

MEDIATION Q&A: RUSSIAN FEDERATION

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Russian Federation - specific information concerning the key legal issues that need to be considered when mediating a dispute.

This Q&A provides country-specific commentary on *Practice note: overview, Mediation: Cross-border* and forms part of *Cross-border dispute resolution*.

JUDICIAL ATTITUDE TOWARDS MEDIATIONS

1. Is mediation a commonly used alternative dispute mechanism in your jurisdiction, especially in relation to cross border disputes? What proportion of commercial disputes are settled through mediation? What is the judicial attitude towards mediation in relation to commercial disputes?

Although courts usually indicate to the parties that they have a right to refer a dispute to mediation, mediation is very rarely used to settle civil and commercial disputes in Russia. According to a survey undertaken by the Supreme Court of Russia, only 44 (0.002%) out of 1,531,473 commercial disputes that were heard in 2015 by commercial courts were dealt with by a mediator.

COMMERCIAL ATTITUDE TOWARDS MEDIATION

2. How do commercial parties commonly view mediation? Do parties typically opt for institutional mediations or do they prefer the flexibility of independent/ad-hoc mediations?

Despite the adoption in 2010 of the Federal Law "On alternative procedure of dispute resolution with participation of a mediator (mediation procedure)", mediation has so far not been widely applied. Commercial parties do not consider this method of dispute resolution to be alternative to judicial process.

LAWS ON MEDIATION

3. Are there any national laws or regulations that govern the conduct of mediations in your jurisdiction?

The conduct of mediation is primarily regulated by Federal Law No. 193-FZ dated July 27, 2010 "On Alternative Procedure for Dispute Resolution with Participation of a Mediator" (Mediation Procedure)" (the Mediation Law).

Some aspects of mediation are also regulated by the procedural legislation. For example, procedural rules provide the following:

- An obligation on the courts to encourage the parties to enter into a settlement agreement, including by way of mediation.
- A prohibition to examine mediators in court on the circumstances that became known to them as a result of the fulfilment of their duties.
- A right for the courts to stay proceedings for a period not exceeding 60 days on request by both parties, if they decide to mediate.

INTERNATIONAL TREATIES ON MEDIATION

4. Is your jurisdiction a signatory to any international treaties or directives on mediation?

The Russian Federation is a party to a number of international treaties which call for wider application of mediation in certain (non-commercial) types of disputes.

For example, The Russian Federation is a signatory to the Council of Europe Convention on preventing and combating violence against women and domestic violence, which provides in Article 48 (1) that parties will take the necessary legal or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this convention.

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MEDIATION AS A PRE-CONDITION TO LITIGATION

5. In the absence of a dispute resolution clause, which calls for mediation, are parties required to engage in mediation as a pre-condition to accessing the local courts?

The mediation procedure is initiated by way of an agreement between the parties, which may be formalised as a separate agreement to use mediation (Article 7(1), Mediation Law). A reference in a contract to a document containing conditions for dispute resolution with the assistance of a mediator is deemed to be a mediation clause, provided that the contract is in writing.

If the parties have concluded an agreement to use the mediation procedure and have undertaken not to refer the dispute to a court within the agreed period of such mediation procedure, the court will recognise the binding nature of such obligation until the terms of such obligation are fulfilled. The only exception is when a party has to protect its rights, for example if the mediation procedure is burdensome or implies unwarranted delays for that party (Article 4(1), Mediation Law). In practice we have not seen any courts apply this provision so far. This exception may have the effect that will enable the parties to avoid the mediation process as a necessary step before referral of the case to a court.

Thus parties must engage in mediation as a pre-condition to accessing the local courts only if there is a valid mediation clause in place and, the parties agreed not to refer their dispute to the court.

If there is no mediation clause, the parties are not obliged to undertake mediation before going to the court.

COSTS CONSEQUENCES OF REFUSING TO MEDIATE

6. Can local courts force parties to mediate, especially in commercial or employment disputes? Do local courts impose costs for:

- Delay in consenting to mediation?
- Failure to mediate?
- Refusal to participate in mediation, particularly if that party is also a losing party in subsequent court proceedings?

