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Mediation and amicable dispute resolution in Russian legal and cultural traditions

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Content:

Since early human history favorising amicable dispute settlement and adjudication avoidance has been a fundamental value of mankind. It has become a legal and cultural norm in many societies. For instance,

- ancient Greeks believed that Eirene, Goddess of Peace, was the mother of Plutus, God of Wealth, and the daughter of Themis, Goddess of Justice;
- In ancient times mediation and arbitration formed a single dispute resolution procedure consisting of a 'dialogue' (negotiations) and, where necessary, a 'crisis' (an award). Also, reaching a settlement agreement after the arbitral awards was a common practice;

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- Greek philosopher Socratus authored many question-posing techniques mediators have in their toolkit nowadays;
- Roman law allowed amicable settlement, recognized its *res judicata* effect and penalized abusive, frivolous and vexatious claims;
- Since Middle Ages many European courts consistently practiced special 'conciliation days' ('*dies amori*'), completely reserved for conciliation of the parties;
- First French Constitution in late XVIII century prescribed compulsory mediation and conciliation as prerequisites for hearing of the disputes by the state courts.[1]

I. Historical background

The ability to reach agreements, cooperate and amicably settle disputes and differences once discerned humans from the natural world.

Already in primitive society, there was a practice of preventing conflicts by appealing to authoritative people who were trusted by both sides. After hearing the dispute, they informed the parties of the terms of reconciliation, which they considered fair. Such people were elders or other venerated persons. They were not necessarily powerful enough to impose their opinions on those in conflict. Thus, Western researchers note that in the Germanic tribes advice to people in disagreement and those in a difficult situation was given by persons who enjoyed the greatest authority due to their minds and wisdom. Such person was called "witan" - "smart person" (probably from the English word "wit").[2] The settlement reached with their assistance was sealed by an oath before the gods. It was of great importance for maintaining peace, and it could not be violated without endangering the entire way of life of the family and tribe. This was the mechanism for preventing conflicts and bloodshed.

Consequently, the appeal to the generally trusted and respected third parties ("good men") to prevent conflicts has become a common practice in commercial relations, including transnational ones. This was enshrined, for example, in the Treaty of the Smolensk, Vitebsk and Polotsk Principalities with Riga, Gotland and German cities in 1229.[3]

Such dispute prevention procedures as the conciliatory council ("*mirovoy riad*") constituted an integral part of business life in a Russian state closest to Europe – Great Novgorod in XI—XV centuries. "Good

[1] Dmitry Davydenko. Примирительные процедуры в европейской правовой традиции [*Amicable Dispute Resolution in the European Legal Tradition*] / Moscow: Infotropic Media. 2013. 232 p.
[2] *Berman H.J.* Law and Revolution. The Formation of the Western Legal Tradition. Harvard University Press, 1983. P. 70–80.
[3] Quoted from the book: *Куницын А. П.* Историческое изображение древнего судопроизводства в России. СПб. (Kunitsyn A.P. Historical depiction of ancient legal proceedings in Russia. Saint-Petersburg), 1843. P. 30. Translation into English is ours: «33. *Which case will be settled in Smolensk between Russia and the Latins, before judges and before good men; and which will be settled in Riga and on the Gothic coast in front of judges and in front of good men, that shall not be relitigated in Smolensk*».

men" were invited by the parties in order to try to agree upon the conditions under which the dispute should be terminated without going to court.[4]

Law and the State in the most ancient period of Russian history encouraged the parties to settle their disputes through conciliation procedures. In particular, the law provided for monetary incentives for reconciliation. “Both the custom and the princely decrees to the widest extent allowed the resolution of all kinds of disputes and litigations (with the exception of murder and robbery caught in the act) by means of amicable settlement or arbitration, and in certain cases they exempted amicable transactions from court duties even, when the dispute came to court and the judges made some judicial steps."[5]

In Western Russian law, as in the law of many other peoples, settlement agreements were allowed even in criminal cases, mainly for crimes against the person. Thus, the parties could enter into a direct amicable agreement with each other and elect mediators for this purpose (compositors – "unifiers"). If a party went to court, then the judge often offered the parties to reconcile or referred the dispute to private mediators.

In Middle Ages upon completion of the proceedings in arbitration or state court, after the decision was rendered, the parties had to conclude an agreement on its execution. This was common practice. Moreover, such an agreement could provide for other conditions than those established by the court. Thus, even after the court's decision, social norms encouraged the disputing parties to terminate the dispute by consent.

