

Institutional integration of mediation into a civil-law legal system: Russian perspective

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This paper studies how mediation is built-in into Russian legal system. First, it shows the state policy towards mediation. Then it covers Russian legislative framework for mediation practice. Finally the paper examines inclusion of mediation into judicial procedure.

Policy and regulation

Russia historically belongs to the European "continental" legal family and is a civil-law country which legal system is essentially based on Roman law, certainly through subsequent European legal texts. In particular, Russian Civil law is essentially based on German model. Litigation between commercial entities and sole entrepreneurs is governed by Commercial Procedure Code, whereas the Civil Procedure Code governs the judicial resolution of the disputes involving individuals other than solo entrepreneurs (both codes entered into force in 2003). In Russia there is no separate commercial code and the Civil Code governs, in particular, relations between commercial entities and sole entrepreneurs. Russian law consists of federal law and the law of constituent entities of Russian Federation.

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Russian state consistently declares general support of conciliation in civil-law and labor disputes and, in particular, of mediation. Article 2(6) of the Commercial Procedure Code provides that assistance in the establishment and development of business partnership relations is a goal of judicial proceedings in commercial courts. Such provision implies that commercial courts shall support the amicable settlement of dispute between the litigants.

The Civil Procedure Code is less explicit about judicial assistance to amicable dispute resolution. However, it does establish the judges' duty to encourage settlement.

The Government is conscious about early and out-of-court dispute resolution especially because the courts are overloaded by cases. Thus, an average caseload in a commercial court is about 50 cases monthly. This is one of the reasons why the Government generally favors conciliation of the parties.

This does not mean however that the Government compels the disputing parties to mediate. There was concern among businesspeople and lawyers that an obligatory mediation would compromise the right to judicial procedure and would make public averse to mediation. The Federal Law on Alternative Dispute Resolution Procedure Involving a Mediator (Mediation Procedure)("the Mediation Law") thus provides that mediation shall be voluntary (Article 3). The law is quite consistent in this regard. However, arguably conferring such a great extent of voluntariness to mediation (i.e. the non-existence of mediation by operation of law or upon court order) hinders fulfillment of the above-mentioned goals, such as relieving the courts of cases which could be better solved amicably.

The regulation of mediation in Russia limits itself to establishing a general framework. However, there are no or only few rules creating incentives for mediation.

The Government also encourages development of mediation services networks for settlement of conflicts resulting from or related to juvenile delinquency and restorative justice for adolescent offenders. The appropriate

Government Concept is expected in late 2014.²⁾

Legislative framework

Since early 1990s mediation was practiced in Russia without a developed legal basis. Only the Commercial Procedure Code and the Labor Code mentioned the possibility to settle a case through mediation. Then Russia has adopted the Mediation Law which entered into force in January 2011. The Mediation Law aims to assist in the establishment and development of business partnership relations. This shows that it was adopted to develop the aims earlier established in the Commercial Procedure Code. In addition this law aims to harmonize social relations (Article 1(1)).

This law provided important legal framework clearly regulating certain crucial issues such as confidentiality of mediation, immunity of mediators from testifying at courts as witnesses and the validity of a mediated settlement agreement.

The law defines mediation as follows: "a method of dispute settlement with the assistance of a mediator on the basis of the parties' voluntary consent aimed at reaching a solution mutually acceptable for them".

The Mediation Law governs different aspects pertaining to the mediation of disputes arising from civil, commercial, labour³⁾ and family law matters. This legal text also applies to the mediation of other disputes if another federal statute refers to the Mediation Law.

Many provisions of the Mediation Law are actually based on the UNCITRAL Model Law and have the same practical meaning. Nonetheless, there are some important differences: under Article 1(5) Mediation Law, if a dispute 'affect[s], or can affect' public interests, then it may not be mediated. Also, the Mediation Law, unlike the UNCITRAL Model Law, distinguishes between professional

2) <http://minjust.ru/ru/press/news/pravitelstvo-namereno-prinyat-koncepciyu-razvitiyu-sluzhb-mediacii-do-konca-2014-goda>

3) Except collective disputes which are subject to separate regulation.

and non-professional mediators⁴⁾. Furthermore, the Mediation Law introduces a notion of *mediated agreement* (*mediativnoe soglashenie*), thus distinguishing it from other settlement agreements, albeit without practical implications at the moment (i.e. a mediated agreement does not have any special enforcement mechanisms which are different from other settlement agreements). Finally, the Mediation Law has a wider scope: it also governs some issues not covered by the UNCITRAL Model Law, such as self-regulating organisations of mediators.

