THE INTRODUCTION OF MEDIATION TO RUSSIA

An NCEEER Working Paper by

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Executive Summary

Mediation offers disputants an opportunity to resolve their disagreements with the help of a neutral third party. Russians' well-documented preference for informal problem-solving and their much-vaunted distrust of the courts would seem to portend great demand for mediation. In mid-2010, a law on mediation was passed that laid out the interplay between mediation and the courts. The law went into effect in 2011. Drawing on field work in 2011-12, this paper explores the legislative history of the law and delves into several of the more controversial provisions of the law. The paper closes with a discussion of why, in the months since the law has been in effect, demand has been minimal.

Introduction

Mediation has long existed on an informal basis in Russia.[1] Questions persisted about how mediation could dovetail with litigation. With an eye to the experience of Western countries, a law was developed and passed in 2010 that clarified who could act as a mediator and how mediation would work. This law came into effect at the beginning of 2011. In theory, mediation should thrive in Russia. It offers disputants a mechanism for bypassing the courts when resolving disputes and guarantees confidentiality of the process. It allows disputants to retain greater control over the process and the outcome. The informality of mediation would also seem to be appealing to Russians.

The law was greeted with mixed emotions and expectations. Russian court administrators hoped that embracing mediation would help ease the oppressive caseload by offloading cases onto mediators (Samsonova 2008; Fedorenko 2007). They knew that mediation had ameliorated the burden of judges in the U.S. and many European countries (Nosyreva 1999; Sevast'ianov 2001). Yet many judges were openly skeptical about whether Russia's experience would mirror that of these Western countries. They pointed to the qualitative difference between the institutional constraints on litigation in Russia and the West. Litigants in the West have flocked to mediation as a way of avoiding the expense and delay associated with their courts. By contrast, taking a case to court in Russia is relatively inexpensive and quick. Judges also argued that Russian litigants' lack of familiarity with mediation would discourage them from using it.[2] The jury is still out on whether mediation will take hold in Russia. The law has only been in effect for about 18 months. Though initial indicators are not encouraging, inculcating a new

[1]For an overview of activities akin to mediation in Russia dating back to the 14th century, see Lisitsyn (2011: 18-79).
[2]In my interviews with judges, some went further, arguing that Russian litigants were not ready for mediation and that there was something in the Russian character that would resist mediation. For an overview of these arguments, see L'vova 2008.

institution into a legal system is often a lengthy process. Consequently, conclusions about the long-term viability of mediation in Russia would be premature at this point.

In this working paper, I focus primarily on the law itself. The law had a rather tortured path to passage. I begin by laying out this legislative history in broad strokes. Many of the details remain obscure. I then turn to the law as enacted. I explore the parameters of mediation in Russia, as established by this law, and contrast it with what might have been had alternative drafts of the law gone forward. Although the basic principles governing mediation are laid out clearly, other parts of the law are less decipherable. Commentators and practitioners continue to puzzle over what some of the provisions mean. I conclude by offering some thoughts on why demand for mediation services has been so slow to evolve.

The Evolution of Alternative Dispute Resolution in Russia

The concept of "alternative dispute resolution" (ADR) includes a wide variety of non-court-based options, ranging from negotiations between the disputants to mechanisms that rely on neutral third parties in lieu of judges. Mediation provides an opportunity for disputants to find a mutually acceptable solution with the help of a mediator. The onus is on the parties themselves; the mediator simply facilitates the process. Arbitration is more court-like in its operation. As with mediation, the parties' participation is voluntary, but the nature of the participation is qualitatively different. Because mediation is seen as a way to help the parties themselves find a solution, the parties are free to walk away if they find the process unproductive. By contrast, parties to arbitration agree to put the dispute in the hands of the arbitrator. The decision of the arbitrator is final (much like a judge's decision). The parties' role is more passive; it is limited to presenting their arguments and evidence.

