DOI: 10.52028/rbadr.v6.i11.ART08.RU

Mediation as an effective way to settle economic disputes: current experience and prospects for development

Fatima Konova

Arbitrator of the Arbitration Centre of The Russian Union of Industrialists and Entrepreneurs (RUIE), Moscow. Mediator of the Mediation Centre under The Russian Union of Industrialists and Entrepreneurs (RSPP), Moscow. Associate Professor of Law, Department of Civil and Administrative Litigation, Moscow State Law University, PhD in Law. E-mail: fatimar.konova@gmail.com. ORCID: https://orcid.org/0000-0001-5081-1459.

Adel Abdullin

Doctor of Law. Professor. Head of the Department of International and European Law. Kazan Federal University. E-mail: adelabdoulline@yandex.ru. ORCID ID: 0000-0001-6078-8029.

Abstract: The mediation procedure is considered the most effective method of settling business conflicts in the system of alternative ways of dispute resolution through the prism of fundamental principles. The article reveals the advantages of settling cross-border economic disputes through mediation, including out-of-court procedures. The article examines doctrinal approaches to the mediation procedure, analyses the main problems of its unpopularity in the country and suggests ways to improve it and popularize it in Russian society through amendments to the mediation legislation, such as the legislative establishment of the term "mediation" and a uniform approach to the mediation procedure itself, including the requirements to the mediator's identity and responsibility, as well as the exclusion from the legislation of the possibility of conducting mediation on a non-professional basis. The author pays special attention to the role of the judicial community in the development of mediation in the settlement of disputes in court.

Keywords: Dispute resolution. Alternative dispute resolution. Mediation. Voluntariness. Neutrality. Mediator.

1 Introduction

In today's reality and in the age of digitalization, not only new opportunities but also new problems arise in connection with the resolution of business disputes. With the emergence of many disputes between business entities, the judicial burden and, therefore, the duration of their resolution and a sharp increase

in legal costs are also increasing. This is one of the reasons for the popularity of alternative methods of resolving business disputes.

The concept of "alternative dispute resolution" is borrowed from American legal doctrine. The term "alternative dispute resolution" (ADR) covers all methods of out-of-court conflict resolution. It should be noted that the American judiciary was confronted with the problems of the judicial system described above a century earlier. In 1906, Roscoe Pound, a lawyer, drew public attention to the inefficiency of the courts and dissatisfaction with the judicial system[1] in his report to the American Bar Association conference, which influenced further reform of the American judicial system and led to the introduction and effective use of alternative dispute resolution methods.

The literal translation of the term ADR from English is "alternative dispute resolution", however, for the Russian law such wording is not correct, as it can cover only dispute resolution procedures (for example, arbitration), but not settlement (conciliation). In this regard, there is a well-founded opinion in the academic literature that the use of the term "alternative dispute resolution and settlement" is more appropriate.[2]

Thus, it is possible to distinguish the legal categories of "settlement" and "resolution" of a dispute according to their nature and purpose. Dispute resolution has an authoritative nature, as it is carried out by authoritative action of the court, while dispute settlement is carried out based on a compromise voluntary agreement between the parties. Reconciliation aims at eliminating the conflict, eliminating the contradictions between the subjects, and dispute resolution aims at establishing the "right and wrong side" and making a judgement based on legal norms.[3]

Worldwide practice of ADR methods includes mediation, negotiation, binding recommendation, referral to an ombudsman, conciliation, pre-neutral evaluation, arbitration, fact-finding, dialogue forums and others. Of these, mediation is the most widely used.

Mediation is a universal tool for resolving a wide range of conflicts and in international practice is used for independent conflict resolution by its participants with the support of a third party. Undoubtedly, in some foreign countries (Austria, England, Wales, Germany) the use of mediators is associated with high costs and complexity of court proceedings.[4]

---

1 POUND, R. Reasons for widespread dissatisfaction with the administration of justice, Mediation and Law, 1, 15-29, 2016.

