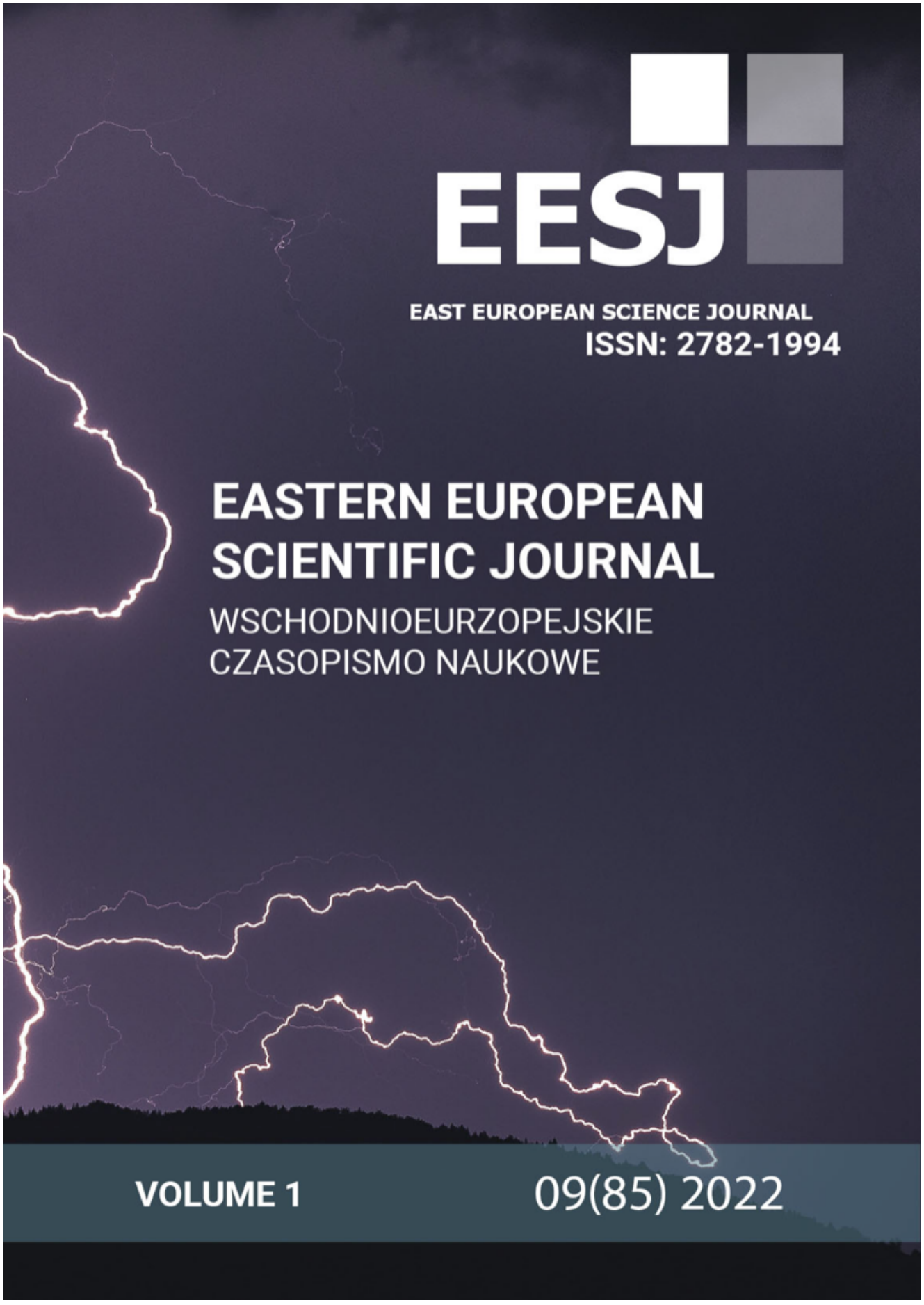
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RESOLUTION OF DISPUTES IN THE FIELD OF INTELLECTUAL PROPERTY.

