Mediation a la Rus: Peace, Not War?

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Finally, mediation in Russia is receiving official recognition. On Jan. 1, 2011, the Federal Law No. 193-FZ "On Alternative Settlement of Disputes with an Intermediary (Mediation Procedure)," dated July 27, 2010, came into effect. The law represents a critical shift in mentality, showing the increasing acceptance of early settlement as an alternative to the usual winner-takes-all litigation. The law provides a number of useful dispute resolution tools for companies with operations in Russia. This article provides a brief review of the new legislation and offers several practical applications of the law to a company's legal strategy.

The ground rules

As pointed out by many observers, Russian litigation is still relatively inexpensive, quick and easily influenced, making settlements unattractive. It has been common for parties embroiled in disputes in Russia to pursue litigation to the end in a zero-sum fashion. However, growing expense, delays and unpredictability have been driving up the number of cases settled out of court. This is a growing trend: Although the official statistics are reasonably modest, figures are steadily increasing (in 2010 3.3 percent of all commercial cases were settled compared to 2.5 percent of all cases in 2007).[1] In some areas, the percentage is as high as 5 to 8 percent.[2] The courts note that in 2010 approximately 40,000 (or about 16 percent) commercial cases were discontinued because of settlement.[3] Companies should trade in on this trend. As explained in this article, mediation is a valuable tool in early case assessment and cost-effective resolution.

Who and what?
The law adopts the familiar definition of mediation as a voluntary dispute resolution procedure where the parties are assisted by a neutral mediator in an effort to find a mutually satisfactory resolution. This ambiguous formula is then shaped into a number of easily digestible and detailed steps. For a US practitioner, the law is unexpectedly restrictive and open-ended at the same time.

The law is intended for private actors to mediate private disputes (Art. 1(2)). Any disputes between private actors, including commercial and employment-relations, can be resolved through mediation. By definition, governmental and administrative bodies are excluded from mediation, as well as any disputes that involve administrative or governmental agencies as parties and arise out of so-called "public" matters (Art. 1(5)). Thus, one cannot attempt to mediate a dispute with a local zoning board, or with the tax service regarding a levy. This is a logical extension of the general official policy that essentially prohibits Russian governmental agencies from settling disputes with private actors.[4] The law also expressly prohibits mediation of disputes, which concern collective bargaining agreements. Finally, one cannot mediate a dispute that affects the rights of third parties without their participation.

When?
Mediation is available both before commencement of a suit and during its pendency, which is equally applicable to arbitration proceedings (Art. 4). The proceedings are suspended pending the outcome of a mediation. One of the benefits is that the statute of limitations is tolled during the pendency of mediation. To ensure that the parties do not use mediation as a delay mechanism, there are outer limits to the mediation. For matters pending in court or in arbitration, mediation is to be completed within 60 days from the date it was ordered or agreed upon

by the parties. For all others, mediation is to be completed within 180 days (Art. 13 (3)).

If the parties agreed to submit a dispute to mediation prior to going to court or into arbitration, they are not allowed to seek intervention from the court or arbitration panel until mediation is complete, "except where one of the parties, in its opinions, feels it necessary to protect its rights." (Art. 4). This language arguably softens the provision, but is likely to be interpreted akin to allowing parties to seek injunctive or other immediate relief where harm is imminent and irreparable.

Who mediates?
The mediator or several mediators may be chosen by the parties or appointed, for instance, by a mediation service chosen by the parties (Art. 9). Any "disinterested," competent person over the age of 18 and without a criminal record can act as a mediator (Art. 15). The parties are free to impose additional qualifications or requirements. The law makes provisions for official mediator certification and professional mediator associations similar to mediation firms in the United States. While at this time no such organization is officially recognized, the segment is rapidly developing with certification courses announced almost daily. To ensure that the mediator acts as an "independent and impartial intermediary," the law prohibits him from rendering services to either party. The mediator is also prohibited from having a direct or indirect interest in the subject matter of the dispute. The disqualification extends to the relatives of the mediator and the parties (Art. 15 (6.3)). The law expressly forbids him from conducting the matter in a manner "disadvantageous" to either party. He is prohibited (unless the parties agree otherwise) from making express settlement suggestions or proposals. He is also required to keep all information received during mediation confidential and may not make any public statements about the matter. The mediator is allowed to meet with one or both parties; ex parte communications are not expressly prohibited.