Over the past few decades, ADR has become increasingly popular around the world. To summarize a voluminous literature briefly, this change in behavior has been prompted by several institutional and material incentives. In countries where the overloading of the courts has led to serious backlogs in civil cases, disputants have long sought out such alternatives. Few are willing to cool their heels for the months or years needed to secure a court date. Not only are they keen to move on, but they are also loathe to pay their lawyers to represent them through the endless delays. Indeed, many business require their customers to sign form contracts that mandate arbitration in lieu of court. Alternatively, ADR can be appealing when disputes arise between parties that have a preexisting relationship, such as family members, neighbors, or long-term business partners. This is particularly true in countries with an adversarial legal tradition in which litigation forces disputants to go after their opponents aggressively. Courts themselves have sometimes required litigants to go through mediation as a prerequisite to litigation with the goal of trying to preserve the parties' relationship. This is especially common in cases involving family members.

Russia has mostly been on the sidelines during this global ADR movement. A full analysis of the reasons why are beyond the scope of this working paper, but I can put forward a few hypotheses. Although Russians often complain about the slow pace and high cost of their courts, when viewed in comparative perspective, the Russian courts are remarkably efficient. The reason is grounded in the deadlines for resolving cases set forth in the procedural codes. Failing to meet these deadlines subjects judges to informal sanctions, including being denied financial bonuses for good performance. This gives Russian judges a strong incentive to manage their docket efficiently. The procedural rules themselves are relatively straightforward. As a result, Russian litigants are more likely to represent themselves, thereby limiting the cost of

going to court. If they do hire counsel, then the fact that cases are resolved relatively quickly tends to keep a lid on legal fees. Finally, the non-confrontational nature of the process means that relationships are not inevitably fractured by litigation.

Though Russia has lagged behind many other countries in terms of ADR, it has not forbidden disputants within Russia from looking outside the courts for assistance.[3] Private arbitration has long been available domestically through the *treteiskie sudy*. This option tends to be used almost exclusively by businesses. Participants must affirmatively agree to go to the *treteiskie sudy* in lieu of the state-sponsored courts. It goes without saying that they have to pay the costs associated with the *treteiskie sudy*, including fees for the arbitrators. Such business-related cases would otherwise be heard by the *arbitrazh* courts. The decisions of these private arbitration tribunals are final. If a loser fails to follow through, then the winner can appeal to the *arbitrazh* court for assistance with implementation. Much as in other countries, the state-sponsored courts issue an enforcement order without revisiting the substance of the case. Relatively few Russian businesses turn to the *treteiskie sudy*, preferring instead to use the *arbitrazh* courts. As I have argued elsewhere, the efficiency and low cost of the *arbitrazh* courts make them an attractive option.

The procedural rules have always left the door open for litigants to settle their disputes at any point. Indeed, it is in the interest of the courts to avoid having to hold a full-fledged hearing

[3]International transactions are a different story. Foreigners doing business in Russia tend to include clauses in their contracts with Russian business requiring disputes to be submitted to international arbitration. This is not a practice that is unique to Russia, but is fairly common for transactions that span more than one country. It is particularly common for countries where doubts about the integrity of the judicial system have been raised. Hendrix's (2001) study of the treatment of foreigners in the *arbitrazh* courts suggests that concerns about discrimination against foreigners are overblown. The Chamber of Commerce in Moscow has a well-respected arbitration tribunal that specializes in international transactions. For more information, see http://arb.mostpp.ru/. In addition, the well-known tribunals in Stockholm, London, and elsewhere are available. As with domestic arbitration, using international private arbitration requires the consent of both parties. Pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the so-called "New York Convention," to which Russia is a signatory, such awards can be enforced by Russian domestic courts. See generally http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

and, instead, to endorse the negotiated agreement of the parties. These are known as *mirovye soglasheniia* in Russian.[4] Not only does this help manage the docket, but it also helps ensure that the will of the parties is respected. As a rule, the parties are more familiar with their dispute than the court and can do a better job of finding a mutually acceptable resolution. Prior to the changes made when the law on mediation was passed in 2010, the procedural codes governing the courts of general jurisdiction and the *arbitrazh* courts required judges to make the parties aware of their continuing right to settle.[5] The *Arbitrazh* Procedural Code (APK) has always been more open to settlement than has the Civil Procedure Code (the *Grazhdanskii Protsessual'nyi Kodeks* or GPK). While the GPK took a minimalist approach by merely obligating judges to acquaint parties with their right to settle, the APK devoted an entire chapter to settlement.[6] This portion of the code began with a declaratory provision that calls on *arbitrazh* judges to take measures to encourage settlement.[7] Parties were authorized to "conclude settlement agreements or engage in other settlement procedures provided they do not violate federal law."[8] Elsewhere in the code, judges were empowered to delay the proceedings to give the parties time to negotiate.[9] But the APK did not specifically endorse mediation.[10] Moreover, while observing *arbitrazh* court hearings in various locales across Russia, I noticed

