



Mediation in employment dispute settlement in Russia

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Mediation is a rather new idea in the contemporary Russian legislation, despite the fact that similar procedures have been already used in employment law for decades. However, neither the current Law on Mediation takes into account the specificity of employment relations, nor the Labour Code recognizes mediation as a legitimate way of employment dispute settlement. Logically, these two acts do not contain special provisions on procedure, documentation requirements, time limits and there is actually no clear legal status assigned to agreements resulting from mediation, when they are implemented extra judicially (out-of-court) and the agreement is not approved by a court.

These problems are now widely discussed both in academic research papers and between practitioners. Some of the outcomes of this legislative lacuna and possible solutions suggested by leading employment law scholars are described in this paper.

1. Historical development of mediation in Russia

Mediation itself is not a new phenomenon in the Russian law. Lawyers generally specify four major periods of its development in the Russian legislative history.

1.1 Initial introduction (late 1200 – middle 1800)

As ancient as XIII century mediation – in a form of a peaceful dispute settlement through an intermediary – was mentioned (though scantily) in such legislative sources as writings on birch bark (Novgorodskaya of the years 1281-1313, Pskovskaya of 1397), Sudebnik of Ivan III (1497) and Sobornoe Code (Sobornoe ulozhenie – 1649). Later Katherine the Great issued a number of Orders establishing ‘provincial conscience courts’ (1775–1862) for civil (commercial, family, etc.), some

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criminal (involving minors, insanes etc.) and other cases in which the parties agreed to submit their case to a ‘conscience court’. If consideration in such court was unsuccessful, the parties were allowed to proceed to a regular court.

1.2 Further development (middle 1800–1917)

In this period mediation received a more detailed regulation. For instance, the Charter on Civil Procedure of 1864 contained a separate chapter ‘On conciliatory examination’.

1.3 Decline and restriction during the Soviet era (1917–1991)

This period was rather unfortunate for the mediation phenomenon. Traditional conciliation became seen as a ‘vestige of the past’, a ‘capitalist invention’ that contradicts a general uncompromising nature of the ‘class struggle’. Trials became mostly investigatory with a tendency to dig for the evidence of the defendant’s guilt. Even when the Code of Civil Procedure of 1923 (i.e. enacted during the relatively short period of the ‘New Economic Policy’ which was generally a relaxation of the Soviet regime) allowed disputing parties to settle their dispute peacefully, it still gave the courts a wide discretion in deciding when this approach is applicable. In addition, resolutions of the Plenary Session of the Supreme Court directed courts to allow peaceful settlement only for ‘minor’ civil disputes.

In the postwar period the Code of Civil Procedure of 1964 was the first act in the Soviet legislative history, in which a court approval of an amicable agreement was recognized as a separate ground for proceedings discontinuance. It also contained much more elaborate provisions on peaceful dispute settlement (e.g. criteria for court approval of an amicable agreement, agreement drafting procedure).

1.4 Modern period (1991 – nowadays)

There was no particular legislation on conciliation and mediation before 2010. The Federal Law No. 193-FZ ‘On alternative procedure of dispute settlement with the participation of an intermediary (mediation procedure)’ was enacted in 2010, which this paper aims to discuss.

2. Prototypes of ‘Employment Mediation’ in the present Labour Code

The Labour Code of the Russian Federation¹ has been in force since 2001. It was enacted ten years before the general Law on Mediation. From the very beginning, the Labour Code contains provisions

¹ Labor Code of the Russian Federation of 31 December 2001 (Federal Law No. 197-FZ of 2001) <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm> (accessed: 21. 03. 2017).

on two dispute settlement procedures that resemble what the Russian legislation considers presently as ‘mediation’:

- a) ‘Consideration of collective labour disputes with the participation of an intermediary’ as a formal intermediate stage of dispute settlement; its procedure is regulated in details in a particular article of the Code (Articles 401 and 403 of the Labour Code).
- b) ‘Direct negotiation’ as an informal preliminary phase of an individual employment dispute settlement, before the dispute is submitted to a commission on employment disputes. It is just mentioned directly in the description of the scope of competence of the commissions on employment disputes (Article 385(2) of the Labour Code) and indirectly in the definition of an individual employment dispute (Article 381(1) of the Labour Code), has no particular procedural requirements and is not formally addressed in the Code as itself.