2 ROZHKOVA, M.A., ELISEEV, N.G., SKVORTSOV, O.Y. Contract law: agreements on jurisdiction, international jurisdiction, conciliation procedure, arbitration (arbitration) and amicable agreement (Moscow: Statute, 2008).

3 Alternative ways of settlement and resolution of disputes in Russia (Samara: Samara University Publishing House, 2021). p. 104.

4 KONOVA, F.R. Mediableness of civil-law disputes: correlation with jurisdiction (Moscow, 2023).

Mediation in the context of increasing complexity and growth of international and domestic trade relations and increasing mobility leads to legal problems, but there are still unresolved issues related to the concept of mediation in different legal systems, the problem of applicable law, the wording of the mediation clause or agreement, gaps in legal regulation, differences in dispute resolution procedures in different countries, the procedure for enforcing a mediation agreement in a foreign country and others.

In addition, another important question arises: can mediation replace the judicial system and how effective and beneficial is it for the parties?

Globalization of trade and increased mobility make dispute resolution more complex and present companies and courts with additional challenges, such as issues of applicable law, gaps in the law, differences in national dispute resolution procedures, i.e. issues that may not arise in a domestic dispute. In addition, traditional judicial dispute resolution has its own procedural idiosyncrasies that can further complicate the resolution of a commercial dispute. Moreover, the strictly formalized structure of judicial dispute resolution can seriously damage the partnership relation between the parties.

However, unpleasant disputes and disagreements may arise; their total elimination is unfortunately an unattainable goal. After all, conflict is a reality of human interaction, and business relationships are no exception. After all, conflicts must be managed. Rather than trying to avoid them, we need to ask a question: how can we best manage conflicts arising from economic relations? In search of an answer to this question, economic actors are increasingly turning to alternative dispute resolution.

2 Mediation as an effective way to settle economic disputes

Historically, alternative methods of dispute resolution formed earlier than court proceedings. Mediation, negotiation, and mediation were already in use to resolve disputes in the early stages of social development. These procedures involve settling disputes outside the courtroom with the help of an impartial mediator who either resolves the dispute or assists the parties in resolving it. Different cultures have adopted different methods, but the dominant intention has always been to delegate dispute resolution to a respected member of society, the so-called mediator. Often, people have been using mediation to resolve inter-ethnic, multilateral, and international disputes.

Dispute resolution through mediation has a long tradition around the world.[5] The nature of the informal legal outcome in mediation is such that the resolution of the conflict is not in the hands of a third party but depends on the co-operation of the parties with the assistance of the mediator. The more parties use the process of alternative dispute resolution in resolving certain types of conflicts outside the formal court process, the more popular mediation becomes in various fields as one of the most effective methods.

Based on the general principles of alternative dispute resolution, mediation can provide greater flexibility, confidentiality, and participation of all parties in finding solutions different from those offered through the adversarial system in court. Mediation is more in demand where the usual conflict resolution mechanism may be ineffective.

Even though mediation is currently part of the legal systems of different countries, there is no clear definition of mediation in the legal literature.

Modern doctrine understands mediation as a method of dispute resolution alternative to litigation and there are different approaches to its definition:

- normative, as peaceful resolution of conflicts and disputes;
- communicative, as a mutual exchange of information within the framework of tripartite negotiations to reach a compromise;
- functional, as a combination of techniques used to reach a compromise between the parties;
- consultative, as a way of resolving disputes through the exchange of competent opinions;
- psychological, as a way of eliminating a conflict by rethinking it and eliminating its root causes.