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Summary: This article analyzes the issue of resolving disputes in the field of intellectual property using the example of some countries. Specialists in this field are convinced of the necessity of mandatory preventive measures for the protection of intellectual property. The resolution of disputes in the field of intellectual property with the participation of specialists makes it possible to use all promising options for actions to come out with the result with the least losses and with possible profit. This issue is relevant today and requires detailed consideration.

Key words: intellectual property, liability, defense, court.

Today, so-called intangible assets, namely intellectual property objects, play an important role in business. We propose to consider the issue of legal protection of intellectual property in detail in this article and to analyze the mechanism of solving problems in this area. Intellectual property means copyright and patent rights, related rights, and the right to marketing designations. All these are important components of competitive struggle in the business sphere. For business entities, effective legal protection of intellectual property is one of the most important conditions for successful market positioning and profit growth.

Specialists in this field are convinced of the necessity of mandatory preventive measures for the protection of intellectual property. The resolution of disputes in the field of intellectual property with the participation of specialists makes it possible to use all promising options to get out of the situation with the least losses and with a possible benefit.

The range of issues with which a specialist of this specialization works is quite wide. These can be appeals against decisions of Ukrpatent regarding the registration of intellectual property objects, resolution of conflicts related to the violation of the exclusive right to a trademark, as well as the recognition of certain situations as unfair competition.

Also, an alternative to court proceedings in this category of disputes is an appeal to an arbitration court or international commercial arbitration. However, the protection of violated rights in the field of intellectual property cannot always be implemented in this way. The Law «On Arbitration Courts» dated 11.05.2004 defines the list of non-arbitrable disputes, which includes some categories of disputes regarding intellectual property rights. Disputes regarding the registration of intellectual property, validity of patents/certificates, commercial secrets, etc. are not considered in arbitration courts. When protecting intellectual property rights, a lawyer through the court resolves the following issues:

-stopping the passage of products through the customs of Ukraine, if their import or export takes place with non-compliance with intellectual property rights;

- seizure of materials or equipment used for the production of goods in violation of intellectual property rights;

-removal from circulation of products produced in violation of intellectual property rights.

- taking measures to prevent crime;

- receiving a decision on compensation for damages due to infringement of intellectual property rights.

Sometimes the restoration of violated intellectual property rights through the court involves the publication in the mass media of information about their violation. The protection of intellectual property rights is based on the application of substantive law: the Civil Code of Ukraine, the Criminal Code of Ukraine, the Code of Ukraine on Administrative Offenses, as well as the use of provisions of procedural codes. In particular, the protection of intellectual property rights

through court is regulated by Article 432 of the Civil Code of Ukraine.

With the gaining of independence, a new stage in the development of the judicial system began in Ukraine, including an increase in the role of the court in resolving disputes through conciliation (mediation). In 2005, another judicial reform was carried out in Ukraine, as a result of which administrative courts were created, the powers of which included consideration of administrative cases regarding the appeal of any decisions, actions or inaction of subjects of power, except for cases when such decisions , actions or inaction, the Constitution or laws of Ukraine establish a different procedure for court proceedings [6]. In particular, only in the edition of December 15, 2017 of the Code of Administrative Procedure of Ukraine does the court have a real opportunity to take an active part in the reconciliation procedure. Until now, the court did not have access to the procedure for discussing reconciliation, in fact, it was only provided with a ready-made document on the achievement of reconciliation between the parties, after which the obligation to close the proceedings arose. That is, before the adoption of the above changes, resolving the dispute through conciliation remained the exclusive prerogative of the parties in the case. Currently, the court has the opportunity not only to observe the actions of the parties to find ways of reconciliation, but also to help them understand the essence of the dispute and offer possible options for its resolution. This follows directly from Chapter 4 of the Code of Administrative Procedure of Ukraine [5, p. 83].