These two procedures share some features with the ‘regular’ mediation as it is currently described in the Law on Mediation. All three are by nature extrajudicial and conciliatory. However, while ‘regular’ mediation is used as an alternative to judicial (in-court) dispute settlement, it is not the case for a ‘consideration with an intermediary’ in collective labour disputes. Under the Russian law, the latter has not been granted an option of judicial consideration at all. Therefore, for this this category of disputes, ‘consideration with an intermediary’ is not a possible option, but rather one of the regular methods of their settlement, all of which are extrajudicial and conciliatory.

As for ‘direct negotiation’, the Labour Code provides it with neither formal features, nor a clearly described procedure. All that is said about it in the Labour Code is, that it may take place and until it is successful, the discord shall not be regarded as an ‘individual employment dispute’.

3. Mediation in the Law on Mediation v ‘quasi-mediation’ in the Labour Code in collective labour disputes: irreconcilable notions

As it has been stated above, the only procedure that resembles ‘regular’ mediation and is provided for in the Labour Code in a feasible form relates exclusively to collective labour dispute settlement. It may seem reasonable to employ it as a basis for developing a similar construction applicable to individual employment dispute settlement or to broaden its scope to cover the latter. However, if we undertake a closer scrutiny of this Labour Code concept – especially in comparison with a ‘regular’ mediation -, this may help us to see, why it may not be conceptually recommended to serve as such.

Certainly, these two procedures do share a number of common features. For example, both ‘consideration of collective labour dispute with an intermediary’ and ‘regular mediation’ rest upon similar principles: voluntariness, confidentiality, cooperation, parties’ equality, impartiality and independence.² However, while ‘regular’ mediation shall be objectively based exactly on these

² Regulation of the Ministry of Labour No. 58 of 14.08.2002 and Article 3 of the Law on Mediation.

principles, collective labour dispute resolution seems to rely on a subjective assessment of the capability of an intermediary to comply with this principles. Namely, the Code determines the parties' recognition of the intermediary's competence, objectiveness, impartiality and independency as a prerequisite for him "to efficiently perform his functions".

Both generally and in collective labour disputes, mediation is used upon the parties consent. The person of mediator shall be agreed between the parties (Article 403 of the Labour Code and Article 9 of the Law on Mediation). However, if the parties find it difficult to agree upon a mediator's candidacy, it can be recommended by a particular 'third party', which differs for 'regular' mediation and collective labour disputes settlement. Thus, in collective labour disputes it is a state authority responsible for collective labour dispute settlement (Article 403(2) of the Labour Code) while in a 'regular' mediation it is a non-governmental company that specializes in ensuring the use of mediation procedure (Article 9(2) of the Law on Mediation).

Time limits for the parties to agree upon a mediator's personality also differ in these procedures. In collective labour disputes, the mediator nominee shall be agreed upon in a very short period of time (not more than 2 working days) and the dispute itself shall be settled strictly in not more than 3 working days from the mediator's nomination on a corporate level and not more than 5 working days on other levels of collective labour relations (Article 403 of the Labour Code). On the contrary, statutory time limits for a 'regular' mediation are much more flexible: it shall not last more than 180 days (or not more than for 60 days after the dispute has been submitted to court or arbitration).

Differences lie also in the requirements imposed on a person serving as a mediator. While collective labour disputes can be mediated by any independent person (par. 6 of Regulation No. 58), 'regular' mediator must meet a list of particular criteria stipulated in the Law on Mediation (Article 15, 16).

While in collective labour disputes the intermediary is allowed to make suggestions on how to settle the dispute (par. 12 of Regulation No. 58), 'regular' mediators are prohibited to offer ready-made ideas or solutions to the parties of the dispute (Article 11(5) of the Law on Mediation). Both generally and in collective labour disputes a mediator does not solve the dispute and may not issue a decision on the dispute. The main task of the mediator is to help the parties in finding a mutually acceptable solution 'on the basis of a constructive dialogue'.

In both cases dispute settlement ends in the parties making a mutually agreed decision in a written form. However, if the parties of a collective labour dispute agreed upon nothing or upon just a part of the agenda, the disagreed issues shall be included in a protocol of disagreements (Article 403(5) of the Labour Code; par. 11 of Regulation No. 58). 'Regular' mediation does not imply having the disagreed issues written in a special document (Article 14 Law on Mediation).

All this makes academics believe, that 'regular' mediation is not prohibited in collective labour disputes as such. It is the procedural aspects of mediation in this category of disputes that differ from a 'regular' one, and the Law on Mediation that does not prohibit the application of a 'regular' mediation

to such disputes, but rather just does not cover them. Provisions concerning collective labour dispute settlement are stipulated exclusively in the Labour Code (Article 61).