[4]The adjective comes from the word for peace – *mir* – which gives rise to a literal translation of "peaceful agreement." *Soglashenie* is one of several words that can be used for agreement in Russian. In contrast to the other choices (*e.g., dogovor, kontrakt*), it typically refers to a more informal agreement.

[5]Art. 49, 2008 APK; Art. 150, GPK.

[6]Chapter 15, 2008 APK. This chapter was one of the innovations of the reworked code passed in 2002. The provisions included in this chapter are designed to encourage both the judge and the parties to settle the case. They specify the requirements for a *mirovoe soglashenie*, and obligate the court to endorse such agreements. See Hendley (2003) for more on the changes introduced to the APK in 2002.

[7]Art. 138, part 1, 2008 APK.

[8]Art. 138, part 2, 2008 APK.

[9]Art. 158, 2008 APK.

[10]The closest the statute comes to endorsing mediation is in the article authorizing delays, in which a reference is made to submitting the case to an "intermediary" (*posrednik*), who is akin to a mediator. Art. 158, part 2, 2008 APK. See below for a discussion of the decision to shift from using a purer Russian term for mediation, namely *posrednichestvo*, to *mediatsiia*, an English language cognate that is less familiar to Russians.

that judges tended to pay more attention to the letter than to the spirit of this aspect of the APK. They rarely failed to include the right to settle when listing the parties' rights at the outset of the case. All too often, however, this notice was given in a rapid monotone that did not invite discussion. A few courts made an effort to reeducate their judges to take affirmative action to persuade litigants to settle cases on their own in order to divert cases from the court.[11] The reasons why most courts adopted a more passive approach did not reflect a hostility to ADR, but rather a desire to process cases as expeditiously as possible in order to ensure compliance with the statutory deadlines for resolving cases.[12]

Concurrent with the passage of the law on mediation in July 2010, the text of the APK and GPK was changed to reflect the societal embrace of mediation. For example, the article of the APK that had previously authorized parties to make use of any procedure aimed at settlement not prohibited by law was amended to refer to mediation. The new text reads: "Parties can regulate their disputes by concluding settlement agreements or making use of any settlement procedure, including mediation, if it is not prohibited by federal law."[13] Likewise, the article that allows judges to delay cases to facilitate settlement talks now includes a specific reference to mediation.[14] The changes to the GPK are more meaningful. The GPK now requires judges to affirmatively question parties about whether they want to settle the case or seek help from a mediator.[15] Given the powerful influence of the statutory deadlines, perhaps the most important change is to allow judges to delay cases for up to 60 days to facilitate resolving the case through

[11]A prime example is the Sverdlovsk oblast' arbitrazh court. See generally Reshetnikova (2011).
[12]Elsewhere (Hendley 2007) I have written about the perverse and unintended consequences of the strict statutory deadlines for resolving cases. In light of several decisions from the European Court of Human Rights, Russian litigants are now entitled to seek damages from the courts when their cases have taken too long (O kompensatsii 2010). This has only reinforced the tendency of Russian judges to endeavor to decide cases as quickly as possible. Allowing delays for settlement risked possible violation of the statutory deadlines. See generally Andreev and Rozina (2011).
[13]Art. 138, part 2, 2012 APK.
[14]Art. 158, part 2, 2012 APK.
[15]Arts. 150, 172, 2012 GPK.

mediation.[16] These amendments represent a qualitative shift in the institutional attitude toward mediation. Whether they will have the desired effect of stimulating widespread use of mediation remains to be seen.