The idea of the necessity of the existence of the possibility of reconciliation in court with the direct participation of the court in this process of consideration of the case also found its support in the practice and legislation of foreign countries.

In the modern civil process in Germany, there are norms similar to the provisions of the Ukrainian legislation regarding the right and duty of judges to take actions until the parties are reconciled. For example, § 278 of the German Civil Code orders the judge "in every situation to make the maximum effort to reconcile the parties." In addition, in the latest amendments introduced after the entry into force of the German Mediation Act on July 27, 2012, §278a states that a judge is allowed to conduct mediation or other dispute settlement procedures on behalf of the parties [27]. That is, the court is given the opportunity not only to take a direct active part in the settlement of the dispute, but also the right to involve a mediator (intermediary) for such purposes. The court also has the right to suggest that the parties turn to mediators for an alternative, out-of-court settlement of such a dispute and, if they agree, to close the proceedings in the case.

In France, Art. 21 of the current Code of Civil Procedure provides for a similar duty of the judge to make attempts to reconcile the parties [16]. It is interesting to note the statement of the famous French legal theorist J. Bergel, who, researching issues related to court activity, concludes that "the power of the state to administer justice implies the obligation to judge," meaning, among other things, to resolve cases through mediation. If a judge refuses to judge for the reason that the law does not provide for consideration of this issue, which is not interpreted in the best way, then such a judge will be prosecuted for denying access to justice" [3, p. 533]. However, as A. Weifels notes, the historical experience of France in implementing the idea of judicial reconciliation is of particular interest, because during the Great French Revolution an attempt was made to change the nature and content of the judicial process and to build it on the basis of the ideas of reconciliation. Reconciliation, as the researcher claims, and not the resolution of disputes based on the rules of law, was supposed to form the basis of justice in the young French Republic and the order it proclaimed based on the general rights of freedom, equality and fraternity. One of the revolutionary innovations was the mandatory preliminary reconciliation procedure. A special bet in the new system was made on justices of the peace. The foundations of the legal profession were also reformed, as early as 1790, the profession of lawyers was abolished, and later that of attorneys in court cases, and a new category of advisers (avoues) was introduced [26, p. 28].

Another country in which the idea of reconciliation found support and further development is the USA. It was in this country, as G. Abolonin emphasizes, that the concept of cooperative negotiations (the so-called Harvard concept of negotiations) appeared, which formed the basis of mediation procedures, as well as most modern reconciliation procedures. Judicial mediation in the USA is united under the concept of "a court with many doors". For the practical implementation of this concept in the USA there are special small claims courts, also called courts with conciliation procedures, the subject matter jurisdiction of which is determined according to the amount of the claim. The limit is set from 1,000 to 5,000 USD depending on state legislation [2, p. 111].

According to G. Abolonin, in many courts of the United States, pre-trial hearings are held, one of the goals of which is "to assist the court in creating conditions for the parties to conclude a peace agreement, including the possibility of alternative dispute resolution using mediation, independent assessment of the damage caused, arbitration" [2 , p. 292]. U. Gottwald, analyzing the conciliation procedure in US courts, points out that in many states court mediators work in courts. The scientist claims that the procedure is very different from the one in Russia, France or Germany, which can be explained by basing the law and process on more liberal ideas and legal traditions belonging to the Anglo-Saxon legal family. However, U. Gottwald also points to the significant shortcomings of the conciliation procedure in US courts, stressing that even in the US, when considering court cases, judges are usually limited to only reminding the parties that they have the opportunity to settle the conflict peacefully independently or with the participation of mediator and providing them with information about the consequences of concluding a peace treaty [18, p. 425-

426]. Indeed, it can be seen from the above that the development of the idea of judicial mediation is directly related to the development program of alternative dispute resolution.

This phenomenon (initially as a way of resolving labor conflicts) was scientifically substantiated in the USA in the 60s and 70s of the 20th century, and then began to be successfully used in other spheres of life [4].