Thus, according to T.A. Savelyeva, mediation is a way of resolving a conflict through negotiations with the participation of a neutral mediator. I.V. Reshetnikova gives a similar definition, seeing mediation as a form of reconciliation of the parties through negotiations by a neutral person chosen by the parties.[6] V.F. Yakovlev has his own view on the definition of this term – "mediation is the activity of a specialist in dispute resolution within the framework of negotiations between the disputing parties in order to conclude an amicable agreement between them".[7] D. Den defines mediation as the functional role of a third neutral party in a dispute, which helps to find mutual understanding between the parties and to resolve the conflict.[8] Although this definition is more widespread and clearer, it still does not

[5] GALINDO AYUDA, F. Algorithms, Sociology of Law and Justice. Journal of Digital Technologies and Law, 2 (1), 34, 2024.
[6] RESHETNIKOVA, I.V. And again, about mediation. What should it be like in Russia?, Law, 1, 51, 2014.
[7] YAKOVLEV, V.F. Law of free application, Mediation and Law. Mediation and reconciliation, 9, 34, 2016.
[8] DAN, D. Overcoming Disagreements (SPB., 1994). p. 437.

provide a clear distinction between mediation and conciliation due to the lack of distinguishing criteria.

The last, third definition of mediation as a special procedure is characteristic of those who seek to institutionalize and separate this alternative procedure from all others. Thus, mediation is recognized as being like other methods, but different in terms of the role and characteristics of the mediator, the techniques used and the criteria for decision-making. For example, A.D. Karpenko, Director of the Centre for Development of Negotiation Process and Peaceful Strategies in Conflict Resolution, mentions: "mediation, along with other forms of alternative dispute resolution, represents a special technology in which the parties themselves work on their conflict in negotiations with the participation of a third party".[9] One of the most successful definitions in terms of content is that of R. Baruch Bush, which includes important features of mediation: "Mediation is usually understood as an informal process in which an impartial third party, who does not have the authority to make a binding decision, helps the conflicting parties to reach a solution that is acceptable to both parties".[10] Based on this definition, we can identify the main features of mediation: informality, impartiality and neutrality of the mediator, lack of authority of the mediator to make a binding decision, reaching a compromise by the parties.

Thus, we can conclude that the absence of a legal definition of the term "mediation", a unified approach to the mediation process itself, as well as to the role, personality, and responsibility of the mediator, confirms the difficulty of developing a unified concept that distinguishes mediation from other procedures. This is due to the lack of universal rules and standards for the conduct of mediation, the diversity of its types and the variability of the techniques used by mediators. In addition, the definition of mediation suffers from the influence of the context in which it is used. For example, some countries legislate on the specifics of the process, giving it its own national characteristics. In Germany, for example, a mediator can be a person with public authority, although most countries require the mediator to be a person specialized in conflict and experienced in dispute resolution.

Despite the different approaches to the definition, there is a consensus on the purpose of mediation, which is to assist the parties in reaching a voluntary resolution of a dispute or conflict.

[9] KARPENKO, A.D. Mediation terms as an element of practice development in Russia, Court of Arbitration, 3, 164, 2016.

[10] BARUCH BUSH, R. The promise of mediation: responding to conflict through empowerment and recognition (CA: Jossey-Bass, 1994).

Thus, mediation should be understood as a dispute resolution process, defined by the rules of institutional mediation centers and the discretion of the parties, based on the principles of confidentiality, voluntariness and carried out by the parties to a conflict to resolve the dispute together with a neutral party (mediator) who does not have the authority to make a binding decision.

In the global context, cross-border recognition of judgments requires the cooperation of sovereign states. On the one hand, the states themselves must ensure that the individual agreements of the parties can be enforced; on the other hand, it is regional and global recognition that allows the development of sustainable practices in economic relations and strengthens mediation as an alternative to the judicial form.

The international community therefore needed a single instrument to recognize and enforce such agreements. At the time, the New York Convention of 1958[11] was the main international instrument establishing such an alternative dispute resolution mechanism as commercial arbitration on the international level. However, less formalized methods of dispute resolution, in particular mediation, have recently gained popularity. Thus, in 2018, the recognition and enforcement of mediation agreements became the subject of the first international convention in this field. To recognize mediation as a dispute resolution method on an equal footing with arbitration, the United Nations Commission on International Trade Law (UNCITRAL) drafted the Singapore Convention, which will enter into force on 12 September 2020.