Given that mediation is based on the voluntary consent of parties, a local court may not force parties to mediate. Therefore, refusal to mediate or disregard of a proposal to mediate made by the other party will not likely result in imposing costs on the party avoiding mediation.

Article 7(5) of the Mediation Law expressly provides that if one of the parties has sent a written proposal to mediate and has not received positive consent to mediation from the other party, such proposal will be deemed declined.

LIMITATION PERIOD

7. What is the limitation period for filing a civil and commercial claim? Is the limitation period for initiating judicial or arbitral proceedings extended/suspended in cases where parties attempt to settle their disputes through mediation? What are the formalities required to trigger such extension/suspension?

The general limitation period for filing civil and commercial claims (including contractual claims and tort claims) is three years (Article 196, Civil Code of the Russian Federation). As a general rule, the limitation period will start to run from the date when a person learnt or should have learnt about a breach of their rights and that person qualifies as the legitimate defendant in a claim for the protection of such right. However, the limitation period cannot exceed 10 years from the date of the respective violation.

If the parties have opted for mediation, the limitation period is automatically suspended for the mediation process for six months from the date of commencement of the process. (Article 202(3), Civil Code of the Russian Federation).

If litigation commences and the defendant argues that the limitation period has expired, the claimant will have the right to refute this argument by claiming that the parties have engaged in mediation and the limitation period has been suspended.

DISPUTES SUITABLE FOR MEDIATION

8. Are there any class or type of disputes that are not considered suitable, either by law or otherwise, for mediation in your jurisdiction?

Mediation is used in resolving disputes arising out of civil law relations, including matters relating to carrying out entrepreneurial and other economic activities, as well as in resolving disputes arising out of labour legal relations and family law matters (Article 1(2), Mediation Law).

The Mediation Law expressly provides that mediation may not be used in collective labour disputes and the other disputes mentioned above, if such disputes affect or may affect either (Article 1(5), Mediation Law):

- The rights and legitimate interests of third parties that are not involved in the mediation process.
- The public interest.

As a result, tax and customs disputes, antimonopoly disputes and disputes relating to, for example, bankruptcy may not be resolved by mediation.

MEDIATION AGREEMENT

9. Is it customary in your jurisdiction to execute a written mediation agreement before the start of the mediation proceedings to record the rights and obligations of the parties and the mediator?

Under the Mediation Law, before the mediation procedure is commenced the parties may enter into two written mediation-related agreements. In the first place, the parties enter into an agreement to settle their disputes through the mediation process (mediation agreement or mediation clause). This is a written agreement, and it can be concluded either before or after the dispute has arisen. In the mediation agreement, the parties agree to settle by way of mediation a dispute that has arisen or may arise between them in connection with a particular legal relationship.

After the dispute has arisen, the parties enter into a separate agreement to use mediation (implementation agreement). The mediation process is deemed to be commenced in relation to a particular dispute between the parties from the date of conclusion of such implementation agreement. The implementation agreement must be in writing, and will contain information on the subject matter of the dispute, the mediator, the mediation procedure, the allocation of the mediation-related costs and the timeframe for mediation.

STANDARD CLAUSES FOR MEDIATION AGREEMENT

10. Are there any clauses that would be usual to see in a mediation agreement and/or that are standard practice in your jurisdiction?

See *Question 9* for mediation-related agreements and their clauses.

For a mediation agreement to prevent referral of a dispute to the court, such agreement must expressly provide for an obligation of each party not to refer the dispute to a court until the conditions of the obligation are fulfilled.

In the absence of this type of provision, the parties will still be able to opt for court intervention even if they have entered into both a mediation and an implementation agreement, and the mediation process has already commenced.

TIMING OF MEDIATION

11. When do parties usually mediate?

In Russia there is no central authority or organisation that would collect mediation related information and provide relevant statistics. However, our experience shows that most parties come to mediation after filing a court claim in the first instance.

Parties who decide to mediate after a claim has been brought to the court are entitled to request the court to stay the proceedings for a period not exceeding 60 days.

CHOOSING A MEDIATOR

12. How do parties usually choose a mediator? What happens if the parties cannot reach an agreement?

The mediation agreement must contain information about the mediator, mediators or the organisation providing mediation services.

