Mediation: Overview (Russian Federation)

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A Practice Note providing an overview of the key legal issues that need to be considered, from a Russian law perspective, when mediating a civil dispute.

Mediation is a flexible, voluntary, and confidential form of alternative dispute resolution (ADR). In a mediation a neutral third party assists parties to work towards a negotiated settlement of their dispute, with the parties retaining control of the decision on whether or not to settle and on what terms. Given its nature, the way mediations are conducted across jurisdictions will vary, depending on different factors such as the local approach to mediation, the applicable law, complexity of the issues involved, the characters of the parties, and the value of the dispute. For a counsel engaged in mediation, a deeper understanding of these factors is critical for a successful outcome.

This Note explains the key issues that need to be considered, from a Russian law perspective, when mediating a civil dispute. In particular, it covers:

- The attitude of the courts towards mediation.
- Whether mediation is perceived as an effective means of dispute resolution by the business community.
- The laws on mediation, including pre-action requirements for parties to mediate before initiating litigation (regardless of any contractual obligation to refer their disputes to mediation).
- The disputes considered suitable for mediation.
- Whether the limitation period stops running when parties attempt to settle their disputes through mediation.
- How the mediation process works (including issues related to costs, confidentiality obligations of the parties and the mediators, timing of mediation, selecting a mediator, agreement to mediate, time frame for mediations, and legal representation at mediations).
- Whether judges (retired or serving, or both) can act as mediators.
- Court-annexed, judicial, and online mediations.
- The main institutions providing mediations services, including appointment of mediators.

For more on the key challenges and considerations in cross-border mediation, see *Practice Note, Cross-border mediations: overview*.

Judicial Attitude Towards Mediations

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 the Russian

Federation, only 10 (0.0006%) out of 1,508,226 commercial disputes that were heard in 2020 by commercial courts were dealt with by a mediator. Similarly,

only two cases brought before the commercial courts were settled by mediation in 2021 and six in 2022.

In civil disputes heard by the courts of general jurisdiction, parties settled disputes through mediation or court conciliation in only 770 out of about 28.5 million cases considered by the first instance courts in 2020. Similarly, the number of disputes resolved through mediation were 728 in 2021 and 903 in 2022.

Generally, mediation appears to remain unpopular as a method of dispute resolution in Russia.

Costs Consequences of Refusing to Mediate

Given that mediation is voluntary, a local court cannot force parties to mediate. Therefore, refusal to mediate or disregard of a proposal to mediate made by the other party is unlikely to result in the court imposing costs on the party that refuses to mediate.

Under the Federal Law "On alternative procedure of dispute resolution with participation of a mediator (mediation procedure)" (Mediation Law), when one of the parties has sent a written proposal to mediate and has not received consent to mediation from the other party, the proposal will be deemed declined (Article 7(5), Mediation Law).

However, the court of the first instance can point out to the parties that they are allowed to use mediation to settle the dispute, and provide information on actions and time limits required to use mediation or other settlement procedures (Article 134 (1), Commercial Procedural Code (CPC); Article 147(1), Civil Procedural Code).

According to case law of the Supreme Commercial Court, if the conduct of the party that initiated the mediation procedure and requested a stay of proceedings clearly indicates that they are avoiding to participate in the mediation, this may be considered an abuse of rights. In these circumstances, the court is entitled to impose all costs on that party (Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation No. 50 (18 July 2014) "On Settlement between Parties to Commercial Proceedings").

Commercial Attitude Towards Mediation

Despite the adoption in 2010 of the Mediation Law, mediation has so far not been widely used. Commercial parties do not consider this method of dispute resolution as a real alternative to the judicial process. This may be due to the lack of familiarity with the procedure, as mediation is a relatively new mechanism under Russian law. Parties usually opt for institutional mediation.

However, the Federal Law "On Amendments on Certain Legislative Acts of the Russian Federation" No. 197-FZ (Mediation Amendment Law) was issued on 26 July 2019 to develop mediation in Russia and to overcome the problems mentioned above. New rules on mediation and other alternative dispute resolution mechanisms entered into force on 25 October 2019.

The amendments provide for a new alternative dispute resolution procedure, court conciliation, which is similar to mediation but is subject to specific regulation. Additionally, the scope of mediation has been extended to disputes arising out of administrative and other public law matters. The new rules also set out a non-exhaustive list of the possible different outcomes of the settlement procedure (Article 138.6, CPC; Article 153.7, Civil Procedural Code). For example, the settlement process may result in a settlement agreement, the withdrawal of the claim, an agreement on the facts of the case, and so on. Finally, under the new rules, parties that settle their dispute during court proceedings may receive a partial refund of the court fees.