After Moscow became capital of a centralised State, the legislation in Muscovite Rus (1328 to 1547) also stimulated the disputants to reconciliation. As a general rule, the reconciliation of the parties could become the basis for the termination of the criminal prosecution. The law imposed strict sanctions for violation of the terms of the peaceful settlement.

At the same time, the prevailing belief in the society of that time was that it was preferable to settle private conflicts amicably and without trial.

During the period of the Russian empire (1721 – 1917), the scope of disputes over which the parties had the right to settle became significantly narrower.

The state now did not any more provide for benefits in paying state fees when the dispute ended peacefully without a court decision: priority was given to the interests of replenishing the treasury. In

[4] *Давыденко Д.Л.* Примирительные процедуры в российской правовой культуре: мировой ряд — особый способ урегулирования споров в Новгородской республике в XI–XV вв. // Третейский суд. — СПб. (Davydenko D.L. Conciliation procedures in Russian legal culture: the conciliatory council — a special way of settling disputes in the Novgorod Republic in the XI—XV centuries. // “Arbitration court” journal), 2011. – № 3. P. 157—169.

[5] Веселовский С.Б. К вопросу о происхождении вотчинного режима. М., 1926. С. 50 (Veselovsky S. B. On the question of the origin of the patrimonial regime. M., 1926. P. 50).

addition, the state increasingly limited the range of crimes for which reconciliation between the victim and the offender was allowed.

However, the law of the Russian Empire included a principle of favoring the reconciliation of conflicting parties (*favor conciliationis*). It was of great practical importance although not for all categories of disputes.

In 1775, Catherine the Great established by her decree the so-called "courts of ethics" ("*sovestnye sudy*"), which considered civil cases based on traditional ethics. Their judges acted as amiable compositeurs, with the main goal of achieving reconciliation of the parties.

Another legal institution, the main task of which was to assist the parties in the settlement of the dispute, was the magistrate's court, or peace court ("*mirovoy sud*"). The activities of these courts were regulated by the first Russian civil procedure code - the Code of Civil Procedure of 1864. Justices of the peace (magistrates) were elected.

The procedure in the magistrates' courts differed significantly from the procedure established for the general courts, contributing to the achievement of reconciliation of the parties and a more favorable treatment for litigants. So, in the magistrates' court, the attorneys could end the clients' case peacefully, even if this was not expressly mentioned in their powers of attorney.

Inducing the parties to reconciliation constituted the main function for the justices of peace. After a preliminary explanation with the parties, the judge had to offer them to dismiss the case peacefully, indicating all possible ways to do so. The judge was obliged to take measures to persuade the litigants to conciliate during the proceedings, and only in case of failure he was to proceed with the decision (Article 70 of the Code).

Mediation was institutionalized in Russian commercial justice. The system of commercial courts in Russia was formed with the adoption of the Code of proceedings in commercial courts of 1832, uniform for the entire Empire.

Cases were envisaged when it would be expedient for the court to propose to the parties to conclude an amicable settlement (§ 194 of the Code): "In complicated disputes, … when… based on evidence neither party obviously prevails, and when this preponderance can be revealed only by prolonged litigation, sophisticated inquiries, testimonies, … the Court, without proceeding to a decision, shall first invite the parties either to enter into an amicable agreement through its mediation, or to sort it out by voluntary arbitration."

If the parties decided to participate in court-assisted mediation, the court gave them the right to elect one or two conciliators from among the judges; otherwise, he himself appointed such conciliators (§ 200). The conciliators were obliged, after hearing the parties, first to present to them the laws based

on which the case would be decided, and then to communicate their opinion as to how it could be ended amicably (§ 201).

Commercial courts existed in Russia until 1917 and were abolished by the Soviet regime.

The Code of Civil Procedure of 1864 contained similar provisions in the chapter "On Conciliation Proceedings". Judges-mediators were authorised, first of all, to reconcile the parties, and only then, in case of failure, to make a decision on the merits.

Russian historical practice also knows other bodies that carried out mediation: mediation commissions in insolvency cases, on delimitation (land disputes) and others.