The Adoption of the Law on Mediation

The law on mediation was passed in July 2010, and went into effect at the beginning of 2011. Prior to that, mediation took place on an informal basis. Disputants could turn to third parties for help. Centers offering mediation services sprang up in disparate parts of Russia.[17] But without clear and binding rules about the interplay between the courts and mediation, the role of mediation was destined to be peripheral. Even with the law, there are no guarantees that Russian litigants will opt for mediation over litigation. After all, legislation authorizing private arbitration of economic disputes has been on the books for decades and relatively few disputants have made use of it.[18]

Unraveling the legislative history of the law on mediation has proven difficult. This is not unique to this particular law. As a rule, Russian legal scholars take little interest in the process by which laws are adopted, preferring to focus on the final language. But the story of this law is worth investigating. Both the general approach and the terms themselves changed significantly as between the early drafts of the law and the final version.

[16]Art. 158, parts 2 and 7, 2012 APK; art. 169, part 1, GPK.

[17]Not surprisingly, the early nodes of activity track the locations of scholars who took an interest in mediation. Examples include the department of conflictology at St. Petersburg State University (the home of O.V. Allekhverdova, E.N. Ivanova, and A.D. Karpenko), and the law faculties at Ural State Law Academy (the home of S.K. Zagainova) and Voronezh State University (the home of E.I. Nosyreva). While they maintained their intellectual interest, publishing many articles on the general topic of mediation, these pioneers started to offer their services and mediators and to train others as mediators. Many of them were active in drafting and/or offering advice about the legislation on mediation as it evolved.

[18]From the outset, the Russian civil code has contemplated the existence of *treteiskie sudy* (Art. 11, GK RF 1994). The current law on *treteiskie sudy* was passed in 2002 (O treteiskikh sudakh 2002). Prior to that, their operations were governed by a web of regulations (Vinogradova 1997). In 2011, the Constitutional Court upheld the constitutionality of having cases resolved by *treteiskie sudy* in the face of a challenge (Postanovlenie 2011).

The initial drafts were published in the journal, *Treteiskii sud* (Proekt 2005a; Proekt 2005b; Proekt 2006). They represented the collective efforts of a working group that was brought together by the Moscow Chamber of Commerce. Among the participants were the former chairman of the Moscow city *arbitrazh* court (A.K. Bol'shova), the chief editor of *Treteiskii sud* (G.V. Sevast'ianov), as well as representatives from the Chamber of Commerce and several well-respected scholars. E.I. Nozyreva, the head of the civil procedure department at the law faculty of Voronezh State University, coordinated the group and synthesized the discussion into a coherent document.[19]

The working group took the UNCITRAL Model Law on International Commercial Conciliation as its starting point (UNCITRAL 2002). Its task was to adapt the provisions of this model law to Russian circumstances. The embrace of the model law reflected the group's belief that mediation was going to be primarily a tool for expediting commercial disputes. This also helps explain why the Chamber of Commerce, which had long been a leader in ADR in the commercial context, took a leadership role in developing the mediation law, and why the Russian Union of Industrialists and Entrepreneurs participated actively.

In December 2006, the draft of the working group was forwarded to the Duma.[20] Its sponsors within the Duma were V.N. Pligi and P.V. Krasheninnikov. The draft made its way through a first reading, but was then stalled. Ultimately, it was withdrawn from consideration. In 2010, then-President Medvedev introduced a different draft (Proekt 2010). Most credit Ts.A. Shamlikashvili, the president of the Moscow-based Center for Mediation and Law, with preparing the new draft. The scholarly community was disappointed to have its work sidelined.

[19]Nosyreva developed an interest in mediation when she spent a year in the U.S. as a Fulbright fellow. She wrote a book about the U.S. experience with ADR and became active in pushing for the full legalization of mediation in Russia (Nosyreva 2005). Others have also advocated for the expansion of mediation in Russia by drawing on the experience of other countries (*e.g.*, Sidorov 2007; Podol'skaia and Mikhal'chenkova 2004).
[20]A copy of the transmittal letter is replicated in *Treteiskii sud*, no. 1, p. 5, 2007.

When speaking with me, one prominent scholar described the draft as an "outrage" (*bezobrazie*). But the members of the working group and their scholarly colleagues saw the handwriting on the wall. They recognized that the presidential endorsement made passage of the new draft inevitable. They registered their objections in the pages of *Treteiskii sud* (*e.g.*, Allakherdova 2010; Davydenko 2010; Ivanova 2010; Morozov 2010), but were powerless to stop the juggernaut. Several scholars told me that they were asked to soft pedal their objections by Duma insiders, and were told that the shortcomings of the law would be fixed before the second reading. Yet a comparison of the draft and the law as enacted document that very few changes were made. The law went through the legislative process at lightning speed. It was introduced in March 2010 and received final approval in July 2010.