How?
In general, invoking mediation requires a written agreement, such as a mediation clause or a separate agreement (Art. 2(5)). The agreement must contain the subject matter of the disputes subject to mediation, a choice of mediator or mediators (which can be accomplished by referencing a specific mediation organization), the procedure and rules of the process, agreement on splitting the costs, and the timeline. The cost component is particularly important because Russia, like all jurisdictions with the exception of the United States, awards the winning party its attorney's fees. Mediation is thus an opportunity to have the other side share at least a portion of the litigation costs. A party may "invite" the opponent to participate in mediation by directing to it an "invitation" to mediate. Such an invitation is considered rejected if the opponent fails to respond within 30 days. Much like arbitration, the parties are free to establish their own rules or, if they chose to submit their dispute for mediation with the assistance of a mediation organization, they are free to adopt the rules provided by the organization (Art. 11(4)). The parties are required to act cooperatively and in good faith. The mediation process is strictly confidential. Any statements made during mediation, including offers, confessions, opinions and willingness to compromise, are inadmissible in court.

If the parties are able to reach a compromise they may execute a so-called "mediated agreement." This agreement is treated as a settlement agreement or as a simple commercial contract.

Practical tips for advantageous use of mediation in Russia

Not surprisingly, the usual arguments in favor of mediation, such as predictability, the less adversary setting, the ability to assess own case and that of the other side through a neutral observer, greater compliance, reduced time and expense, and even a legitimate opportunity to vent, are all applicable to mediation in Russia. The unique advantages of using mediation and mediation clauses in Russia, however, include a) unique emotional appeal; b) confidentiality; c) early dispute assessment and discovery; d) resolving potential volume (i.e., consumer) disputes in a commercially reasonable manner; and e) obtaining a final agreement enforceable in a simplified manner.

Companies who stand to benefit most
Companies that would benefit from mediation most are those with substantial operations in Russia on the consumer or business-to-business level. Mediation makes sense for small to medium consumer and vendor/supplier disputes, which have a high potential for resolution. Transactions involving a significant foreign element (joint ventures, asset acquisitions) are usually structured through foreign entities. Disputes related to such transactions, such as, for instance, the latest battle between

British Petroleum and its partners in the Russian joint venture TNK-BP, are at once highly politicized and also subject to complex arbitration clauses vesting jurisdiction in foreign tribunals.

Companies that have extensive sales or procurement operations in Russia can streamline their dispute resolution processes. By taking advantage of the confidentiality restrictions available to mediated disputes, these companies can also minimize reputational risks associated with litigation.

Addressing the emotional aspect

While settlement discussions and mediation are well accepted in the United States and other Western jurisdictions, they are still a relative novelty for many domestic Russian operators. Filing a lawsuit has long been considered an act of war, which leaves no chance for reconciliation. The parties then dig their heels and litigate to the end. One commentator recently noted that this scenario is influenced, in some part, by unique emotional factors.[5] These include the fear of appearing weak or uncertain, inability to make important decisions, and overwhelming anger and frustration. While these concerns are not unheard of in the American practice, it is rare for these reasons to derail settlement talks completely, especially if the attorneys are doing their jobs and the parties are running daily legal fees. Inserting a mandatory mediation language addresses these concerns. First, there is no appearance of weakness because mediation is required by contract. Second, as our readers know, mediation is uniquely suited to letting the parties vent their frustrations. Finally, because mediation is mandatory, the decision makers are faced with the necessity of making a decision and participating personally, much earlier in the process than when in litigation.

Confidentiality

One of the significant advantages to using mediation in Russia is confidentiality of the process. First, all statements made during the mediation process are inadmissible in court or in arbitration proceedings. The parties are not allowed to call the mediator as a witness. This obviously makes for a more open and constructive dialogue. Second, the parties can further restrict any disclosures about mediation by agreement to the point where the mere fact of mediation can be made confidential. This is important in the circumstances where mediation concerns pose reputational risk to the company. Given the media's penchant for sensationalizing, it is easy to see how resorting to mediation is preferable to the more open court proceedings.