In Soviet time the economy exclusively belonged to public sector. The State established a system of "state arbitration courts", *sui generis* public bodies entrusted to settle disputes between legal entities involved in economic turnover. Filing a claim to such body became possible only after complying with a pre-trial dispute settlement procedure.[6] This means that before commencing a litigation the parties were obliged to try to reach a settlement agreement. In particular, an exchange of a written claim letter with proper annexes and a substantiated reply constituted a necessary precondition for any litigation. This procedure did not imply involvement of third parties. This obligatory pre-trial dispute settlement procedure exists in modern Russia for many categories of disputes.

It should be mentioned that the Soviet state arbitration courts have become predecessors of post-Soviet state commercial courts which more or less actively promote mediation.

II. Russian legal system and mediation

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 Code is essentially based on German and Netherlands models. 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. The Civil Code governs, in particular, relations between commercial entities and sole entrepreneurs. Russian law consists of federal law and the laws of constituent entities of Russian Federation.

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

[6] Каллистратова Р.Ф. Разрешение споров в государственном арбитраже. М., 1961. С. 22-24 (Kallistratova R.F. Dispute resolution in state arbitration. M., 1961. P. 22-24).

the establishment and development of business partnership relations and to amicable settlement of disputes constitute goals of judicial proceedings in commercial courts.

The Civil Procedure Code is also explicit about judicial assistance to amicable dispute resolution. Apart from that, it establishes 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 more than 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 mostly limits itself to establishing a general framework. However, there are 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 judges are taught to make conflict diagnosis and to recommend mediation to parties. Many state commercial courts have Conciliation rooms in their buildings. The parties are free to enter them to meet a mediation specialist who discusses with them the prospects of mediation in their particular dispute. If the parties become interested in mediation, the specialist arranges the procedure. This mechanism is functioning rather efficiently.

Apart from that, there are mediation centers at the chambers of commerce in many regions of Russia. International mediations are practiced, in particular, by the Panel of mediators of the Russian Chamber of Commerce and Industry.[7] Online mediation is practiced as well and is becoming more popular.

III. 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

[7] Panel of mediators of the Russian Chamber of Commerce and Industry https://mediation.tpprf.ru.

mediation. Then Russia has adopted the Mediation Law which entered into force in January 2011. It has a wide scope: it governs some issues not covered by the UNCITRAL Model Law, such as self-regulating organisations of mediators.

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" (Article 1).

The Mediation Law governs different aspects pertaining to the mediation of disputes arising from civil, commercial, labour[8] and family law matters, as well as administrative and other public law disputes. 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 and non-professional mediators[9]. Furthermore, the Mediation Law introduces a notion of *mediated agreement* (*mediativnoe soglashenie*), thus distinguishing it from other settlement agreements. This has practical implications: a mediated agreement has a special enforcement mechanism different from other settlement agreements: it may be notarised and thus obtain direct enforceability.

IV. Direct enforceability of the mediated settlements affecting international disputes with Russian parties

Under Russian law, a settlement agreement reached as result of mediation constitutes a civil law contract (Article 12 of the Law of the Russian Federation on Mediation) and, therefore, is as a rule enforceable by commencing a new litigation.

[8] Except collective disputes which are subject to separate regulation.

[9] 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.

Issues of international recognition and enforcement of mediated settlement agreements fall within the scope of the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2018 (the Singapore Convention)[10]. It contains a mechanism that is balanced as per the rights of the parties and the public interest: that is, it provides for proceedings under a simplified procedure with a uniform and exhaustive range of grounds for refusing to enforce. However, the Singapore Convention is currently effective only for a very limited number of countries.[11] In particular, Russia, unfortunately, did not express its intention to participate in it. It appears that Russia's participation is expedient and does not entail significant risks for it, given the balanced nature of the convention and the possibility of entering into it with reservations. For example, it is possible to exclude its applicability for government agencies and persons acting on their behalf (Article 8 of the Convention).

V. Notarial certification and direct executive force

In Russian law, since October 2019, there is a possibility of giving a mediated settlement agreement direct executive force by certifying it by Russian notaries (Article 591 "Certification of a Mediated settlement agreement" of the Fundamentals of the Legislation of the Russian Federation on Notaries, Article 12(1)(3) of the Federal Law on Enforcement Proceedings ") ("Law on Enforcement Proceedings"). This makes it more attractive for foreign companies to conclude transactions and resolve possible disputes with Russian commercial entities. Indeed, when settling disputes arising from cross-border contracts through mediation, there are now guarantees that the terms of the reached mediated settlement agreement will be enforced in Russia without any lengthy procedures and difficulties.