Undoubtedly, the USA is traditionally considered to be the first country where various programs for the development of alternative dispute resolution began to be implemented. The main goals of such programs were to relieve the burden on the law enforcement system and facilitate the dispute settlement procedure for the parties. Public and religious organizations acted as initiators and active participants in the implementation of the programs. Therefore, alternative dispute resolution in the USA appeared in the early 1970s as a "bottom-up" initiative, which subsequently led to the decentralization of legal regulation. In some states, the programs were supported by local authorities, as a result of which the courts were involved in their implementation.

In the spread of mediation in the USA, three periods can be distinguished:

1) the population has a need for an out-of-court dispute resolution procedure as an alternative to the court process;

2) political science and jurisprudence recognized this necessity and developed methods of mediation as an independent and clearly structured service;

3) the services provided turned out to be interesting even for those participants in the conflict who were initially not interested in alternative dispute resolution methods.

As a result, mediation and its professional form - mediation became one of the main elements of American culture [9, p. 86–87].

In 1972, the Society of Professionals in Dispute Resolution (Society of Professionals in Dispute Resolution) was established in the USA. In 1977, a special committee (Special Committee on the Resolution of Minor Disputes) was formed at the authoritative association of lawyers - the American Bar Association [22].

It is worth noting that in April 1976, at the Pound Conference in Minnesota, the report "On Different Methods of Dispute Resolution" was delivered by Frank Sander. Since then, this day is often called the birthday of alternative dispute resolution, and Sander himself - the founder of mediation as a discipline. Shortly after the 1976 conference, a special Dispute Resolution Committee (later transformed into the Dispute Resolution Section) was established within the American Bar Association. From 1959 until his retirement in 2006, Professor Frank Sander taught at Harvard Law School. He is the author of many books on jurisprudence and alternative dispute resolution, including the popular textbook "Dispute Resolution: Negotiations, Mediation and Other Procedures" [21].

In 1990, the Joint Commission on Alternative Dispute Resolution was established in the state of Georgia, which studied the possibility of using alternative dispute resolution methods in court proceedings and launched pilot programs. These efforts led to the Georgia Supreme Court's adoption of rules that established a blueprint for the use of alternative dispute resolution in the state. The plan provided for the creation of the Dispute Settlement Commission as a special coordinating body. The Commission is engaged in the development of principles of certification of alternative dispute resolution programs and their certification, development of criteria for training and behavior of mediators.

The plan proposed that each court adopt its own alternative dispute resolution programs and submit them to the Commission for approval. The plan does not prescribe any one form of mediation, but allows courts to create programs that take into account the specific needs of local communities. According to the plan, the Georgia Office of Dispute Resolution was also established, which implemented the principles of ADR, certification of mediators and collection of information about ADR programs [19, p. 40–41].

Currently, federal regulation of alternative dispute resolution is carried out with the help of a model act - the Uniform Mediation Act of 2001 [24].

In India, the concept of mediation was first enshrined in the Industrial Disputes Act. Conciliators appointed under Section 4 of the Act were charged with "the duty of mediating and promoting the settlement of industrial disputes". In 1987, the Legal Services Authorities Act was passed, according to which the National Legal Services Authority, patronized by the Chief Justice, was established. Among other things, this body should "encourage the resolution of disputes through negotiation, arbitration and conciliation."

In 1996, the Arbitration and Conciliation Act was adopted. Provisions on alternative dispute resolution were introduced into the Civil Procedure Code of 1908 [14].

In the countries of Western Europe, the first special laws on alternative dispute resolution appeared only in the 1990s (in France, Italy), and in some countries they still do not exist. However, the process of introducing alternative methods of dispute resolution is developing almost everywhere. Special laws on alternative dispute resolution have already been adopted in Belarus and Moldova. Similar draft laws are being actively discussed in Spain, Austria, and Ukraine.