The final draft of the Convention was formed at the 51st session of UNCITRAL on 25 June 2018, and the related Model Law was adopted. The first signatories were Singapore, Fiji, and Qatar. At present, its coverage has expanded significantly to 55 signatory countries and 11 ratifying countries. The Russian Federation and the EU countries have not yet acceded to the Convention. Regarding the EU, the Convention does not specify how such an integration association could accede to it: as a whole group of states or individually. The Russian Federation has not yet taken an official position on accession to the Convention.

The most important factor in the success of mediation is a society's long-standing cultural traditions and moral culture. In the Asian region, Confucianism promoted the spread of the alternative process; in Muslim countries, Sharia law served as a basis; and in Europe, the culture of the Greek polis.[12] However, Russia is only at the beginning of its journey. An analysis of the specifics of mediation in Russia shows that the current regulation of this procedure lacks not only systematic

[11] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

[12] DAVYDOV, A.P. The basis of development as a sociocultural problem (to the question of mediation theory of the evolution of Western society). Vestnik of the Institute of Sociology, 24, 27, 2018.

implementation, but also a cultural basis for it. Of note is the analytical report of the Supreme Court of the Russian Federation on this issue, which identifies four main reasons for the low popularity of mediation in Russia: organizational, economic, procedural, and psychological.[13] Although the first three reasons are important and can be overcome with the help of structural legal acts and financial support from the state in the initial stages, the last reason is the most difficult to solve. It has to do with a certain established psychology of people, which determines what fairness, justice and conflict resolution mean to them. The Supreme Court of the Russian Federation has identified the following causes: the growth of conflicts in society and business, a low level of legal culture, a lack of negotiation skills, and the belief that a court decision is more reliable.

As a result, the state's imposition of mediation without a prepared cultural base led to poor results. The textbook "Alternative Dispute Resolution", edited by E.A. Borisova, noted the wrong initial approach to the introduction of mediation: legal rather than social, so the law began to regulate relations that had not yet really developed in society.[14]

At the same time, the state has recently taken active steps to further promote this procedure. In October 2019 the Supreme Court of the Russian Federation adopted the Regulations on Judicial Mediation,[15] in 2020 the Plenum of the Supreme Court of the Russian Federation adopted a resolution with a list of mediators for all subjects of the Russian Federation,[16] and in the same year the Ministry of Justice prepared a draft Law on mediation,[17] thus initiating a policy of reforming this institution and strengthening the role of judicial mediation. Nevertheless, the introduction of mediation through the courts is unlikely to create a positive attitude towards it, as many people accuse the judicial system of being subjective and corrupt[18] (according to a sociological survey). In addition, there are many other problems that need to be solved, including those related to the

[13] Reference on the practice of application by the courts of the Federal Law of 27 July 2010 No 193-ФЗ "On alternative procedure of dispute resolution with the participation of a mediator (mediation procedure)" for the period from 2013 to 2014. (Approved by the Presidium of the Supreme Court of the Russian Federation on 1 April 2015), http://www.supcourt.ru/Show_pdf.php?Id=9939.

[14] BORISOVA, E.A. Alternative dispute resolution (Moscow: Gorodets, 2019). p. 416.

[15] Regulation of judicial reconciliation approved by Resolution of the Plenum of the Supreme Court of the Russian Federation of 03.10.2019 No. 41, https://vsrf.ru/about/info/primirenie/reglament_sud_pr/.

[16] Resolution of the Plenum of the Supreme Court of the Russian Federation of 28.01. 2020 N 1 "On Approval of the List of Judicial Conciliators".

[17] Federal Law "On the Settlement of Disputes with the Participation of a Mediator (Mediation) in the Russian Federation" (Draft of the Ministry of Justice of the Russian Federation. Out. No 12/108186-MB of 23.09.2020), https://www.advgazeta.ru/upload/medialibrary/3a9/Zakon_o_o_mediatsii_ot_minyusta.pdf.