Early case assessment and discovery

One of the tremendous disadvantages of litigating in Russia is the absence of any mechanism for obtaining the opponent's documents and other information. While the plaintiff bears the burden of proof of a case, there are no discovery mechanisms. In other words, the plaintiff must have all documentary evidence in his possession prior to the filing, and in any event, before trial. Mediation can be used as a valuable substitute for discovery.

For instance, the parties may include a protocol for exchange of information as part of the mediation procedure. Requiring the parties to produce all correspondence, including electronic documents, on the subject of the matter before the mediation session would foster transparency and encourage compromise. Further, the parties may agree to make specific persons, including key people or decision makers, available to speak at mediation, thereby ensuring at least some potential for consensus.

Cost-effective resolution/volume disputes

Mandatory mediation is a useful tool in volume contracts or transactions for companies that have extensive operations in Russia. First, ensuring that a consumer or provider has to appear at a mediation session early on and paying for his portion of the expenses can discourage frivolous claims. Second, ensuring that all disputes are mediated and resolved prior to escalating into full-scale litigation can lead to significant cost savings and lower attorney's fees. The emotional openness of mediation can be used to foster open communication. It will thus strengthen a relationship with a consumer, supplier or vendor, where litigation is likely to cause an irretrievable breakdown. Again, such long-term relationships tend to benefit businesses.

Finality and enforceability

For a case pending in court, an agreement reached in mediation, the so-called "mediated agreement," has the finality of a settlement agreement. Under Russian law, a party seeking compliance with the settlement agreement can obtain an immediate execution on a motion.[6] A settlement agreement obviates the need for a supplementary process, which would be necessary in the United States. Similarly, an arbitration tribunal may accept the agreement and endorse it as part of its decision to give it the necessary finality and simplify enforceability.

Unfortunately, a mediated agreement is not given the status and enforceability of a settlement agreement. The mediated agreement is treated as any other contract. A breach would have to be remedied through litigation, which negates the purpose of mediation. A simple, but as of yet untested, way to remedy the situation is through a concurrent mediation clause.[7] Such a clause would allow filing a suit followed by immediate mandatory mediation. The obvious disadvantage of this approach is the loss of the confidentiality. Another possible solution is for the parties to petition the court jointly to endorse the mediated contract as a settlement agreement. Again, in addition to making the matter public, this approach would add unnecessary complexity and cost.

An attractive alternative to litigation

The new mediation law offers an attractive alternative to litigation and to ad hoc settlement negotiations because of the unique advantages of the procedure, including mandatory confidentiality, tolling of the statutes of limitation and some simplified enforcement mechanisms. The companies that should be considering adding corresponding clauses to their contracts are the ones with extensive operations in Russia. While the full effects of the new statute are yet to be seen, early adopters are likely to realize considerable cost-savings and other benefits by using the new dispute resolution mechanism for small to mid-sized consumer and vendor disputes.

Notes

1 See official statistics available at *http://arbitr.ru/_upimg/50036F2384E2E7F1CB7445559AFDA540_8.pdf.*
2 See the Notes to the Statistical Report of the Highest Arbitration Court for 2010, p. 5, available at *http://arbitr.ru/_upimg/ABB739E6657079D763C2E5A005FA9779_1.pdf.*
3 Id.
4 See, e.g., Art. 53 and 139 of the Russian Code of Commercial Procedure prohibiting settlement of disputes in cases involving "public" interests.
5 See M. Kulkov, What Prevents Settlement Agreements, Arbitration Practice Magazine, No. 11, November 2010, available at *www.arbitr-praktika.ru/arhiv/92_noya_2010/topic759_chto_meshaet_nam_zakluchat_mirovye_soglasheniya.html.*
6 See The Russian Code of Commercial Procedure, Art. 142.
7 See e.g., S. Andersen, ICDR Offeris Concurrent Mediation/Arbitration Clause in AAA Handbook on International Arbitration & ADR, pp. 327-329 (2010), available at http://www.acc.com/vl/membersonly/Article/loader.cfm?csModule=security/getfile&pageid=1248294