4. Implementation of mediation in employment disputes

The implementation of the above mentioned provisions is not smooth. Courts rarely suggest using mediation to the parties and still certify more non-mediatory amicable agreements than agreements resulting from a mediation procedure (and there is a very small number of agreements on employment issues among them). Express ‘judicial’ mediation is the most popular form of mediation, while family and land issues are its most popular subjects. When mediation is used in employment disputes, these are mostly disputes with counterclaims. Their subjects embrace establishment of the existence of an employment relationship, unlawful dismissal, reinstatement, remission of disciplinary penalties, wage arrears recovery, and moral damages compensation.³

Therefore, mediation is still rarely used in employment disputes. For instance, one of the Russian regional non-profit partnerships providing legal advice and mediation services (‘Siberian Center for Mediation and Law’⁴) reports that in 2013 it took part in only 3 employment disputes on dismissal. Scholars name several reasons of such a slow integration of mediation into employment dispute settlement practice. Among others, there is a lack of explanation, awareness raising and promotion, which result in a general perception of employment mediation as a ‘foreign’ idea, a folly borrowed from some alien legal orders. People are unaware of its advantages and its procedure, thus, do not develop personal reasons to use it. And even when people feel like using it, they do not know where to start.

There is still a lack of trusted professionals (mediators) despite the fact that at the end of the year in which the Law on Mediation was enacted, the Government issued a model Program on the training of mediators.⁵ This is a program of professional retraining, which integrates three separate courses, each leading to a certificate of advanced training upon successful completion:

- Mediation, Basic course (3 modules of 40 contact/auditorium hours each, 12 hours of which allocated to family, employment, corporate and other disputes together).
- Mediation, Peculiarities of mediation application (10 modules, 312 contact/auditorium hours in total, 30 hours of which allocated exclusively to employment disputes).
- Mediation, Course for mediators’ trainers’ training (4 modules of 36 contact/auditorium hours each).

³ Information on judicial application of the Law on Mediation for 2013-2014, approved by Supreme Court Presidium of the Russian Federation of 01. 04. 2015.

⁴ <http://www.mediacia.com> (accessed: 22. 03. 2017).

⁵ Decree of the Government of the Russian Federation No. 969 of December 03, 2010. It came into force at the same date as the Law: January 01, 2011.

The model Program provides an approximate syllabus for each of these three courses. Students receive a certificate (diploma) of professional retraining upon the entire Program completion. A few months after the Model Program was introduced, the Ministry of Education and Science approved a real Program based on the model one.⁶ In 2014, the Ministry of Labour and Social Protection approved a professional standard for the ‘Specialist in the field of mediation (mediator)’⁷, what was drafted by several non-commercial organizations specialized on mediation, in collaboration with several leading Russian universities and the Russian Union of Industrialists and Entrepreneurs. The standard describes three levels of proficiency and respective functions. It is still debatable, whether this standard complies with the amended Labour Code provisions regarding employee qualification, introduced in 2012.⁸ However, the pace and scope of the Program implementation still leave much to be desired.

Many if not the majority of those who attended a course built on this model are lawyers and it also brings some difficulties. Mediators with legal background say that their previous experience as lawyers, legal and business advisors hinders a ‘switch’ between a ‘lawyer’s’ and a ‘mediator’s’ way of thinking and may impede application of the acquired skills and knowledge.

Another problem is the parties’ and the lawyers’ opposition to mediation. Parties to an employment dispute in Russia are usually exempted from litigation fees, which is not the case for mediation. Thus mediation expenses coverage cannot be imposed on a defeated party. Therefore mediation fees seem to the parties to be an unnecessary and unjustified expense that has no chance to be covered. Lawyers feel this on the other end of the chain, seeing mediators’ fees as their direct loss of income which they otherwise earn in litigation. By the way, this is believed to be one of the reasons, why many of the practicing mediators in Russia were initially lawyers or have a legal education and/or background.

Practitioners also mention a lack of an expected effect in employment dispute settlement even when mediation is used, as well as technical obstacles, such as the lack of places suitable and/or officially allotted for mediatory sessions (e.g. in courts). There are also social and cultural reasons, among which two key behavioral issues are usually mentioned: (a) paternalism and a loss of traditions/culture of voluntary dispute settlement; (b) ‘Soviet’ tradition of social intolerance. In this infantile intolerant context the non-mandatory nature of mediation makes it felt as ‘needless & useless’, ‘a loss of time’ and generally foreign to the traditional perception of how a self-respecting serious person should behave. The idea of a ‘win-win’ solution is generally seen as either deceitful and manipulative or hardly attainable, or at best as an unwelcome compromise (i.e. ‘solution equally uncomfortable for both parties’).