Mediation and Arbitration

Attempts to negotiate or resolve disputes through mediation are usually made before arbitration. The parties can also agree that mediation must take place before the commencement of arbitral proceedings.

Once arbitration proceedings have started, the parties are less likely to compromise.

Laws on Mediation

The conduct of mediation is primarily regulated by the Mediation Law.

Some aspects of mediation are also regulated by 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 two months on request by both parties, if they decide to mediate.

The Mediation Amendment Law, which entered into force on 25 October 2019, introduced a judicial or court conciliation procedure that is very similar to mediation. The procedure has been codified in both the Civil Procedural Code and CPC Court. Conciliation can be commenced at any stage of the proceedings. Only a retired judge can act as a court conciliator and the procedure is not confidential. A list of court conciliators, divided into regions and specialisation, is included in Resolution No.1 adopted by the Plenum of the Supreme Court on 28 January 2020. The Plenum of the Supreme Court made changes to the list several times by excluding some court conciliators. At the time of writing, the list includes 339 names.

International Treaties on Mediation

The Russian Federation is not a party to international treaties covering mediation-related issues.

The Russian Federation has not yet signed the Singapore Convention on Mediation that entered into force on 12 September 2020.

Mediation as a Pre-Condition to Litigation

The mediation procedure is initiated by way of an agreement between the parties, which can 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 mediation and have undertaken not to refer the dispute to a court within the agreed period of this mediation procedure, the court will recognise the binding nature of this obligation until the terms of the obligation are fulfilled. The only exception is when a party must 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, the courts have not applied this provision so far. This exception may have the effect of enabling the parties to avoid the mediation process before referring the case to a court.

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

If the parties start the mediation procedure in accordance with their agreement, but then opt to terminate the mediation due to failure to settle the dispute, the pre-judicial procedure of dispute settlement is deemed to have been completed (Clause 12 of the Supreme Court Judicial Review of Application of the Procedural Legislation on Mandatory Pre-trial Dispute Settlement Procedure by Commercial Courts dated 22 July 2020).

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

Effect on Limitation Period

The general limitation period for filing civil and commercial claims (including contractual claims and tort claims) is three years (Article 196, Civil Code). As a rule, the limitation period starts to run from the date when a person learnt or should have learnt about a violation 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 ten years from the date of the respective violation.

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

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. For these purposes, the claimant must provide evidence that the parties tried to resolve the dispute by mediation (for example, relevant correspondence between the parties or their mediation agreement).

Disputes Unsuitable for Mediation

Mediation can be used to resolve disputes arising out of civil law matters, including matters relating to carrying out entrepreneurial and other economic activities, as well as disputes arising out of labour legal relations and family law matters. Following the entry into force of the Mediation Amendment Law on 25 October 2019, mediation now also extends to administrative and other public law matters (Article 1(2), Mediation Law).

A draft law recently submitted to the State Duma proposes to allow consumer disputes to be resolved by mediation (Draft Federal Law No. 1138398-7 (Registered on 29 March 2021)). At the time of writing, the Draft is in its second reading in the State Duma (with no specified timeline).

The Mediation Law expressly provides that mediation cannot be used in collective labour disputes and any other disputes if these affect or may affect either:

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

(Article 1(5), Mediation Law.)

As a result, tax and customs disputes, anti-monopoly disputes, and disputes relating to, for example, bankruptcy cannot be resolved by mediation.

Mediation Agreement

Under the Mediation Law, before the start of mediation proceedings, the parties can enter into two written mediation-related agreements. The parties first enter into an agreement to settle their disputes through mediation (mediation agreement or mediation clause). This is a written agreement that 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 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 dispute between the parties from the date of conclusion of the implementation agreement. The implementation agreement must be in writing and contain information on the subject matter of the dispute, the mediator, the mediation procedure, the allocation of mediation-related costs, and the time frame for mediation.

Standard Clauses for Mediation Agreement

See *Standard Document, Mediation agreement: Cross-border* for mediation-related agreements and their clauses.

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

The following sub-clause should be added to the background clause as stated in *Standard Document, Mediation agreement: Cross-border*:

> "The Parties agree not to refer the Dispute to a court until the Mediation is terminated according to this agreement."

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

In relation to the time frame of the mediation procedure, the following sub-clause should be added to the conduct of mediation clause as stated in *Standard Document, Mediation agreement: Cross-border: Clause 5*:

> "The duration of the mediation shall not exceed [DURATION] starting from [the appointment of the mediator by the [APPOINTING INSTITUTION]."

Timing of Mediation

In Russia, there is no central authority or organisation that collects mediation-related information and provides relevant statistics. However, the authors note that most parties come to mediation after filing a court claim.