[18] PROKHODA, V.A. Trust of Russians in the national judicial-legal system (on the materials of sociological research). Sociodynamika, 5, 86, 2019.

mediation community, as there is no organized professional community and no unified system of mediator training.

The problems of mediation in the Russian Federation and the strategy of application of the Singapore Convention also became a subject of discussion of the participants of the Third Asia-Pacific Conference, which will happen in Korea in 2019. N.G. Prisekina, Professor at the Faculty of Law of the Far Eastern Federal University, noted that mediation has not gained much popularity in the Russian Federation since it has become a widespread phenomenon abroad because of the serious shortcomings of the judicial system, namely its high cost, overload and slowness. In Russia, the situation is somewhat different; it is sometimes more profitable for companies to go to court than to a mediation center, as courts are easily accessible and inexpensive compared to Western countries.

At present, three main legal acts regulate the business mediation in the Russian Federation: the Federal Law "On Mediation Procedure",[19] the Law of the Russian Federation "On International Commercial Arbitration"[20] and the Arbitration Procedural Code of the Russian Federation.[21] The Federal Law "On Conciliation Procedure", the Law of the Russian Federation "On International Commercial Arbitration" and the Arbitration Procedural Code of the Russian Federation. These laws contain a provision on the enforcement of domestic mediation agreements, but the question of the enforcement of cross-border agreements remains open.

As for the Singapore Convention, it has the potential to make mediation one of the most popular forms of dispute resolution. Its adoption would help Russian participants in international trade to learn from the experience of their foreign counterparts and would contribute to the spread of this procedure for both cross-border and domestic disputes. In my opinion, it is the most active development of cross-border mediation that would help to make mediation, including domestic mediation, more popular. The participation of Russian business in an established procedure in major mediation centers abroad and a reliable international legal framework for the enforcement of mediation agreements would help to increase confidence in the procedure, its adoption by foreign partners and its adaptation to the conditions of domestic disputes. Moreover, the adoption of the Convention would not require significant changes in Russian legislation, as O.F. Zasemkova noted.[22] This would help to create a basis for the enforcement of mediation agreements

[19] Federal Law "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" dated 27.07.2010 No. 193-ФЗ. Rossiyskaya Gazeta. 2010. No. 168.

[20] Law of the Russian Federation "On International Commercial Arbitration" of 7 July 1993 No. 5338-I (ed. of 30.12.2021), Rossiyskaya Gazeta. 1993. No. 156.

[21] Arbitration Procedural Code of the Russian Federation of 24 July 2002 No. 95-ФЗ (ed. of 18.03.2023), Rossiyskaya Gazeta. 2002. No. 137.

[22] ZASEMKOVA, O. F. Singapore Convention on Enforcement of Settlement Agreements reached as a result of mediation: from dream to reality?. Lex Russica, 3 (148), 60, 2023.

in countries with different legal systems, economic and social conditions, while maintaining the flexibility of procedural aspects offered by mediation, reducing the burden on the courts, and contributing to the development of the Russian legal system.

3 Conclusion

The development of mediation in Russia requires a systematic approach and a combination of certain conditions. There is a public demand for this procedure, a high level of legal literacy among the population, organizational resources, state funding, effective regulation, and active central support from the judiciary.

It seems that for the successful development and popularization of mediation in Russia as an effective alternative method of dispute resolution it is necessary to improve the mediation legislation. It might happen by introducing amendments and additions related to specific economic incentives for the use of mediation in the form of full or partial exemption from payment, reimbursement of court costs and expenses in enforcement proceedings, preferential taxation of mediators, as well as the exclusion of the possibility of taxation of the mediator.

References

BARUCH BUSH, R. The promise of mediation: responding to conflict through empowerment and recognition (San Francisco, CA: Jossey-Bass, 1994).

