method for objective reasons should not change the essence of a phenomenon. However, since the first attempts to implement ODR platforms, the development of the Internet's capabilities has provoked a leap in the form of gradual, qualitative changes, which has changed the concept of ODR functioning as a social and legal phenomenon. This clearly characterizes the process of active influence of form on the content of phenomena established by dialectical laws, where form determines the specifics of its existence and development.

Each transition of quantitative changes to qualitative means at the same time transition of qualitative changes to new quantitative changes. Qualitative changes occurring in the objective world are made only on the basis of quantitative changes. There is no other way to the emergence of a new one. The change in form and method was more profound, which led to a change in the quality of the online dispute resolution process, which determined the overall process of development of this phenomenon as a whole. Therefore, the above has led to the formation of the ODR as an independent, alternative type of dispute settlement at the level of mediation, arbitration.

Moreover, as a result of such transformations, ODR is not only a type of alternative dispute resolution, but also involves the use of alternative dispute resolution procedures to effectively resolve claims or disputes, including through negotiation, mediation, facilitating and other procedures, which gives grounds for claiming the autonomy of this species and brings to a new qualitative level of development alternative dispute resolution as a whole.

In this regard, ODR can be considered as a new type of alternative dispute resolution, because by resolving online disputes through the Internet, ODR becomes a universal tool accessible to the widest possible range of individuals, regardless of their legal status and jurisdiction.

Since 2015, online dispute resolution has been recognised by the United Nations legislature, the Council of the EU. The ODR has been used in various judicial systems.

With the entry into force of Regulation (EU) No 524/2013, the European Commission has put in place an ODR platform that has become available for use in online dispute resolution. This platform allows buyers and sellers to submit complaints in all official EU languages.

Its purpose is to help consumers and online sellers resolve their contractual disputes out-of-court, at a low cost, easy and in a fast way.

To achieve this goal, first, the consumer fills out an electronic form. The consumer fills in an electronic complaint form. The complaint is then sent to the appropriate online retailer, who is offered by the ADR institution to the consumer. Once the consumer and online seller have agreed on an ADR institution to resolve their dispute, the ODR platform automatically submits a complaint to that institution. The ADR authorized person processes the case completely online and reaches the result within 90 days.

One of the promising trends in the introduction of ODR platforms in the European Union is the regulation at EU level of the obligation for online sellers to provide links to the ODR platform on their websites.

In accordance with Article 14 of Regulation (EU) No 542/2013, traders established within the Union and engaged in online sales or online service contracts, as well as online shops established within the Union, must provide an electronic link on their website to the ODR

platform. This link should be easily accessible to consumers.

However, prior to the official introduction of the ODR platform in the EU, other online dispute resolution platforms have already been successfully established and developed in other countries, which over time have spread not only to the e-commerce market but also to other markets.

Labor, family, banking, housing disputes, e-commerce disputes have already been successfully resolved without lawyers, lawsuits, using special platforms.

In addition, ODR platforms may also exist on separate services such as PayPal, eBay.

For example, PayPal Dispute resolution process, suggests to the participants of transactions in case of disputes to suspend the transaction until everything is solved. If the Buyer and the Seller both fail to agree, the dispute can escalate into a complaint, and then the Dispute Resolution Center will consider and decide.

The world-renowned eBay service also uses squaretrade.com's ODR platform, where ODR clients get when purchasing a warranty plan and do that in a convenient online form. [80]

In the USA, online dispute resolution is used in e-commerce by eBay (157 million users) and Amazon (244 million users). A special program in the form of a dispute resolution center has been developed for eBay online. Each year, about 60 million seller disputes are resolved online on eBay, with 90% of these disputes resolved through specialist software without human intervention; 50% of disputes are resolved by negotiation between seller and buyer.

The main purpose of building such a dispute system on eBay was customer loyalty. After all, if buyers have the ability to resolve a dispute, they will trust the site. People who have resolved a dispute through a dispute center have become more active eBay customers than those who have never contacted a dispute center.

Based on the positive result of the eBay Dispute Center, we can point out the following basic features of online dispute resolution, such as out of court procedure - resolving online disputes on eBay does not limit the parties' ability to go to court, but less than 1% of eBay disputes are settled in court; it is a cross-border, universal way of resolving disputes, as countries' legal systems

are not designed to resolve disputes regarding online purchases between parties from different countries, so it is difficult to determine jurisdiction in online disputes, especially if parties from two countries purchase goods manufactured in a third country; a quick way to resolve disputes. The maximum deadline for resolving disputes on eBay is 12 days. Given that eBay customers are people from any country in the world, no court in the world can reach this deadline.

Modria is a platform for providing all parties with online dispute resolution services. This platform consists of four modules that represent four stages of online dispute resolution: problem diagnosis, negotiation, mediation and arbitration. In doing so, the Modria platform allows these modules to be applied in a free sequence, creating their own dispute resolution.

The platform helps automatically resolve the most common and long-standing disputes (such as debt, rent disputes, small claims, etc.). Modria is capable of handling any type of case and scope, from simple debt cases to complex cases, such as child custody.

Demand justice is a platform which offers parties instructions for litigation and online dispute resolution. This platform provides online dispute resolution services designed to promote access to justice for all citizens who often lack the perseverance of their rights or who are unable to obtain quality legal assistance.

The Netherlands has been using the Rechtwijzer online platform since 2007.

Rechtwijzer is an online dispute resolution method developed by the Legal Aid Board of the Netherlands as part of a public-private partnership. Rechtwijzer is the first ODR platform to adapt to family disputes, property disputes, alimony disputes, tenancy disputes, purchases / sales, and more. Each year, about 700 divorces are filed with the Rechtwijzer, and the platform is expanding its use to resolve labor disputes. The platform uses algorithms to look for possible arrangements and offers solutions. But if the agreement fails, the parties can apply to the mediator. If mediation is not reached, it is possible to appeal to the arbitrator for a binding decision on the parties, but this occurs only in 5% of cases.

Youstice is an ODR platform designed to address consumer complaints and facilitate online shopping. The scope of this service is significant: retail trade disputes, transportation, labor

disputes, online gambling and others. The service enables companies to effectively engage with consumers and deal with their complaints within minutes. Businesses and consumers have the ability to negotiate directly and resolve issues in just a few clicks.

Conclusions

In place of the ineffective existing forms of protection of infringed rights, it is advisable to apply online dispute resolution (ODR) procedures, which are a cross-border alternative, have a cross-border nature, are a quick and universal way of resolving disputes, as countries' legal systems are not designed to resolve online disputes. - purchases between parties from different countries, so it is difficult to determine jurisdiction in online disputes, especially if parties from both countries purchase goods manufactured in another country; a quick way to resolve disputes.

Based on the analysis of the existence of alternative dispute resolution methods, it is established that online dispute resolution due to its specific legal nature is an independent way of resolving disputes.

Given the current trends in the existence of ODR platforms in their diversity in scope and in the number of tools used to resolve disputes, the following ODR classifications can be distinguished: according to their location and function among legal institutions; by autonomy of existence; using third parties to resolve the dispute; by the number of parties involved in dispute resolution

The mechanisms of online dispute resolution and ODR platforms are plentiful, but they are all aimed at effectively resolving conflicts and satisfying the interests of both consumers and sellers.

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