⁶ Order of the Ministry of Education and Science No. 187 of February 14, 2011.

⁷ Order of the Ministry of Labour and Social Protection No. 1041n of December 15, 2014.

⁸ Federal Law No. 236-FZ of December 03, 2012.

‘Machismo’ that considers any step from one’s position/viewpoint as a ‘defeat’ is still quite widespread. Imposing one’s viewpoint is often seen as a more ‘honorable’ result than finding the best or at least an optimal solution for both parties, even if the imposed viewpoint does little good even to its advocate. Struggle, conflict and confrontation are still too often seen as a more adult, powerful and responsible behavior than social concord, dialogue and conciliation. Non-mandatory nature of mediation also provokes people to exercise the ‘freedom to ignore’, which is somewhat perceived as an element of personal freedom in a society with a rather long history of authoritarianism, subordination and oppression.

Finally, there are also obvious and direct legal obstacles. First, the Labour Code does not have any direct provision on mediation in employment disputes. Many other laws (Civil Code, Code on Civil Procedure, Code on Administrative Procedure, etc.) have been amended after the Law on Mediation was enacted, but not the Labour Code. Second, there is no account of employment dispute peculiarities in the general Law on Mediation (for example, control and subordination that make employment relation different from many other economic relations). Therefore, at the moment we have a strange combination of ‘labour mediation’, which cannot be used to settle individual employment disputes, and a ‘regular’ mediation procedure that is hard to apply in employment dispute settlement. It is clear, that both pieces of legislation should be amended to facilitate efficient mediation in employment disputes.

5. What could be improved?

It seems to be quite obvious that it is easier to amend legislation than to change culture and traditions. Notwithstanding, academics and practitioners have formed a list of recommended legislative amendments.

First of all, the Labour Code should clearly provide for mediation as a legitimate (and may be even preferable) method of settlement for not just collective disputes but also individual ones. At the same time, the Law on Mediation should be amended respectively to embrace all categories of employment disputes, and not just “disputes that arise from employment relations”, as the Law stipulates now. This is because there are also disputes that do not stem directly from an employment relationship, but rather arise in some connection with it. For instance, these are disputes that relate to hiring procedure, in-house professional retraining, apprenticeship agreements, some aspects of material liability, etc. Furthermore, both acts should be amended with the prohibition of mediation usage in certain cases. For instance, these are disputes on occupational accidents, which are considered by a special state authority and rest upon mandatory standards provided for in the federal legislation.

It also makes sense to amend both acts with provisions on mediation application on a pre-judicial phase of dispute settlement. For an employment dispute, this is settlement in commission on employment disputes (Article 382 of the Labour Code). The commission should be allowed to

postpone the dispute consideration, if the parties agreed to use mediation procedure, and may also be granted an authority to certify the mediatory agreement the parties conclude. A clause on mediation should be also mentioned in the Labour Code among the legitimate clauses of an employment contract.

There is also a problem of extrajudicial use of mediation in employment disputes because of the vague legal status and unclear legal effect of the agreement resulting from this procedure. If the dispute relates to terms of employment set by the parties, such an agreement can be regarded as a supplementary agreement to the employment contract between them (a particular category of agreements in employment law, similar to employment contract – Article 72 of the Labour Code). However, in other cases this approach does not work. Therefore, the status of such an agreement should be clearly defined by the Labour Code and also mentioned in the Law on Mediation.

To spare courts from the agreements certification, some scholars suggest recognition of an executory power of such agreements as they are. Others point out that enforcement does not fit into the idea of voluntary mediation. Many believe that the extrajudicial agreements should be notarized and notaries should be granted such authority.

Procedural time limits also require special attention concerning employment disputes. The Russian Labour Code sets shorter periods for procedural steps in employment dispute settlement both in commission on employment disputes and in courts in comparison with a general court procedure. Therefore, it makes sense to grant both institutions an authority to officially postpone settlement, if the parties resort to mediation. The time spent on mediation should be excluded from the period allowed for the claim to be submitted to a commission or a court as it is now stipulated in the Civil Code (Article 202(3)). This should be clearly guaranteed by the law in full accordance with the constitutional right of access to justice (Article 46 and 47 of the Constitution).