CLAYTON, G.; DORUSSEN, H. The Effectiveness of Mediation and Peacekeeping for Ending Conflict. Journal of Peace Research, vol. 59, n. 2, pp. 107-301, 2022. DOI: https://doi.org/10.1177/0022343321990076.

BORISOVA, E.A. Alternative Dispute Resolution (Moscow: Gorodets, 2019).

DAN, D. Overcoming disagreements (SPB., 1994).

DAVYDOV, A. P. The basis of development as a sociocultural problem (to the question of mediation theory of the evolution of Western society). Vestnik of the Institute of Sociology, 24, 27-31, 2018.

DHIAULHAQ, A., DE BRUYN, T., GRITTEN, D. The Use and Effectiveness of Mediation in Forest and Land Conflict Transformation in Southeast Asia: Case Studies from Cambodia, Indonesia and Thailand. Environmental Science & Policy, vol. 45, pp. 132-145, 2015. DOI:10.1016/J.ENVSCI.2014.10.009.

FENG, Zhiyuan; LI, Yali. Natural Resource Curse and Fiscal Decentralization: Exploring the Mediating Role of Green Innovations and Market Regulations in G-20 Economies. Resources Policy, vol. 89, 2024. DOI: 10.1016/j.resourpol.2023.104556.

FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings", Technology in Society, 68, 101872, 2022.

FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. BRICS Law Journal. 8(3), 5-26, 2021. https://doi.org/10.21684/2412-2343-2021-8-3-5-29.

FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un) Certainty of Judge Analytics. Int J Semiot Law, 36, 2261–2281, 2023. https://doi.org/10.1007/s11196-023-10015-0.

GALINDO AYUDA, F. Algorithms, Sociology of Law and Justice. Journal of Digital Technologies and Law, 2(1), 34-45, 2024 https://doi.org/10.21202/jdtl.2024.3.

GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 05, n. 10, p. 153-175, jul./dez. 2023. DOI: 10.52028/rbadr.v5i10.

KARPENKO, A.D. Mediation terms as an element of practice development in Russia, Court of Arbitration, 3, 164, 2016.

KONOVA, F.R. Mediableness of civil-law disputes: correlation with jurisdiction (M., 2023).

POUND, R. Reasons for widespread dissatisfaction with the administration of justice, Mediation and Law, 1, 15-29, 2016.

PROKHODA, V.A. Trust of Russians in the national judicial-legal system (on the materials of sociological research) // Sociodynamika. - 2019. – No. 5. - p. 86-94.

RESHETNIKOVA, I.V. And again about mediation. What should it be in Russia?, Law, 1, 51-56, 2014.

ROZHKOVA, M.A., ELISEEV, N.G., SKVORTSOV, O.Y. Contract law: agreements on jurisdiction, international jurisdiction, conciliation procedure, arbitration (arbitration) and amicable agreement (Moscow: Statute, 2008).

SINIŠA, Vuković. International Multiparty Mediation: Prospects for a Coordinated Effort. Global Policy, vol. 10, n. S2, 2019. DOI: https://doi.org/10.1111/1758-5899.12698.

SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56-76, 2023. DOI: https://doi.org/10.54934/ijlcw.v2i2.56

YAKOVLEV, V.F. Law of free application. Mediation and Law. Mediation and reconciliation, 9, 34, 2016.

YUDIN, A.V. Alternative ways of settlement and resolution of disputes in Russia: (Samara: Samara University Publishing House, 2021).

ZASEMKOVA, O. F. Singapore Convention on the Enforcement of Settlement Agreements reached as a result of mediation: from dream to reality?, Lex Russica, 3(148), 60-72, 2019.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

KONOVA, Fatima; ABDULLIN, Adel. Mediation as an effective way to settle economic disputes: current experience and prospects for development. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 06, n. 11, p. 141-150, jan./jun. 2024. DOI: 10.52028/rbadr.v6.i11.ART08.RU.