



Self-irony is not what we, lawyers, do very often.

J. Vermin

Caucus-race



'WHAT IS A CAUCUS-RACE?' ASKED ALICE WHEN SHE FELL DOWN THE HOLE AND MET THE INHABITANTS OF WONDERLAND. Then, everyone 'began running when they liked, and left off when they liked, so that it was not easy to know when the race was over'. At last, in about half an hour, Dodo said that the race was over and that 'everybody has won, and all must have prizes'.

This 'everybody has won, and all must have prizes' idea lies at the heart of mediation. It is also a reminder that, all too often, lawyers are not welcome and that stepping in the legal minefield can be a no-way-back road to total disaster – no one wins, all lose.

Mediation is not, strictly speaking, a legal procedure. It is voluntary. Its outcome is not promised nor is it legally binding. A mediator intervenes in a dispute to help negotiation. Unlike a judge or an arbiter, the mediator can only shuttle backwards and forwards trying to persuade the quarrellers to move their positions. If a solution is found it is an agreement, not an order.

The Federal Law 'On Alternative Dispute Resolution with the Participation of an Intermediary (Mediation)' has been adopted by Parliament and in January 2011 will come into force. It introduces what should not need introduction, a bit of common sense. The idea is to keep people out of the courts, to remind them that they should talk first and, only if negotiation fails, fight.

Ironically, mediation is where our law started. A leader not always had real power to enforce his decisions. Back then, dispute resolution was just that – mediation where the arbiter's role was finding a compromise and preventing a big brawl.

There are many cases when litigation is a way to nowhere. In divorce, for example, former spouses fight for the shrinking cake which, unless the litigants are movie stars or investment bankers, is hardly big enough for one family, let alone two and which, when legal costs are deducted, gets really small.

It is time to remember that life is not a zero sum game where if they win you lose. And this is exactly how the legal system works. It is not built for a win-win situation - in each case it strives to find the one who wins and the one who loses.

In Russia, mediation as a formal procedure will, most probably, fail. Courts' charges are small and lawyers' fees are high. In most cases, like divorce or labour disputes, legal representation is not obligatory. It appears cheaper not go to an intermediary but directly to court. Usually, this is the road to hell.

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text: E. Andreeva

photo: Peter Newell



IS MEDIATION TO GAIN GROUND IN RUSSIA?

TEXT: [Dmitry Davydenko, associate, Muranov, Chernyakov & Partners \(dmitry-davydenko-muranov-chernyakov-partners\)](#)

The draft federal law "On Alternative Dispute Resolution with the Participation of an Intermediary (Mediation)" has been adopted in the third hearing in Russian Federal Assembly. This means that only President's approval separates it from becoming law. This approval is quite likely to be granted soon given that such draft law is the President's initiative.

Current draft does not provide for a compulsory mediation 'by operation of law'. Nor does it establish penalties for refusal to mediate such as duty to bear the resulting litigation costs. The bill aims to provide a legal framework and maintain standards of quality for mediation practice. In addition, it serves a considerable informative function, increasing public awareness and trust in mediation.

Currently mediation is practiced only sporadically in Russia. Mostly it is used in family, labour disputes or in small and medium business controversies. There are a number of centres consistently providing actual mediations as well as methodological support to mediation throughout the whole Russia. The most well-known of them are the Conflict Resolution Centre in Saint-Petersburg and the Centre of Mediation and Law in Moscow. In Moscow Centre of Arbitration and Mediation at the Russian Chamber of Commerce and Industry also provide mediation services. Yet the overall mediation centres caseload is very small (several hundred disputes in the whole Russia, judging by the disclosed data) both absolutely and in comparison with the state courts' dramatic caseload (25 mln court cases in 2009, according to President's Advisor Veniamin Yakovlev. The average monthly caseload per one commercial judge ('arbitrazhnyi sudia') is about 100).

Inserting mediation clauses in contracts has not yet become a wide-spread practice. Supposedly foreign companies, in particular, from the US or UK, where mediation has already gained large ground, will be initiators of mediation clauses and conveyors of mediation culture. However, as Executive Secretary of the Mediators' Panel at the Russian Chamber of Commerce and Industry Maria Berezjuk points out, often where a party to a dispute proposes to mediate, the other party gets suspicious and is reluctant to agree.

For many people in Russia mediation is yet well enough known. For me this raises an association with invention of the telephone a hundred years ago. The inventor had to sell it for small price as initially telephone communication was not considered a serious business service. Now a similar situation is with mediation.

Conciliatory procedures, such as mediation, are yet weakly integrated in the Russian business and legal culture. People are used to resolve disputes by fighting, be it through litigation or through unlawful violent mechanisms. In comparison with litigation, arbitration requires more cooperation between parties, in particular, in choosing arbitrators or agreeing upon the arbitration procedure. Mediation obviously requires even more cooperation. However many businesses are very reluctant to cooperate with the other party or with the arbitral institution once the dispute arose. Given this, there is no chance that mediation can unload the courts in the short run. However, a consistent cultivating of mediation culture both by state and by associations representing businesses and lawyers can gradually make a large difference.

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Besides, a court-referred mediation can be helpful. The judges should be required to take the initiative and refer the parties to mediation in appropriate cases. Also, information on the mediation providers should be available at courts.

The Russian state displays a generally friendly approach towards ADR. The overloading of state courts greatly contributes to it. Top Russian public officials, including the President, the Prime-Minister, senators and highest judges declared their support of ADR. In terms of practice, the arbitration initially faced huge mistrust and jealousy of the judges. However, over the last few years there is a distinguishable positive trend, in particular with regard to international arbitration. The High Commercial Court of Russian Federation greatly contributes to the trend. It often exercises its supervisory powers to reverse lower courts' judgments which, usually through formalistic interpretation of law, create unfounded and unlawful obstacles to arbitration.

For example, recently the High Commercial Court Presidium held that an arbitration agreement incorporated in a bill of lading which was not signed by the parties is valid. Such incorporation is widespread in the maritime practice. At the same time there is a formal requirement that bills of lading shall be signed by the parties. However, the Russian courts held that absence of the signatures of the parties on a bill of lading does not affect validity of an arbitration agreement. The parties to dispute were both Dutch companies: ESF Euroservices B.V. (the claimant) and Hyundai Merchant Marine (the respondent).

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Besides, the High Commercial Court Presidium recently granted interim measures (seizure of an apartment in Moscow belonging to a Russian citizen Shalva Chigirinsky) in support of arbitration in London. Russian legislation allows the courts to grant interim

measures at the request of the parties to arbitration proceedings regardless of the seat of arbitration. However, the courts are often reluctant to grant such interim measures. That is why this case is worth mentioning, because the HCC has demonstrated the opportunity of the courts to assist arbitration even if the proceedings take place abroad.

The attitude of many judges towards arbitration in domestic disputes is less supportive. State judges of local courts in many Russian regions are suspicious of arbitration courts and, according to some presidents of the latter; usually the only efficient remedy is personal connection with the head of the local courts.

International arbitration is better viewed by many judges and other public officials. This fact is due to the high reputation earned by international arbitration practitioners worldwide and to trust to the qualification of international arbitrators, in particular, to the activity of the International Commercial Arbitration Court at the Russian Chamber of Industry and Commerce, which is highly respected in the Russian legal and business community.



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