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Alternative Dispute Resolution of Chinese Enterprises: Learning from Foreign ADR Application Experience

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Abstract: With the development and prosperity of China's market economy, enterprise disputes have become more and more frequent. The perfection of the ADR mechanism applicable to enterprise disputes is an effective guarantee for friendly commercial competition between enterprises and an essential cornerstone for maintaining enterprise development and social stability. This article focuses on the types and characteristics of Chinese enterprise disputes, and starts from the case to analyze the difficulties and challenges faced by enterprises in the process of using ADR to resolve the dispute, and learn from the successful experience of foreign ADR. This article believes that the legislative, institutional design and implementation agencies in enterprise disputes should be found to find the ADR model suitable for Chinese enterprise disputes.

Keywords: alternative dispute resolution mechanism, China's new normal economic transition, enterprise disputes, ADR application experience, enterprise ADR case analysis

1. Introduction

Nowadays, China’s economy is in transition, and enterprise contradictions and disputes occur frequently. Therefore, the development of an alternative dispute resolution mechanism, as an important part of China's integrated dispute resolution mechanism, meets the potential needs of the whole country. Not just looking to traditional methods of mediation or other non-confrontational means to resolve disputes for averting conflicts, Chinese people would tend to settle their disputes in China's modern integrated dispute resolution system. It could resolve the dispute in the shortest time possible, with the least expense and stress, and achieve acceptable results[1]. For another, the scope of application of ADR has broadened a lot in the whole world, including commercial, insurance, family, health, small business, finance, construction, and consumer disputes [2]. But in China, the ADR in resolving enterprises has not fixed and normalized, becoming a research blank for the ADR mechanism. This article mainly studies how to establish a set of ADR mechanisms suitable for solving the disputes of Chinese enterprises. The potential risks and problems will be collected and analyzed from the cases. And one by one, the article will look at the relevant and good experiences from other countries around the world. In these ways, it can resolve enterprise disputes with limited judicial resources at a lower cost, maintain and strengthen the cooperative relationship between Chinese market players, and promote the construction of rule of law in China.

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2. Types and Characteristics of Chinese Enterprise Disputes

A dispute is a kind of antagonism and disharmony when the distribution of limited interests appears unfair or unreasonable. Enterprises, as the main participants in the activities of the socialist market economy, constitute the foundation of the socialist microeconomy in three basic organizational forms: sole proprietorship, partnership, and corporation. Currently, there is no clear definition of enterprise disputes in China. In a broad sense, enterprise disputes refer to all civil and commercial disputes related to the enterprise subject [3]. From the perspective of the industry involved, enterprise disputes involve banking, insurance, securities, and other financial fields, including transportation, service, and other social fields. From the point of view of the subject involved, it can include not only the two sides of the enterprise but also the subject of one party being the enterprise and the subject of the other party being a natural person—mainly workers and consumers. From the nature of the disputes involved, enterprise disputes include equity disputes, management rights disputes, intellectual property rights disputes, sales contract disputes, loan disputes, and other disputes between enterprises. It also includes disputes between enterprises and natural persons such as dismissal, overtime work, industrial injury treatment, illness treatment, claims for inferior products, investment and financial management, private financing, the Internet economy, etc.

The discussion of the settlement of Chinese enterprise disputes cannot be separated from the context of China's economic development in "new normal" mode: the relatively low position of Chinese industry in the global value chain, and the rising prices of domestic production factors bring about problems and challenges that force China's economic transformation and industrial upgrading[4]. So the "new normal" for Chinese enterprises should develop more complex and reasonable stages. During this process, the following enterprise dispute gradually presents the characteristics of many various kinds, many different interest demands of involved parties, close relationships that are difficult to give up, and a high professional threshold.

3. Cases and Analyses in Building Enterprise Alternative Dispute Resolution Mechanisms in China

Each country will define ADR with its own characteristics according to its own national conditions and understanding of ADR. This fundamental difference in understanding determines the underlying logic of ADR in resolving local enterprise disputes. The object of this article is the Chinese enterprise disputes using ADR. Therefore, the definition of relevant Chinese scholars is mainly adopted. The essence of ADR is the way of dispute settlement outside the court. Parties to disputes can resolve disputes through any ADR process under the principle of autonomy of will: mainly negotiation, mediation, and arbitration, rather than the traditional highly adversarial route of court litigation. " For as long as there have been disputes, there have been resolution alternatives [5]. When states engage in disputes, the ultimate resolution mechanism is war, but just as states (generally) manage to overcome their differences without resorting to bloodshed and annexation of territory, most of the time so do corporations and individuals [6]." In other words, choosing a less confrontational way to solve conflicts and disputes is in line with the human instinct to seek advantages and avoid disadvantages.