There are also suggestions to amend Article 9 of the Labour Code, which introduces an *in favorem laboratories* principle in employment relations. The amendment should make this principle applicable also to agreements resulting from mediation, in order to protect an employee from waiving his/her statutory rights in such agreements. However, we should mention that this article of the Labour Code is generally applicable in employment relations, thus, it is already applicable to all relations and contracts covered by the Labour Code. Therefore, if we clearly regulate mediation in the Labour Code, this provision will hardly require such clarification.

We have also a problem with the legal nature of out-of-court and out-of-arbitration mediation agreements (agreements resulting from mediation) on employment matters. Presently, such agreements on civil matters are considered civil-law transactions, which means all civil law remedies (compensation, novation, debt forgiveness, offset of claim, indemnity in Article 409, 410, 414, 415 and Chapter 59 of the Civil Code) are applicable in case of the agreement violation or improper execution. Protection of the rights violated as a result of the non-execution or improper execution of the agreement shall be implemented according to civil law. However, mediation agreements (agreements resulting

from mediation) on employment matters cannot be considered civil-law transactions, since they are concluded on matters other than the Russian civil legislation regulates.⁹

As it has already been mentioned above, a mediation agreement can be considered a supplementary agreement to an employment contract, when the dispute it has been concluded upon arose from the terms of this contract specified by the parties. Otherwise this solution is not feasible, for instance in case of a dispute on contract termination. Therefore, some scholars suggest amending the Labour Code with the clear specification of the status of a mediation agreement concluded as a result of an employment dispute settlement, and of the legal effect of its improper execution or non-execution by the parties.

At the same time, there are also non-legal steps, which are necessary to be pursued in order to really implant and promote mediation as an employment dispute resolution technique. Many professionals point out, that an additional and more serious training is necessary for both judges that are allowed to advise the parties of a dispute to resort to mediation and for mediators themselves. The latter need more practice and experience in both in-court and out-of-court mediation, while mediation, in turn, requires a wider promotion among both professionals and general public. There shall also be more information and advice on the use of mediation publicly available for free in places and cases where and when mediation can be an option.

There are now several bills submitted to the State Duma (the Russian parliament) aimed at amending the Law on Mediation and some of the related laws. However, only one of the bills touches upon the problems of mediation application in employment disputes and even that bill does it only indirectly and exclusively regarding time limits for the submission of a dispute to a regular court.

6. Conclusions

As for now, there are three major ways suggested as a possible improvement of the legal environment in which employment mediation is supposed to operate. Legal scholars have suggested the following, rather definite ideas:

(1) The first suggestion is to amend both the Labour Code and the Law on Mediation in order to introduce the provisions that would:

- clarify the prohibition for mediation usage in certain cases (e.g. in disputes on occupational accidents, which are considered by a special state authority and rests upon mandatory standards);

⁹ According to Article 2(1) of the Civil Code it regulates only relations based on party equality, autonomy and property self-sufficiency, while employment relations are traditionally seen as based on an employee subordination to an employer. – See f.i.: L. S. TAL: *Labour contract: Civilistic research*. Typography of Governor's Board, St. Petersburg, 1913. (reprinted in 2006); GOLOVINA: Problems of mediation application in employment disputes resolution. *Russian Legal Journal*, 6, 2013. 119–126..

- make mediation applicable also on a pre-judicial phase of dispute settlement (for an employment dispute, possibly also in commission on employment disputes - Article 382 of the Labour Code);
- clarify the definition of the legal status and legal effect of agreements resulting from mediation;
- clarify the legal nature of an out-of-court and out-of-arbitration mediation agreement (agreement resulting from mediation).

(2) There are also suggestions to amend the Labour Code itself, adding a concept of mediation and recognizing it as a legitimate and may be even preferable way of individual employment dispute settlement. The Labour Code provisions on employment contract contents should be respectively amended to mention a ‘mediation clause’ as a legitimate clause of an employment contract.

The above mentioned amendments will logically require broadening the competences of the commissions on employment disputes. The commissions should then be granted an authority to postpone the dispute consideration, if the parties agreed to use a mediation procedure, and may also certify the mediatory agreement once the parties conclude it. The Labour Code should also provide for shorter time limits for the stages of an employment mediation procedure than for a ‘regular’ mediation. The time spent on mediation should be excluded from the period allowed for the claim to be submitted to a commission or to a court. The option to proceed to a court hearing in the absence of an amicable agreement at the end of the mediation shall be clearly guaranteed by law in full accordance with the constitutional right of access to courts.

(3) Finally, in the context of these amendments, the Law on Mediation itself requires at least a minor change to ensure its applicability to all categories of employment disputes, and not just “disputes that arise from employment relations”, as it currently states.