Space constraints make a detailed accounting of the differences between the early drafts and the final version of the law impossible. Instead, I focus on two key shifts. The first change is in the terminology. The second is in the scope of the law.

The two drafts published in 2005 stuck fairly closely to the phrasing of the UNCITRAL law. The drafts were titled "On conciliation procedure with the participation of an intermediary" (*O primiritel'noi protsedure s uchastiem posrednika*) (Proekt 2005a; Proekt 2005b). The final law, by contrast, was entitled "On the alternative procedure for regulating disputes with the participation of an intermediary (the procedure of mediation)" (Ob al'ternativnaia 2010). The shift from conciliation to alternative dispute resolution might seem trivial, but it arguably represents a principled change in the law's goals. Conciliation is one type of ADR. It differs from mediation in that the conciliator is expected to take an active role in shaping the resolution.[21] In mediation, by contrast, the mediator is more of a facilitator. The parties

[21]It appears that the working group equated mediation and conciliation. When defining conciliation, it included a parenthetical with the word for mediation (Art. 3, Proekt 2005a; Art. 3, Proekt 2005b; Art. 3, Proekt 2006). To be fair to

themselves are responsible for finding a solution. By limiting the reach of the law to conciliation, the initial drafts were less ambitious. As adopted, the law embraces both conciliation and mediation.

One of the most noticeable changes between the 2005 drafts and the 2006 draft was the choice of what Russian word to use for "mediation." Initially, the working group used a familiar Russian word – *posrednichestvo* – for mediation and a related word – *posrednik* – for mediator. While not entirely abandoning that terminology, the 2006 draft also used anglicized words (*mediatsiia* and *mediator*, respectively), as did the version of the law ultimately adopted. The root of the first choice (*posredi*) translates as in the middle. The definition of *posrednik* in the standard Russian dictionary is "person or organization who conducts negotiations between parties"[22] Russian-English dictionaries give mediator and intermediary as the top definitions (Smirnitsky 1973). Given that, why did the drafters of this law feel the need to augment the law? In my interviews with Russian scholars of mediation, I received remarkably consistent answers to this question. All of them pointed to the negative connotations of the terms "*posrednik*" and "*posrednichestvo*" from the 1990s. They reminded me that these terms were often used to describe the shady deals and the key players in them that characterized this decade. They feared that if these words continued to be used, their negative connotations would come to be associated with mediation (*e.g.*, Latukhina 2010). Thus, a groundswell developed to use the English cognate "*mediator*." Nosyreva and Sternin (2007: 10-11) pushed back.[23] Conceding that the

the members of the working group, many scholars view mediation and conciliation as synonymous (compare Fahlbeck 1989: 391 ["in Sweden, there is no difference in meaning or practice between conciliation and mediation"] with Sappey 1997: 315 ["Given the use of closely related terms, it is wise to be clear about mediation, and to distinguish it from conciliation and arbitration"]). Whether conciliation and mediation will come to be seen as interchangeable from a legal point of view remains to be seen.

[22]Quoted Nosyreva and Sternin (2007: 12) by from the Russian dictionary compiled by S.I. Ozegov and published in 1983.

[23]Dement'ev (2007) openly supported the position advocated by Nosyreva and Sternin. Nosyreva (2010: 41) reiterated the argument in her critique of the final version of the law.

use of the anglicized terms (*mediatsiia* and *mediator*) had become widespread among scholars, they argued that these words would be completely alien to ordinary Russians and reminded their colleagues that law ought to be written in the vernacular of those most likely to use that law.[24] In essence, they were arguing that couching this new institution in unfamiliar terminology was likely to complicate its acceptance by ordinary Russians. Whether they were right is unknowable. The fact remains that both the law and the public discussion has increasingly been framed in terms of *mediatsiia* rather than *posrednichestvo*.[25]

