

# WHAT IF YOU BUILD IT AND NO ONE COMES?: THE INTRODUCTION OF MEDIATION TO RUSSIA

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## I. INTRODUCTION

Russia joined the community of countries where disputes can legally be diverted to mediation in early 2011. Russian court officials and judges were optimistic that mediation would alleviate the nagging problem of overloaded dockets; however, initial experience has shown that Russian litigants are skeptical of mediation. The reasons for this skepticism are a complex mix of institutional disincentives and a lack of familiarity with alternative dispute resolution. The relatively low costs associated with going to court in Russia, measured in terms of money, time, and relational damage, have done little to encourage litigants to opt for mediation. The absence of a culture of negotiating and settling in advance of court judgments also contributes to the antipathy regarding mediation. Various proposals have been put forward in an effort to spur greater use of mediation.

Mediation has long existed on an informal basis in Russia,<sup>1</sup> and questions have persisted about how mediation could dovetail with litigation. With an eye to the experience of Western countries, a law was developed and passed in 2010, and came into effect in 2011, which clarified who could act as a mediator and how mediation would work.<sup>2</sup> In theory, mediation ought to be thriving in Russia. Similar to other countries, in Russia, disputes are inevitable and cannot always be resolved by the parties themselves. Rus-

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<sup>1</sup> For an overview of activities akin to mediation in Russia dating back to the 14th century, see Valerii Vladimirovich Lisitsyn, *Mediatsiia: Primiritel'noe uregulirovanie kommercheskikh sporov v Rossii*. MOSCOW: IZDATEL'STVO "RADUNITSА," 18–79 (2011).

<sup>2</sup> *Ob al'ternativnoi protsedure uregulirovaniia sporov s uchastiem posrednika (protsedure mediatsii)*, ROS. GAZ. (June 30, 2010), <http://www.rg.ru/2010/07/30/mediacia-dok.html>.

sians' well-documented distaste for the courts,<sup>3</sup> and their strong preference for informal and confidential methods of problem solving<sup>4</sup> ought to have them flocking to mediation. These characteristics are, after all, foundational to mediation. Despite this logic, Russians have yet to embrace mediation. Given that the law has only been in effect for eighteen months, it is too early to give death rites. At the same time, the lack of enthusiasm is a puzzle worth investigating.

The passage of the law was greeted with mixed emotions and expectations. Russian court administrators hoped that embracing mediation would help ease the oppressive caseload by offloading cases onto mediators,<sup>5</sup> as it had in the United States and many European countries.<sup>6</sup> Yet many judges were openly skeptical about whether Russia's experience would mirror that of these Western countries. They pointed to the qualitative difference between the institutional constraints on litigation in Russia and the West. Litigants in the West have flocked to mediation as a way of avoiding the expense and delay associated with their courts. By contrast, taking a case to court in Russia is relatively inexpensive and quick, regardless of whether the case is brought in the courts of general jurisdiction or the *arbitrazh* courts.<sup>7</sup> Judges also argued that Russian litigants' lack of familiarity with mediation would discourage

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<sup>3</sup> Public opinion polls have repeatedly registered low levels of trust in the courts. See *O sudakh i sud'iakh* (July 20, 2012), <http://fom.ru/Bezopasnost-i-pravo/10551> (last visited Aug. 1, 2012). For a summary of recent surveys, see Fedor Bogdanovskii, *Rossiiskii sud teriaet zavoevanoe doverie*, PRAVO.RU (July 31, 2012), <http://pravo.ru/review/view/75723/>.

<sup>4</sup> Social science research has documented a penchant for informal methods of resolving disputes. See LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE (Dennis J. Galligan & Marina Kurkchyan eds., 2003); CAROLINE HUMPHREY, THE UNMAKING OF SOVIET LIFE: EVERYDAY ECONOMIES AFTER SOCIALISM (2002).

<sup>5</sup> A.S. Krasnopedtsev, *Opyt primeneniia medatsii v mirovykh sudakh Sankt-Peterburga*, TRETEISKII SUD, no. 3, 2011, at 144; M.V. Sasonova, *Perspektivy razvitiia al'ternativnykh sposobov razresheniia sporov s uchastiem grazhdan v Rossiiskoi Federatsii*, TRETEISKII SUD, no. 1, 2008, at 141; N.V. Fedorenko, *Mediatsiia: ekonomicheskie i pravovye aspekty*, TRETEISKII SUD, no. 5, 2007, at 156; A.K. Bol'shova, *Sostianie i perspektivy sokrashcheniia nagruzki na sudei*, ZHURNAL ROSSIISKOGO PRAVA, no. 10, 2010, at 86.