In Germany, until the end of the 1990s, there was little general interest in alternative dispute resolution, and mediation was mainly used in divorce disputes. Interest in alternative dispute resolution arose in 1979 at the annual congress of judges in Essen. In 1981, the Supreme Court indicated that the effectiveness of the judicial system could possibly be improved through the use of alternative dispute resolution methods, especially mediation. In 1999, the federal parliament passed legislation allowing German states to introduce mandatory court mediation [17].

In Italy, legislation on alternative dispute resolution appeared relatively recently. It is based on Law No. 38 of January 17, 2003, which regulates the mediation of corporate and insurance disputes. The provisions of the law were developed in two decrees of the Ministry of Justice dated July 23, 2004 (No. 222 and No. 223), which regulate the maintenance of the register of mediators and the system of payment for services, which is mandatory for public mediation organizations. On July 24, 2006, a decree was adopted, which fixed the conditions for the entry of a mediation organization into the register of mediators [15].

In Spain, there is still no legal regulation of alternative dispute resolution. The Civil Procedure Law of 2000 stipulates that within one year from the entry into force of this law, the government will submit to the General Cortes a draft law on voluntary jurisdiction (Ley sobre jurisdicción voluntaria). In 2002, an editorial commission operating within the framework of the General Codification Commission was created, which developed the draft law. Its text was presented as a draft of the Ministry of Justice and published in October 2005. More than 500 amendments were proposed during the passage of the project through the justice commission of the Congress and the Senate, and in the end the project was withdrawn by the government [13].

In some countries, the development of alternative dispute resolution took place in the form of an appeal to the traditional system of dispute resolution [20].

In India, the activity of panchayats (panchayats) - bodies consisting of the richest, most influential or elderly members of the community, who are invited to settle differences - is considered as a prototype. Panchayats tried to resolve disputes in accordance with tribal law and the general interest of the clan in order to maintain harmony and prosperity [23].

In Kyrgyzstan, in 2002, the Law "On the Courts of Elders" was adopted, in which the connection of the institute under study with the "customs and traditions of the peoples of Kyrgyzstan" is clearly traced [5].

The importance of this institute for rural areas remote from regional centers, where there are no qualified lawyers and population access to legal information, is extremely significant. In rural areas, small disputed situations, if not resolved in time, can provoke large conflicts involving relatives and turn into irreconcilable tribal enmity with all possible consequences.

Therefore, it is important at the early stages of conflict development, especially in rural areas, to organize the informal activity of Aksakal courts to resolve all conflict situations through persuasion, public influence, achieving reconciliation of the parties and making a just decision that does not contradict the laws, although, of course, the activity of these organs is not without some shortcomings [12].

In countries where the state encouraged mediation, appropriate services could be established under courts or administrative bodies. In other countries, they are supported not by courts, but by ministries or independent agencies.

If mediation developed independently of the authorities, it was initially provided by professional consultants and welfare experts working in local communities, although their activities could be coordinated by any national body. In some states, mediation was conducted by independent services, so there was no general model [25].

At the same time, alternative methods of conflict resolution cannot become a full-fledged substitute for the judicial system. The Committee of Ministers of the Council of Europe drew attention to this aspect in the Recommendations on mediation in civil cases. It is indicated that mediation can be carried out both in court and out of court. That is, the parties can use mediation to resolve disputes outside the court. However, it is strongly recommended that if the parties do resort to mediation, they should be provided with the right of access to the state judicial system, as it provides the ultimate guarantee of the protection of the parties' rights [11].

The legal literature identifies the following limitations of alternative dispute resolution. Alternative forms are not suitable for disputes involving complex legal issues, they are more appropriate in fact-finding situations. Alternative means are ineffective when settling disputes with many persons representing one of the parties, since it is difficult to reach an agreement between two parties to the dispute and the task becomes more complicated if there are more of them.

Sometimes one side suggests using alternative methods of dispute resolution, and the other side sees this method as a manifestation of a weak position, an admission of guilt, as evasion of a dispute in a state court. Since alternative dispute resolution methods are consensual in nature, their application always requires cooperation. On the one hand, this is a dignity, on the other, it is a limiting fact. If the parties do not want to contact each other, using alternative methods does not make sense. The desire of one of the parties to establish a court precedent, to attract public attention to a particular problem or the need for "slow tactics" when any party is benefiting from a delay in resolving the dispute [8] are cited as restraining reasons.