Turning now to the substance of the law, the version enacted covered more ground than did the drafts that came out of the working group. Yet the various versions of the law had a common core. For example, all renderings shared a commitment to the basic principles of mediation, *e.g.*, voluntariness of the process, confidentiality, impartiality and independence of the mediator, and equality of the parties.[26] All versions of the law allowed for mediation at any stage of the process. Likewise, they all guaranteed that mediators could not later be called as a witness to what happened during mediation.[27] The parties themselves are barred from revealing information gleaned during mediation in any subsequent proceeding (Arts. 13-14, Proekt 2005a; Art. 5, Ob al'ternativnoi 2010). This is essential to preserving the integrity of the process and convincing potential participants that what is said during mediation cannot later become fodder for one's opponents if mediation founders. If successful, the understanding of the parties is

[24]They noted that the term *posrednik* had already been used in the *arbitrazh* procedural code as well as in the law on collective bargaining with no ill effects. They also pointed out that *mediatsiia* had been defined in the dictionary of foreign words as applicable solely to international disputes (Nosyreva and Sternin 2007: 13). Neither *mediator* nor *mediatsiia* is included in Smirnitsky (1973).

[25]More recently, some scholars have begun to draw a distinction between the two terms. Karpenko (2011) argues that *posrednichestvo* has a broader connotation than *mediatsiia*.

[26]Art. 4, Proekt 2005a; Art. 3, Ob al'ternativnoi 2010. For background on these principles, see Zaiganova and Iarkov 2011: chapters 3 and 5; Vladimirova and Khokhlova 2011: 28-29. Lebedev (2011) criticizes the drafters' decision to call for both independence (*nezavisimost'*) and impartiality (*bespristrastnost'*) of mediators in Article 3, thereby implying a distinction between these concepts.

[27]Davydenko (2007: 124) argued that the APK ought to be amended to clarify that mediators could not give evidence. To date, this has not happened.

memorialized in a mediation agreement, which is then endorsed by the court (assuming it does not violate the law in any way) (Art. 17, Proekt 2005a; Art. 12, Ob al'ternativnoi 2010).

One issue on which the final law diverges from the early drafts is the prerequisites for serving as a mediator. The working group's drafts took a minimalist approach, simply providing that a mediator had to be "qualified and unbiased." The parties were entitled to impose additional requirements (Art. 7, Proekt 2005a). Given that the participation of disputants is voluntary, it makes sense that they would have the right to up the ante. Later drafts added the common sense requirement that mediators could not have a criminal record (Art. 8, Proekt 2006). As enacted, the law did not step away from any of these basic prerequisites. But it reframed the concept of mediator by distinguishing between "professional" and "non-professional" mediators (Art. 15, part 1, Ob al'ternativnoi 2010). The requirements for non-professional mediators are akin to those for all mediators under the earlier drafts. They cannot have a criminal record or have been declared legally incompetent. This version adds a minimum age of 18 (Art. 15, part 2, Ob al'ternativnoi 2010). Professional mediators, by contrast, must be at least 25 years old. They also must possess a university degree (though type of degree is not specified) and have successfully completed a training course in mediation techniques (Art. 16, part 1, Ob al'ternativnoi 2010). Only these professional mediators are legally entitled to handle disputes that have been referred from the courts (Art. 16, part 3, Ob al'ternavnoi 2010).

Naturally imposing an obligation to obtain training before becoming a mediator raised a series of practical questions. Everyone agreed that the few training centers operating when the law was adopted were unlikely to be able to meet the demand for training (Zaiganova and Iarkov 2011: 190). The law itself contemplated that a standard course would be approved by the state (Art. 16, part 1). Several proposals were put forward to the Ministry of Education. Although

most of the scholars with whom I spoke supported the proposal from Voronezh, which was spearheaded by Nosyreva, the Ministry opted for the program developed by the Moscow-based Center on Mediation and Law (Postanovlenie 2010). This program required 120 hours of training to become a mediator and also established more advanced courses of study. The suggested lesson plan laid out a course of lectures. One critique advocated increasing the time spent on practical skill-building (Poiasnitel'naia 2011).