However, there is another side of the coin: the possibility of compulsory execution of mediated settlement agreements certified by Russian notaries outside Russia is important for Russian participants in cross-border economic activity. The property of non-Russian parties is usually located outside Russia. Consequently, the question is relevant whether it is possible to ensure the transnational recognition and enforcement of mediated settlement agreements notarized in Russia. The answer to this question depends, first of all, on the existence of an appropriate international treaty. Some such treaties already exist: in particular, they include the CIS regional Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of January 22, 1993 (Minsk Convention). In paragraphs 1 (a) and 2 of Art. 54 "Recognition and enforcement of decisions" it establishes that each of the contracting parties under the conditions stipulated by the convention,

[10] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

[11] Status: United Nations Convention on International Settlement Agreements Resulting from Mediation https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

recognizes and enforces notarial acts in respect of monetary obligations issued in the territories of other contracting Parties. Their recognition and enforcement are carried out in accordance with the legislation of the requested contracting Party.

However, provisions of the convention do not create sufficient legal certainty: in particular, the convention expressly establishes the conditions for the international enforcement of only judicial decisions, or rather, the grounds for refusal to enforce them abroad. These grounds are hardly suitable for notarial acts due to their very nature.

Also, unfortunately, the Russian Law on Enforcement Proceedings and other Russian domestic laws does not contain express provisions on the procedure for the execution of foreign notarial acts.

VI. Russian legal treaties outside CIS

There are applicable provisions in only few Russian legal treaties on mutual legal assistance. Namely, Art. 26 of the Convention between the USSR and the Italian Republic on Legal Assistance in Civil Matters (Rome, January 25, 1979) "Settlement Agreements and Notarial Acts" provides that the provisions of the convention on the recognition and enforcement of judgments in civil matters also apply to notarial acts in relation to monetary obligations.

Consequently, the Convention creates the basis for the enforcement in Italy of mediated settlement agreements, containing monetary obligations and certified by a Russian notary.

It is also possible, albeit with a reservation, to include the Treaty between the Russian Federation and the Republic of Poland on legal assistance and legal relations in civil cases (Warsaw, September 16, 1996) as applicable to this issue. In particular, its Art. 52 provides for cross-border enforceability of notarial deeds having the force of an executive note under the legislation of the contracting Party in whose territory they were made.

It should be noted that the concepts of "notarized agreement" and "notary's executive note" arguably constitute two different notarial procedures. For example, in Russian law, they are regulated by different chapters of the Fundamentals of Legislation on Notaries (Chapters X and XVI, respectively). At the same time, the consequences of the executive note on the contract and its notarization can be considered equivalent in terms of the purposes of enforcement.

However, the overwhelming majority of Russian international treaties on legal assistance, unfortunately, currently do not contain provisions on mutual recognition and enforcement of notarial acts. Also, regrettably, there are no provisions on notarial acts in the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019. Including such provisions would be advisable, given the absence of a separate universal similar convention on notarial acts.

VII. Conclusion

Russia has a long history of institutions relating to amicable dispute settlement. Such settlement has been a part of cultural and ethical norms. It is important to maintain and revive centuries' old traditions of favorising and encouraging early and friendly settlements.

The development of international mediation with the participation of Russian parties to a certain extent depends on the degree of involvement of Russian documents in the international document circulation. In particular, it depends on the development of instruments for cross-border recognition and expedited enforcement of notarial acts.

Expanding international legal cooperation in the field of mutual recognition and expedited enforcement of notarized acts including mediated settlement agreements on commercial disputes, would correspond to the interests of international trade. It is necessary to reform international treaties and domestic legislation to ensure the possibility of mutual compulsory execution of notarial acts. A wider mutual recognition and enforcement of foreign legal acts on a reciprocal basis also remains important.

It is proposed to amend the treaties of Russia on legal assistance in order to include in them provisions on the mutual enforcement of notarial acts, taking as a basis the relevant provisions of the treaty with Italy. In particular, it makes sense to include in them special provisions on the grounds for refusal of such enforcement, taking into account the specifics of notarial acts in comparison with foreign court judgments.

In addition, it is proposed to include express provisions on the procedure for mutual enforcement of foreign notarial acts, including mediated settlement agreements certified by notaries, in the Russian Law on Enforcement Proceedings and the Fundamentals of Legislation on Notaries.

However, even today there is a sufficient legal framework for mediating disputes involving parties from Russia and CIS.

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