Researcher T. Abova believes: "Each country builds a judicial system based on its own needs, but there are some universal values that cannot be disregarded in a society that considers itself democratic. This is the right to judicial protection" [1, p. 9].

Indeed, the centuries-old practice of highly developed countries convincingly proves that achieving high rates of economic growth becomes possible only if there is an effective judicial system that actively helps the progress of industrial relations. If the judicial system is inefficient, ineffective and inadequate to the objective needs of the market economy, all attempts by the state authorities to achieve tangible economic progress are fruitless.

However, it is not always advisable to resolve conflicts by going to court. First, the protection of rights in court should not be the only way to resolve conflicts that arise between subjects of civil legal relations.

Secondly, with the participation of foreign persons in the dispute, the following risks and difficulties may arise, which make the procedure of applying to the state court unattractive:

- lack of knowledge of the procedural procedure mandatory for application by a foreign state court, which in practice means the need to seek the services of a local lawyer, who does not always show a personal interest in the speedy conclusion of the trial, and whose qualifications cannot always be determined until the moment when he is assigned the appropriate powers;
- the obligation to conduct court proceedings in the language of the state where the court is located, in connection with which there is a need to translate all documents related to the dispute into the applicable language; quite often, such a translation must be certified by a sworn translator, who does not always have sufficient knowledge of commercial or technical terminology;
- the presence of several instances, the procedural formalism characteristic of the state court, which contributes to the prolongation of the proceedings and requires additional costs;
- lack of necessary competence among judges, since the training of judges of state courts is designed to apply the norms of the national legal system, although the terms of the contract do not always coincide with the material law of this state. The application of foreign law by the state court is connected with the need to conduct additional examinations and obtain the opinion of relevant specialists;
- unequal treatment of the parties to the dispute (judges of state courts are quite often inclined to be more lenient towards the participants in the proceedings who are subjects of a given state; however, you should not agree with this point, as it means a violation of the principle of equality of the parties, which is impossible a priori;
- the possibility of enforcement of a state court decision on the territory of a foreign state is limited due to the lack of universal international treaties that allow the enforcement of a state court decision of one state on the territory of another state [10, p. 4-5].

Therefore, supporters of alternative dispute resolution prove that in the process of settlement of the dispute between the parties in the case, priority should be given to the mediation program outside of court proceedings, since their role is growing significantly in the world.

So, a successful intellectual property lawyer must have knowledge of both national and international law. A decisive factor in the work of such a specialist is the experience of claim-lawsuit work in the field of intellectual property, representation of the client's interests in courts, arbitrations, and other relevant institutions where disputes are considered. A lawyer in the field of intellectual property comprehensively assesses the problem in order to determine the least expensive ways to resolve the dispute. First of all, the lawyer considers the possibility of an out-of-court settlement. In the case when solving the problem out of court is found to be ineffective, specialist prepares materials for filing a lawsuit in court.

Quite often, dispute settlement specialists use the so-called non-jurisdictional form of protection. In this case, we are talking about the rights holder sending messages to the infringer, negotiations and other independent actions to defend their rights and interests. However, it also happens that it is not possible to achieve the desired result, so then it is necessary to consider other ways of solving the problem. Sometimes the lawyer turns to state regulatory bodies, for example, the Antimonopoly Committee or the State Fiscal Service. Such measures qualify as an administrative dispute resolution procedure. In addition, it should be noted that the resolution of disputes in the field of intellectual property in courts and state bodies is sometimes accompanied by unwanted publicity. In cases where confidentiality is necessary and the parties to the dispute wish to save time, various mediation options are used. Quite often, a neutral intermediary - a mediator who has expert knowledge and authority in a specific field - is brought in to resolve the dispute.

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