The legal basis for mediation in Russian needs further improvement. Thus, Russian law currently does not expressly penalise a failure to undertake mediation in good faith. Where a party participates in settlement negotiations without a genuine intention to resolve the dispute and/or retracts from them in bad faith, it would be very difficult to hold such a party liable for this conduct. Furthermore, there are no mechanisms for the expedited enforcement of extrajudicial mediated settlements. All of these issues will require solutions for mediation to gain ground in Russia.

The Russian Supreme Commercial Court in 2012 introduced a bill aiming to amend the Commercial Procedure Code to establish judicial conciliation by assistants of the judges. However this bill was not sufficiently supported by business community and never became law. Although the Supreme Commercial Court actively promotes this bill, the very future of the Supreme Commercial Court itself is more than uncertain: in late 2013 the Russian President announced a decision to merge it with the Supreme Court to harmonize inconsistencies in case law. The merger is now underway. The Supreme Court judges usually take more conservative stance both to private and public disputes than the commercial court judges. Thus it is possible that the bill on judicial conciliation will not find support in the Supreme Court. However since the Supreme Court never voiced opposition to mediation, hopefully it will also take active measures to further integrate it into judicial procedure.

4) In order to become a professional mediator it is necessary, in particular, to be at least 25 years old and to pass a special training programme. The law allows mediating disputes on an *ad hoc* basis without obtaining a professional status. However, non-professionals are subject to certain restrictions, e.g. they may not mediate a dispute submitted to court.

Mediation and Judicial Proceedings

Although the Civil Procedure Code and Commercial Procedure Code explicitly provide that the judges shall take measures to conciliate the parties, the statutes do not specify such measures other than indicating the duty of the judges to inform the parties about their right to amicably settle their dispute, to refer it to arbitration or to a mediator.

Some courts do take more consistent measures to assist the parties to settle their controversies amicably. Thus, the Commercial Court of Moscow established a Conciliation Room in late 2013. There is always a mediator on duty there ready to give to the parties detailed information on mediation and to discuss its implication and applicability to their particular dispute. Even though the Conciliation Room was created only in late 2013, a number of successful settlements already occurred in it and were approved by the court.

A similar practice exists already for some years in several other state courts, both in commercial courts and courts of general jurisdiction.

The parties express their satisfaction with mediation procedure organized due to conciliation rooms. Thus, in June 2014 the Russian Chamber of Commerce and Industry received a letter from Industrial Technologies Engineering LLC the letter expressed gratitude for the high-quality assistance by the mediator of the Panel of Mediators at the said Chamber. The mediator made an independent analysis of the conflict, studied options of its settlement, their feasibility; the mediator ensured a comfortable regime for the dialogue-making.

Under Article 16(3) Mediation Law, mediation of disputes already submitted to court or to arbitration may be conducted only by mediators carrying out their activity on professional basis.

Importantly, a number of Russian courts publish lists of mediation providers and their contact information at their official websites. Initially the Supreme Commercial Court was hostile to such practice as a "publicity" of mediators. However now this respected court has the longest list of mediation providers from many Russian regions.

In January 2011 the very first settlement agreement reached by means of

mediation in accordance with the Mediation Law. The preliminary court hearing in proceedings chaired by a judge of the Commercial Court of the Omsk region was broadcast via videoconferencing system from the Russian Supreme Commercial Court. Representatives of the parties from several Russian regions took part in the hearing: the Omsk, Novosibirsk, Tyumen and Krasnoyarsk regions.

The preliminary court hearing in that case was commenced in January 2011 in the courtroom of the commercial Court of the Omsk region. A shareholder of ZAO Sibirskaya Gornitsa challenged validity of the general meeting of shareholders' resolution. Upon the defendant's initiative, professional mediators were engaged to mediate the dispute. Three days later the parties submitted to the court the documents signed in the course of the mediation procedure.

With the parties consent the court commenced proceedings by means of a videoconference, whereby the settlement agreement was approved. Upon completion of the court hearing the parties and judges of various commercial courts discussed advantages of mediation procedures and videoconferencing.