The parties will, by mutual consent, select one or several mediators.

If the parties cannot reach an agreement on the mediator, they may request the organisation providing the mediation services to recommend or even appoint a mediator.

CONDUCT OF MEDIATION

13. How are mediation proceedings conducted in your jurisdiction?

The procedure for mediation is set out in the implementation agreement, which may contain a reference to the mediation rules adopted by the organisation providing the mediation services.

The mediation rules usually provide that a proposal to mediate may be made by either of the parties, or by a mediator or organisation providing mediation services upon the parties' request.

In the absence of agreement between the parties on the mediation procedure, a mediator conducts mediation in such a manner as they believe is proper, taking into account the circumstances of the case, the desires of the parties and the need for a prompt settlement of the dispute.

FACILITATIVE OR EVALUATIVE MEDIATION

14. What approach does the mediator usually take to the mediation, is this facilitative or evaluative?

In most cases, mediators come from non-legal professions and are not able to evaluate the strengths and weaknesses of a particular case. Therefore, mediators normally take a facilitative approach, seeking to encourage the parties to negotiate, and reach a mutually acceptable agreement on the disputed issue.

TIME FRAME FOR MEDIATIONS

15. What is the general time frame for mediations in your jurisdiction? Is there any statutory period within which mediations must be completed?

The time frame for mediation should not exceed 180 days, except when mediation is used after the claim has been brought to court, in which case it should not exceed 60 days (Article 13(3), Mediation Law).

In practice the mediation process will involve several meetings of the parties with the participation of a mediator.

PROFESSIONAL ADVISORS IN MEDIATIONS

16. Are parties required to be represented by professional advisors, such as lawyers in mediation proceedings? If there is no requirement, are professional advisers usually present?

In practice, legal counsel to the parties participate in the mediation proceedings, although such participation is not mandatory.

JUDGES AS MEDIATORS

17. Do judges ever act as mediators? If so, do they commonly give a view as to the merits of a dispute? Are they then removed from involvement in the case if the mediation is not successful?

Persons holding public offices, including judges, cannot act as mediators, unless federal laws provide otherwise (Article 15 (5), Mediation Law).

MEDIATOR'S ROLE POST AN UNSUCCESSFUL MEDIATION ATTEMPT

18. Are there any provisions under national law or institutional rules that prohibit a mediator to subsequently act as a judge, arbitrator or conciliator in relation to the same dispute?

Russian law does not expressly prohibit a mediator to act subsequently as a judge, arbitrator or conciliator in relation to the same dispute. However, the previous involvement of a judge or arbitrator in a mediation dispute may be considered sufficient ground for a disqualification request.

COURT-ANNEXED, JUDICIAL AND ONLINE MEDIATIONS

19. Are court-annexed or judicial mediations (conducted under the 'shadow' of the court) and online mediations popular in your jurisdiction? If so, what types of disputes are considered suitable for such mediations? Give details of any pilot schemes that currently exist in your jurisdiction. Are any of these schemes compulsory?

In 2012 the Higher Arbitrazh (Commercial) Court of the Russian Federation drafted a bill setting out the position of court conciliators. Under the bill, the following people may be appointed as court conciliators:

- A retired judge.
- An assistant to a judge not participating in the hearing of the case.
- The court staff with appropriate legal background.

The candidates will be selected by the parties from the list approved by the court.

However, this bill has yet been passed into law.

At present, some courts have separate equipped premises specially designated for the mediation meetings. However, these are not very widely used by the parties.

On-line mediation is not widely used.

COSTS

20. Who bears the cost in mediations involving civil and commercial disputes?

The allocation of the costs of the mediation between the parties must be included into the implementation agreement.

Usually the costs of the mediation are split equally between the parties. The other expenses incurred by either of the parties in mediation (such as legal costs, accommodation and so on) are borne the respective party, unless otherwise agreed.

CONFIDENTIALITY IN RELATION TO MEDIATION PROCEEDINGS

21. Are mediation proceedings considered confidential? In the absence of an express clause in the mediation agreement, can confidentiality be implied in negotiations conducted through mediation?

The Mediation Law expressly provides that all the information relating to a mediation procedure must be kept confidential, except in the cases provided by law and otherwise agreed by the parties. (Article 5 (1), Mediation Law).