<sup>6</sup> E.I. Nosyreva, *Peregovory kak sredstvo ureguirovaniia kommercheskikh sporov: opyt SshA*, KHOZIASTVO I PRAVO, no. 5, 1999, at 123.

<sup>7</sup> The courts of general jurisdiction have jurisdiction over cases involving individuals. Mediation is most relevant for cases brought in the lowest level of these courts, namely the justice-of-the-peace courts (JP courts). The *arbitrazh* courts have jurisdiction over cases involving legal entities. See generally Kathryn Hendley, *Russian Federation*, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1337 (Herbert M. Kritzer ed., 2002).

them from using it.<sup>8</sup> Several prominent Moscow lawyers were queried about the prospects for the law at the end of 2010. The comments of Dmitrii Diakin, the managing partner of the law firm “Magisters,” were representative of the group:

Notwithstanding the passage of the new law, my attitude toward mediation is rather skeptical. I think that, to a considerable degree, the problem is psychological. I have in mind Russian actors’ disinterest in taking part in mediation processes. Russian businessmen are prepared to defend their interests in court. As a result, the demand for mediation will be insignificant.<sup>9</sup>

His words turned out to be prescient.

In this article, I begin by focusing on the law itself and its rather tortured path to passage. Though some of the details remain obscure, I have uncovered the basic story and lay out the legislative history in broad strokes. I then turn to the law as enacted. I explore the parameters of mediation in Russia, as established by this law, and contrast it with what might have been had alternative drafts of the law been passed. Although the basic principles governing mediation are laid out clearly, other parts of the law remain hazy. Commentators and practitioners continue to puzzle over what some of the provisions mean. Lastly, I explore the impact of the law and offer some thoughts on why demand for mediation services has been so slow to evolve.

## II. THE EVOLUTION OF ALTERNATIVE DISPUTE RESOLUTION IN RUSSIA

The concept of “alternative dispute resolution” (“ADR”) includes a wide variety of non-court-based options, ranging from negotiations between the disputants to mechanisms that rely on neutral third parties in lieu of judges.<sup>10</sup> Mediation provides an op-

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<sup>8</sup> In my interviews with judges, some went further, arguing that Russian litigants were not ready for mediation and that there was something in the Russian character that would resist mediation. For an overview of these arguments, see O.A. L’vova, *Perspektivy razvitiia mediatsii v Rossii*, TRETSEISKII SUD, no. 1, 2008, at 148-8.

<sup>9</sup> *Opros iurfirm po itogam praktiki za 2010 god*, ZAKON, no. 12, 2010, at 30, 44.

<sup>10</sup> See generally Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321 (2007); STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* (2007); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995); Roy J. Lewicki, Stephen E. Weiss, & David Lewin, *Models of Conflict, Negotiation and Third Party*

portunity for disputants to find a mutually acceptable solution with the help of a mediator. The onus is on the parties themselves; the mediator simply facilitates the process.<sup>11</sup> Arbitration, on the other hand, is more court-like in its operation. As with mediation, the parties' participation is voluntary, but the nature of the participation is qualitatively different. Because mediation is seen as a way to help the parties themselves find a solution, the parties are free to walk away if they find the process unproductive. By contrast, parties to arbitration agree to put the dispute in the hands of an arbitrator. The decision of the arbitrator is final (much like a judge's decision). The parties' role is more passive; it is limited to presenting their arguments and evidence.

Over the past few decades, ADR has become increasingly popular around the world.<sup>12</sup> To summarize a voluminous literature briefly, this change in behavior has been prompted by several institutional and material incentives. In countries where the overloading of the courts has led to serious backlogs in civil cases, disputants have long sought out such alternatives. Few are willing to cool their heels for the months or years needed to secure a court date. Not only are they keen to move on, but they are also loathe to pay their lawyers to represent them through the endless delays. Indeed, many businesses require their customers to sign form contracts that mandate arbitration in lieu of court. Alternatively, ADR can be appealing when disputes arise between parties that have a preexisting relationship, such as family members, neighbors, or long-term business partners. This is particularly true in countries with an adversarial legal tradition in which litigation forces disputants to go after their opponents aggressively. Courts themselves have sometimes required litigants to go through mediation as a prerequisite to litigation with the goal of trying to preserve the parties' relationship. This is especially common in cases involving family members.

Russia has mostly been on the sidelines during this global ADR movement. A full analysis of the reasons why are beyond

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*Intervention: A Review and Synthesis*, 13 J. OF ORGANIZATIONAL BEHAV. 209 (1992); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

<sup>11</sup> On the role of mediators, see Naman L.J. Wood, *Can Judges Increase Mediation Settlement Rates? Of Course They Can*, 26 OHIO ST. J. OF DISP. RESOL. 683 (2011).