The clear advantages of the ADR procedures were pointed out in the discussion: harmonization of relations and lessening of tension in the society, additional guarantees of legal protection of business. The discussants also noted that modern technologies put into operation in commercial courts facilitate holding of court hearings with the use of videoconferencing between several commercial courts at the same time thereby significantly reducing the time and monies spent by the parties to the dispute from other regions and ensuring easier access to justice.

Now court rulings approving mediated settlement agreements become known from time to time. The most recent such ruling by the time of writing this article was rendered by the Commercial court of Rostov region in case A53-3036/2014 on 10 July 2014. The dispute between a wastewater treatment plant and a port was settled with assistance of Mediation Centre at the Rostov Chamber of Commerce and Industry. The dispute arose because the port used a part of railway which belonged to the plant, and the plant claimed compensation for unjust enrichment. The parties agreed upon the method of counting the

enrichment received by the port due to using the railway. Applying the mutually agreed method the parties agreed upon the amount of compensation for using the railway and the time schedule for its payment. Also the port promised to refund 50% of the court fee paid by the claimant for the judicial procedure. Such payment would extinguish all claims in the dispute. Should the port fail to perform his obligations under the settlement agreement, the plant would be entitled to apply for a writ of execution at the same court for forced execution of its terms.

Rules for professional mediators

Russian Law distinguishes between professional and non-professional mediation (Article 15(1) Mediation Law). Mediation Law imposes special requirements on those who want to become professional mediators: apart from having a university degree, it is necessary to pass a special mediation training according to a program approved as established by the Russian Government.

The Model Program for mediators was approved by the Regulation of the Ministry of Education and Science of February 14, 2011. Since its registration by the Ministry of Justice on March 1 it has become effective and each mediation training center must base its program on this one.

The Model Program consists of three levels: basic, special and 'trainers training', each followed by examination. If the examination is passed, the mediation training center issues an appropriate certificate. Completing the basic level entitles the person to mediate disputes but not to train mediators. The special level 'upgrades' the mediator's competence in particular subject areas (civil, commercial, multy-party, project management, labor, family, IP, administrative, judicial, restorative justice, juvenile justice).

The 3rd level grants right to train mediator at the basic level. The intriguing issue is how the state will enforce the observance of the program. Who will decide whether the training program is sufficiently close to the officially approved model? What will happen if a mediation training center is considered to have a 'wrong' program? Many mediation centers fear a kind of inquisition

which would eradicate “heresy”, i.e. make them follow the officially approved program or terminate their education activity altogether. However, so far no such cases are heard of.

Mediation practice

Although many individuals in Russia scarcely know about or understand mediation, efforts to familiarise them with this method of dispute resolution have been ongoing. Currently, mediation is practised in Russia only sporadically. Mostly it is used in family matters, labour disputes or in controversies involving small and medium-sized businesses. As mentioned above, there are a number of centres consistently providing mediation services as well as methodological and logistics support for mediation occurring in certain regions or throughout the whole of Russia. The most well-known of them are:

- the Panel of Mediators at the Russian Chamber of Commerce and Industry, established in 2006 in Moscow;
- Moscow Centre (Non-Profit-Organisation, Scientific and Methodological Centre for Mediation and Law)⁵⁾ founded in 2006;
- Saint-Petersburg Centre (the Negotiations and Conflict Resolution Centre in Saint-Petersburg) established in 1993;
- League of Mediators which headquarters in Saint-Petersburg and has representation offices in Moscow, Perm, Samara, Velikiy Novgorod, Ekaterinburg, Yuzhnyi Sakhalinsk⁶⁾;
- Siberian Conflictology Centre⁷⁾ launched in Novosibirsk;
- Ural Centre (Mediation Centre at Ural State Academy of Law) instituted in 2009 in Ekaterinburg.

Yet the overall caseload of the mediation centres is very small both in absolute terms and in comparison with the state courts’ dramatic caseload.

5) See <www.mediacia.com>.

6) See <www.arbimed.ru>

7) See <www.edogovor.ru>.

According to official statistics, whereas the commercial courts heard 1,208,737 cases in 2010, the Saint-Petersburg Centre—Russia’s most experienced mediation centre—can only claim to have mediated over 1000 disputes since 1996. In 2011, the average monthly caseload per commercial court judge constituted 47 cases⁸⁾.