My conversations with Russian scholars of mediation suggest that these decisions to create two types of mediators and to require extensive training are some of the most controversial aspects of the law. One commentary describes the creation of professional and non-professional mediators as "not entirely successful" (Zaiganova and Iarkov 2011: 174). No one seems entirely sure what purpose is served by having the category of non-professional mediators. Many scholars also expressed disappointment with the state-endorsed training program. While no one questioned the need for training, some saw the length as overkill designed more to allow training centers to charge high fees. Those who developed the program disagreed (Inter'viu 2008). They thought that a center would have to obtain state approval to conduct this training. University-based training programs took a different position, arguing that their certification to carry out continuing education (*povyshenie kvalifikatsii*) gave them the right to continue to offer mediation training.[28]

The obligation imposed by the law to create "self-regulating organizations" (*samoreguliruemye organizatsii* or SRO) of mediators (Art. 18, Ob al'ternativnoi 2010). In theory, these SRO's would operate as a clearing house or informal licensing agency for mediators. To date, however, not a single SRO has been created. Perhaps the requirement to

[28]I heard this argument from scholars in St. Petersburg, Voronezh, and Ekaterinburg.

have either 25 entrepreneurial organizations or 100 individuals to set up an SRO explains why (Art. 3, part 3, O samoreguliruemykh 2007). Almost all of the scholars with whom I spoke saw this SRO construct as inappropriate and unworkable in the context of mediation (*e.g.*, Fil'chenko 2010).

The Law on Mediation in Action

Much more important than the wording of the law is its use. As I have argued elsewhere, the supply of laws and legal institutions by the state can be a hollow victory if societal demand is lagging (Hendley 1997). Mediation would seem to be well-suited to the Russian context. The evidence, which is admittedly premature and anecdotal, is not encouraging. During 2011-12, I attended several conferences focusing on the prospects for mediation in Russia. How to stimulate greater use of mediation was a hot topic among the participants. Some agitated for institutional reforms. They pointed to the experience of many Western countries, where litigants became acclimated to mediation only when they were forced to try it. To that end, they favored making mediation mandatory in certain categories of cases. Not only would this require legislative changes, but also funding to support this mandatory mediation as well as the creation of a bureaucracy to pick and maintain state-sponsored mediation. My sense is that Russian officialdom has little enthusiasm for such changes.

This question of funding for mediation raises other questions. Elsewhere, cost is typically seen as an advantage for mediation due to the exorbitant costs associated with litigation. In its current form, disputants are expected to bear the cost of mediation in Russia (as elsewhere). Assuming that most parties come to mediation after filing a lawsuit, this means that they have already paid their filing fees. Opting for mediation requires them to pay again, which

has proven to be a hard sell.[29] Indeed, even when the costs of mediation has been subsidized (as in experiments in Rostov-na-Donu and Pskov), few litigants have taken advantage of this resource.[30]

If mediation is being resisted even when it is free, then perhaps there are cultural constraints. According to the judges with whom I spoke in both the *arbitrazh* courts and the courts of general jurisdiction, Russian litigants are bewildered by mediation. These judges told me that when they present mediation as an option, litigants are usually unfamiliar with how it works. They also report that litigants are often confused by why they are being asked to work out a resolution with their counterpart. Judges say that Russians come to court only as a last resort. Put more bluntly, litigants tell judges that if they were capable of resolving the dispute on their own, they would not have brought the case to court. Judges' efforts to explain the facilitative role of the mediator tend to fall on deaf ears. Of course, this assumes that judges are making a genuine effort to convince the parties to try mediation. In my experience, this is a mixed bag. Some judges see the potential of mediation, while others are so focused on the need to manage their docket efficiently and so prefer to retain control.

What the future brings for mediation is unclear. Even with its shortcomings, the law succeeds in creating a legal foundation for mediation to operate in collaboration with the judicial system. Whether Russian disputants will come to appreciate the potential of mediation remains to be seen.

[29]Abolinin (2010: 126) analyzes the likely costs for business disputes. For a dispute in which 10 million rubles is at issue, the cost of going to *arbitrazh* court would be 200,000 rubles, whereas mediation would cost an additional 214,000 to 530,000 rubles, depending on what center is used.

[30]On the experience in Rostov-na-Donu, which was funded by the American Bar Association, see Smol'iannikova 2011.

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