The advantages of ADR itself will attract enterprises to choose ADR to solve enterprise disputes. The application of ADR to solve civil disputes could indeed improve the satisfaction of the parties to the case and reduce the time and money invested [7]. ADR is not a substitute for a court trial, but an effective intervention policy to make up for the function that a court trial cannot achieve. ADR provides dispute parties with faster and lower cost solutions, customized creative solutions, professional solutions that serve business objectives, solutions that improve relationships and the quality of human interaction, and dispute resolution solutions that are affordable to most people [8].

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Using ADR to solve enterprise disputes can help the parties to the dispute decide the applicable ADR method and use of time, place, and professionals according to the different professional content, the extent of importance, and stages of the dispute to provide more professional and neutral solutions and reach a consensus with the minimum cost of time and money as well as the fastest speed. In fact, many legal regimes welcome ADR being widely used in criminal law, family law, labor law, administrative law, and civil law areas, considering the benefits mentioned above [9].

In practice, China has not designed a set of ADR mechanisms specifically for enterprise disputes. But many Chinese enterprises have settled their disputes through ADR. Here are some typical cases and their analyses.

3.1. Negotiation

Fact. In 1999, Chinese Netac was the first company in the world to successfully develop and launch a new generation of mobile memory — flash disk. On August 13, 2004, Netac filed a lawsuit against the international giant SONY (Wuxi subsidiary) on the ground that its invention patent of "flash electronic external storage method and device for data processing system" was infringed. On November 24, 2006, a negotiated settlement was reached between Netac and SONY. Under a confidentiality agreement, SONY will buy USB flash drives from Netac after Netac withdrew a $10 million civil lawsuit against SONY.

Analysis. This was an intellectual property dispute. It was an enterprise dispute arising from the infringement by SONY (a subsidiary in Wuxi) of one of Netac's core patents on flash drives. The subject matter of the case was relatively large. In addition, there were foreign factors. There were some differences in language, business transaction rules, and dispute resolution practices, which may lead to the deepening of contradictions between the two sides.

A negotiated settlement agreement was beneficial to both parties. For one thing, Shenzhen Netac Company, which has the largest market share in China, began to find greater development space in the international market. For another, SONY did not want the case to affect its global strategy and brand image negatively.

The efficiency of the negotiation process and the legal force of the negotiation need attention. From the perspective of communication efficiency, both parties, especially those from different cultural backgrounds, tend to misestimate the other party's motives and interests, leading to the breakdown of the negotiation relationship. From the perspective of the binding force on both parties, the parties can withdraw at any time in the process of negotiation, and even have the incentive to delay the dispute settlement through negotiation. From the perspective of implementation effect, the implementation of negotiation results does not have any legally binding force.

3.2. Mediation

Fact. On February 9, 2020, Topix Securities Co., Ltd. filed a lawsuit against EleFirst Science & Tech Co., Ltd. in Suzhou Intermediate People's Court of Jiangsu Province, requiring EleFirst to immediately pay 220 million yuan of pledged securities repurchase fund and 5 million yuan of liquidated damages. At the same time, Topix Securities applied to the court to freeze all bank accounts of the defendant enterprise 230 million yuan or the corresponding value of the property. On February 19, 2020, the parties agreed to reach a mediation agreement through the court-attached mediation method.

Analysis. This case was an enterprise debt dispute. It was an enterprise debt dispute caused by the inability EleFirst Science & Tech Co., Ltd. to resume production due to the epidemic. The amount of litigation subject to the case reached 230 million yuan, so the risk taken by the enterprises involved was huge. In addition, EleFirst was a high-tech private enterprise serving the construction of the

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national power grid. It was one of the important participants in the policy of resuming work and production during COVID-19, and also had the urgent need to resume work and production corresponding to the country.

The court can effectively and properly resolve the debt disputes of entities through online mediation. This not only guaranteed the realization of the creditors' financial claims but also provided a powerful judicial guarantee for the smooth resumption of work and production of enterprises. However, in such a state of emergency, the court's approach was essentially emergency treatment and was itself unsustainable.

The connection and cooperation between enterprise dispute resolution methods need attention. Due to the complex nature of enterprise disputes, it is difficult to meet the requirements of solving enterprise disputes by relying on a single way, putting forward greater requirements for the connection and integration of various dispute resolution mechanisms.