Some data on mediation practice can be obtained from mediation centres. Thus, the Saint-Petersburg Centre has been conducting mediation training and mediations since 1993. It is assisted by a Russian-American conflictology programme which was established in 1992.⁹⁾ It certifies mediators annually, and its certificate is recognised by the professional community in both Russia and in the US. More than 120 mediators have been certified accordingly. The Saint-Petersburg Centre has successfully mediated the following categories of disputes: Disputes within a commercial company (corporate disputes), e.g. between members of the board of directors; disputes within a holding company; the dissolution of a family business; the opting-out and opting-in of a shareholder; disputes between a company owner and a senior executive (such as the chief financial officer); disputes between company departments or employees; disputes regarding administrative decision-making; debt collection disputes; disputes concerning investment and innovations; and family business disputes.¹⁰⁾

The Panel of Mediators at the Russian CCI processed more than 90 applications to mediate disputes in 2013. The rise in application to mediate disputes took place that year due to the efforts of the Panel headed by a newly appointed chairperson of the Panel of Mediators Yulia Shiryayeva.

Another institution providing public data is the Ural Centre. With regard to disputes involving legal entities, it has mediated conflicts in the following areas: disputes over the supply of electricity; corporate disputes (challenges to the organs of a legal entity and disputes on participation in management

8) Statistical data on the results of work of state commercial courts <www.arbitr.ru/_upimg/731F48357EA6A6C62CEC755A60A0D5E2_o_syd_nagryzke.pdf>.

9) D. Davydenko, *Kak izbezhat sudebnogo razbiratelstva: posrednichestvo v biznes-konfliktah*, p. 104–105.

10) O. Allakhverdova, *5 Treteyskiy sud* 174–8 (2011).

activities); construction disputes; and loan and credit disputes. Additionally, this Centre has mediated disputes involving individuals: inheritance disputes; housing disputes; contractual disputes; bank credit conflicts; disputes over insurance payments caused by work accidents; disputes resulting from participation in corporations, particularly as regards joint-stock companies and companies with limited liability.¹¹⁾

Mediation centres report that the parties reach settlements in 80% of the cases and that approximately 90% of the settlements reached by mediation are complied with voluntarily.¹²⁾ This suggests that the parties are usually satisfied with the mediation outcomes. For instance, the Ural Centre reports that 80% of its mediations resulted in settlement agreements. These agreements formed the basis for terminating court proceedings, either by way of approval of the settlement agreement by court or by the claimant's withdrawing the claim.¹³⁾

As a major Russian mediation scholar Elena Nosyreva notes, mediation in Russia “*primarily has taken shape as a legal institution rather than as a social institution. Law governs relations which have not yet been formed in society [...]. Therefore the main issue is how the legal institution of mediation can influence the development of mediation as a social institution*”¹⁴⁾. Indeed, mediation is not yet sufficiently integrated into the Russian business and legal culture. People are accustomed to resolving disputes through informal mechanisms or by litigation. In comparison to litigation or even arbitration, mediation obviously requires more cooperation between the parties in dispute. Many businesses are reluctant to cooperate with the other party or with a third party once the dispute arises. Given this, mediation cannot unencumber the courts in the short term. However, the consistent cultivation of a culture of amicable settlement by both the state and by business and lawyers' associations has the potential to gradually make a substantial difference.

11) Analytical Memorandum on the Activity of the Ural Centre for 2010; <www.ekaterin.arbitr.ru/about/primir/posredn#i8>.

12) Data obtained from interviews with Russian mediation centres.

13) Analytical Memorandum on the Activity of the Ural Centre for 2010. See <www.ekaterin.arbitr.ru/about/primir/posredn#i8>.

14) Nosyreva, Elena, *Stanovlenie instituta mediatsii v Rossii*, p. 6.

Conclusion

Mediation in Russia slowly but steadily develops, typically due to the efforts of some most active providers. The Government in fact is reluctant to take any active measures such as establishing obligatory mediation by operation of law in some particular types of disputes. However, last years we see clear progress with regard to judicial assistance to mediation, such as establishment of conciliation rooms or similar mechanisms at state courts, forming lists of mediation providers by courts at their official websites. The future of judicial approach towards mediation is uncertain due to the current merger between the two highest courts in Russia and looming risks of conservative policy triumph.

Russia has already detailed federal legislation governing mediation. Also, as I mentioned above, mediation has been practiced in our country for years, even when such legislation was not in force. Russian mediation providers have established non-governmental organizations with the aim of regulating the emerging profession and ensuring its quality. Thus, current Russian experience can be of interest to legislators and practitioners from many countries, which also face problems with case overload in the state courts.