Parties to a dispute and any other persons who have been present during the mediation process, cannot refer during court proceedings to information regarding:

- A proposal by one of the parties to use mediation, and the willingness of one of the parties to initiate the mediation process.
- Opinions stated or offers made by one of the parties in relation to the settlement of the dispute.
- Admissions made by one of the parties during the mediation process.
- Willingness of one of the parties to accept the settlement offer of the mediator or the other party.

(Article 5(3), Mediation Law.)

CONFIDENTIALITY OBLIGATIONS OF THE MEDIATOR

22. Does the confidentiality obligation extend to the mediator as well?

The Mediation Law provides that a mediator cannot disclose information concerning the mediation procedure that became known to them during the mediation process, without the parties' consent (Article 5(2), Mediation Law).

Intermediaries assisting parties in the settlement of a dispute, including mediators, cannot be examined as witnesses on the circumstances that became known to them in connection with the fulfillment of their duties (Article 69(3) (1), Civil Procedural Code and Article 56 (5.1), Commercial Procedure Code).

EXCEPTIONS TO CONFIDENTIALITY

23. Can the local courts override confidentiality provisions and permit confidential information arising out of, or relating to, a mediation to be disclosed under any circumstances?

A mediator or an organization providing mediation services cannot be required to disclose information relating to the mediation, except where required by law and otherwise agreed by the parties (Article 5(4), Mediation Law).

DOCUMENTING A SETTLEMENT

24. How do parties usually formalise any settlement? Is the mediator involved in drafting the settlement agreement?

An agreement reached by the parties as a result of mediation must be in writing and signed by both parties.

Mediators generally neither participate in the preparation of the agreement reached as a result of mediation nor sign it.

DISPOSAL OF COURT PROCEEDINGS

25. How are court proceedings disposed of if settlement is reached at mediation?

An agreement reached through mediation conducted after a dispute has been referred to a court may be approved by the court as a settlement agreement, in accordance with the procedural law rules. In this event, the court will terminate the proceedings. The same apply if the mediation has resulted in a waiver of a claim by a claimant.

If a defendant admits fault during the mediation process, the court must ensure that no third parties' rights are jeopardised by such admission, and then issue a decision based on the admission.

ENFORCING SETTLEMENTS

26. Are there any special procedures for enforcing a settlement agreement reached at mediation? Does this differ from a settlement agreement reached outside mediation? Is it easier to enforce a settlement agreement reached at mediation?

An out-of-court mediation agreement is regarded as an ordinary civil law transaction and the enforcement procedure is the same as for a civil law claim.

A mediation agreement concluded after court proceedings have been commenced, and approved by the court as a settlement agreement can be enforced (compulsory execution) by way of a writ of execution issued by the court without an additional hearing.

MEDIATION INSTITUTIONS AND CENTRES

27. What are the main institutions or centres that provide mediations services, including appointment of mediator in your jurisdiction?

Institutions that provide mediation services have been created in more than 60 constituent units of the Russian Federation.

In addition, mediation services are provided by some of the territorial chambers of the Chamber of Commerce and Industry of the Russian Federation, regional representative offices of the Russian Union of Industrialists and Entrepreneurs and divisions of higher educational institutions.

An example is the United Service of Mediation administered by the Russian Union of Industrialists and Entrepreneurs (RSPP) (<http://ars-rspp.ru/>).

ACCREDITATION SCHEMES FOR MEDIATORS

28. Is there an accreditation scheme or regulatory body for mediators in your jurisdiction? Describe the qualifications, continued professional education schemes and training courses that such institutions have in place for mediators

Mediators can perform their activities on either a professional or nonprofessional basis.

Non-professional mediators must be at least 18 years old, with full civil capacity and no previous convictions.

Professional mediators must be at least 25 years old, have achieved higher education and passed the training course on an approved mediator's preparation programme.

Once proceedings have been commenced in relation to a dispute, if the parties subsequently decide to mediate, only professional mediators are allowed to conduct the mediation in relation to the disputes in question. Various self-regulating organizations of mediators have been created in Russia, tasked with developing rules of professional conduct for mediators, and supervising compliance with such standards

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