3.3. Arbitration

Fact. Zhang joined a delivery company as an intern in June 2020. Two months later, Zhang refused to work overtime because his working hours exceeded the legal limit. The delivery company terminated the labor contract with Zhang because Zhang did not meet the employment conditions during the probation period. Then, Zhang applied to the labor dispute arbitration committee for arbitration. The arbitration commission ordered the delivery company to pay Zhang 8,000 yuan as compensation for illegally terminating the labor contract, and reported the case to the Labor Security Supervision Organization, asking it to supervise the company's subsequent rectification.

Analysis. This case was a labor dispute. The issue was whether the delivery company can terminate the labor contract with Zhang for refusing to illegally arrange overtime work. The amount of economic compensation was small, meeting the provisions of Article 47 of the Labor Arbitration Law on "One Arbitration as Final". The rule of “One Arbitration as Final” is unsuitable for such small cases because it can protect both parties' legitimate rights and interests, especially employers, who are usually in an inferior position in labor disputes. The professionalism and authority of arbitration organizations will often be questioned, which needs attention. That’s because the staff members of arbitration institutions lack professional knowledge in both economic and legal fields.

4. Excellent Experience in ADR Application Abroad

4.1. Legislation

Nowadays, the ADR mechanisms of Chinese enterprise disputes have not been completely established at the legislative level. Only partial types and principles of solutions to enterprise disputes are provided, leading to the lack of legal force in practice.

Throughout the development history of ADR in the United States and concluded that the courts in the United States once faced considerable trial pressure from commercial disputes around 1850 [5]. One way to solve this problem is to divert cases. Until 1925, American courts had been hostile to alternative dispute resolution, either refusing to enforce ADR’s decisions or treating ADR’s clauses in contracts as expendable. Since the passage of the Federal Arbitration Act of 1925, the Supreme Court has made a series of decisions encouraging the use and enforcement of agreements reached through alternative dispute resolution. What’s more, the ADR Act of October 1998 gave further impetus to ADR by empowering the Federal District courts to set specific rules.

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4.2. Institution

There is a lack of good institutional connection and integration among negotiation, mediation, arbitration, and litigation in China, resulting in low efficiency of enterprise dispute resolution.

Mediation in Japan is the non-litigation dispute resolution method attached to the court, which is completely separate from litigation but also connects two different stages of dispute resolution. The parties who refuse to accept the result of mediation may enter the proceedings slothfully. The chairman of the mediation committee is a judge, but he is not the presiding judge in the trial proceedings. "Japan is deeply influenced by Chinese traditional culture. Peace and harmony are the fundamental concepts of Japan's mediation system [5]." Japan's mediation system is a product of the conflict between the Western laws introduced to ease the conflict and the Japanese society. What's more, the flexible entity in Japan makes disputes better resolved [5].

4.3. Organizations

At present, there are few independent organizations applicable to the ADR of Chinese enterprises, so it is difficult to meet the high professional requirements of enterprise dispute resolution.

The efficient application of ADR needs the support of skilled personnel. "The Financial Ombudsman System is above all else designed to protect consumers by providing an ADR system designed to enable them, if possible, to avoid costly proceedings directly against the FSP and to ameliorate some of the undisputed harshnesses of various aspects of the legal system [10]." In 2000, the UK promulgated the Financial Services and Markets Act and established a unified Financial Ombudsman Service system by merging various institutions originally composed of many professional and neutral financial ombudsmen from all walks of life, specializing in handling disputes between financial consumers and financial institutions. These professional third-party organizations can not only solve such disputes efficiently but also pay attention to the protection of the rights and interests of financial consumers.

5. Conclusion

As China has entered the new normal of the economy and the new period of legal construction, the old mode of dispute resolution has not adapted to the demands of enterprise dispute resolution. In this context, the experience of ADR in the contemporary world is used as a reference.

Through the summary of the application of ADR in the United States, Japan, and the United Kingdom, it can be concluded that to establish a set of efficient, flexible, and scientific alternative dispute resolution mechanisms for Chinese enterprise disputes, it is necessary to improve the relevant legal system, strengthen the connection and cooperation between various dispute resolution methods, and pay attention to the role of professional third-party organizations.

Limited by space, this article only analyzed the common methods of resolving disputes abroad. The future study will focus on how to solve the excellent application experience of foreign ADR localization to adapt to China's condition, laying a good foundation for Chinese enterprises running overseas and responding to the Belt and Road policy.

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