Parties who decide to mediate after a claim has been brought to the court are entitled to request the court to postpone the proceedings (Article 138.4, CPC; Article 153.5, Civil Procedural Code).

Choosing a Mediator

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 can request the organisation providing the mediation services to recommend or even appoint a mediator.

Conduct of Mediation

The mediation procedure 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 can be made by either of the parties, or by a mediator or organisation providing mediation services on 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, considering the circumstances of the case, the desires of the parties, and the need for a prompt settlement of the dispute.

The stages of ad-hoc mediation vary depending on the way the mediator guides the process. Usually, the parties first reach an agreement on the mediation procedure or agree with the procedure proposed by the mediator. The parties then present their positions, followed by a discussion aimed at identifying the issues to be negotiated. At the next stage, the parties discuss proposals for resolving the disputed issues. Once the parties have reached an agreement on terms that are acceptable for both of them, they draft and execute the mediation agreement.

Facilitative or Evaluative Mediation

Generally, mediators are not legal professionals and are not able to evaluate the strengths and weaknesses of a 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

Mediation proceedings must not exceed 180 days, except when they are started after a claim has been brought to court, in which case they must not exceed 60 days (Article 13(3), Mediation Law).

In practice, the mediation process involves several meetings of the parties with the participation of a mediator. The duration of mediations can range from several weeks to several months.

Professional Advisers in Mediations

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

Other Attendees at Mediations

Experts, insurers, or other third parties can only participate in the process if the parties agree. If necessary, the parties can also engage interpreters. However, the involvement of third parties is quite rare.

Judges as Mediators

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

However, retired judges can act as mediators on a professional basis (Article 16(1.1), Mediation Law). The Councils of Judges of Russian regions maintain lists of retired judges who want to act as professional mediators.

Mediator's Role After an Unsuccessful Mediation Attempt

Russian law does not expressly prohibit a mediator from acting subsequently as a judge, arbitrator, or conciliator in relation to the same dispute. The only limitation relates to the prohibition to act as a counsel for, or provide legal advice to, a party in relation to the disputes in question or in relation to any other legal issues (Article 15(6), Mediation Law). 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

The Mediation Amendment Law, which entered into force on 25 October 2019, introduced new court conciliators. Under the new rules, only retired judges can be appointed as court conciliators (Article 138.5, CPC; Article 153(6), Civil Procedural Code).

The list of court conciliators was adopted by the Supreme Court on 28 January 2020. The procedure is regulated by the Rules of procedure introduced by the Plenum Resolution of the Supreme Court dated 31 October 2019.

Costs

The implementation agreement must allocate the costs of the mediation between the parties.

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

Confidentiality

Mediation Proceedings

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

During court proceedings, parties to a dispute and any other persons who have been present during the mediation process cannot refer 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.)

Mediator

A mediator cannot disclose information concerning the mediation procedure that became known to them during the mediation process, except with 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 fulfilment of their duties (Article 69(3)(1), Civil Procedural Code; Article 56 (5.1), CPC).

Parties

The parties must keep confidential all the information relating to the mediation procedure, unless otherwise provided by law or agreed by the parties (Article 5(1), Mediation Law).

Exceptions

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

Documenting a Settlement

An agreement reached by the parties following mediation must be in writing and signed by both parties.

Mediators generally do not participate in drafting the settlement agreement, and do not sign it.

Disposal of Court Proceedings

An agreement reached through mediation conducted after a dispute has been referred to a court can be approved by the court as a settlement agreement, in accordance with the procedural law rules. In this case, the court will terminate the proceedings. The same applies 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 put at risk by the admission, and then issue a decision based on the admission.

Enforcing Settlements

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.

Following the entry into force on 25 October 2019 of the Mediation Amendment Law, a mediation agreement can be approved by a notary. The agreement is then equal to a writ of execution and can be enforced without obtaining court approval.

Mediation Institutions and Centres

Institutions that provide mediation services have been created in more than 60 regions of the Russian Federation. In accordance with data available to the Supreme Court on March 2017, there are about 65 organisations providing mediation services. Three self-regulatory organisations of mediators are also officially registered in Russia.

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)*.

Accreditation Schemes for Mediators

Mediators can perform their activities on either a professional or non-professional basis:

- Non-professional mediators must be at least 18 years old, have 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 of an approved mediator's preparation programme. Retired judges can also act as mediators on a professional basis.

When court proceedings have been commenced and the parties subsequently decide to mediate, only professional mediators can conduct the mediation in relation to the disputes in question.

Various self-regulating organisations of mediators have been created in Russia, tasked with developing rules of professional conduct for mediators and supervising compliance with these standards.

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