<sup>12</sup> See generally Mariana H. Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of Law through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91 (2008); Benoit Bastard & Laura Cardia-Voneche, *Family Mediation in France*, 7 INT'L J. L. POL. & FAM. 271 (1993); James A. Wall, Jr., *Community Mediation in the People's Republic of China*, 35 J. CONFLICT RESOL. 3 (1991).

the scope of this article, but one possible explanation depends on the efficiency of Russian courts, which is somewhat counter-intuitive for Westerners.<sup>13</sup> Although Russians often complain about the slow pace and high cost of their courts, when viewed in comparative perspective, the Russian courts are remarkably quick and cheap.<sup>14</sup> The reason is grounded in the deadlines for resolving cases set forth in the procedural codes. Failing to meet these deadlines subjects judges to informal sanctions, including the forfeiture of financial bonuses for good performance and lack of promotion.<sup>15</sup> This gives Russian judges a strong incentive to manage their docket efficiently. The procedural rules themselves are relatively straightforward. As a result, Russian litigants are more likely to represent themselves, thereby limiting the cost of going to court. If they do hire counsel, then the fact that cases are resolved relatively quickly tends to keep a tight lid on legal fees. Finally, the non-confrontational nature of the process means that relationships are not inevitably fractured by litigation.

Though Russia has lagged behind many other countries in terms of ADR, it has never forbidden disputants from looking outside the courts for assistance. Even during the Soviet era, disputes involving foreign companies were typically submitted to international arbitration, either in Moscow or abroad. Such opportunities have only expanded with the transition away from state planning to the market.<sup>16</sup> Domestic private arbitration has

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<sup>13</sup> The Western media consistently presents a negative image of Russian justice. In 2010, the *New York Times* ran a series of articles detailing its dysfunction, for which they earned a Pulitzer Prize, <http://topics.nytimes.com/top/news/world/series/abovethelaw/index.html>. See also Guy Chazan, *Siberia ruling against BP sens chill through Russia's foreign investors*, FINANCIAL TIMES, July 28, 2012, at 12s.

<sup>14</sup> S.V. Lazarev, *Chto sderzhivaet razvitiie primiritel'nykh protsedur?*, TRETSEISKII SUD, no. 6, 2010, at 113, 116; see also A.E. Solokhin, *Mediatsiia: byl' ili ne byl'?*, IURIDICHESKAIA GAZETA, no. 22, June 10, 2011, at 13, <http://www.yur-gazeta.ru/article.php?n=228>.

<sup>15</sup> Like other European judicial systems, Russia's judges are part of the civil service. Those who do well expect to be promoted up the hierarchical ladder. For an introduction to the European approach to selecting judges, see JOHN H. MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 34–38 (2007). On the Russian selection method, see Alexei Trochev, *Judicial Selection in Russia: Towards Accountability and Centralization*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 375 (Kate Malleson & Peter H. Russell eds., 2006). For an argument in favor of making the criteria for promotion clearer, see G.T. Ermoshin, *O sudebnoi kar'ere v ramkakh kvalifikatsionnoi attestatsii sudei: problemy teorii i praktiki*, ROSSIISKII SUD'IA, no. 5, 2010, at 4. On the link between seniority and desirable perquisites, see G.T. Ermoshin, *Stazh sudeiskoi raboty kak osnovnoi kriterii ob'ema l'got sudei i sudei v otstavke*, 1 ROSSIISKAIA IUSTITSIIA [RUSSIAN JUST.], no. 4, 2012, at 44.

<sup>16</sup> Foreigners doing business in Russia tend to include clauses in their contracts with Russian business requiring disputes to be submitted to international arbitration. This is not a practice

long been available through the *treteiskie sudy*. This option tends to be used almost exclusively by businesses. Participants must affirmatively agree to go to the *treteiskie sudy* in lieu of the state-sponsored courts. It goes without saying that they have to pay the costs associated with the *treteiskie sudy*, including fees for the arbitrators. Such business-related cases would otherwise be heard by the *arbitrazh* courts, where parties pay filing fees (though the bulk of the cost of proceeding is born by the state). The decisions of these private arbitration tribunals are final. If a loser fails to follow through, then the winner can appeal to the *arbitrazh* court for assistance with implementation. Much as in other countries, the state-sponsored courts issue an enforcement order without revisiting the substance of the case. Relatively few Russian businesses turn to the *treteiskie sudy*, preferring instead to use the *arbitrazh* courts. As I have argued elsewhere,<sup>17</sup> the efficiency and low cost of the *arbitrazh* courts make them an attractive option.

The procedural rules have always left the door open for litigants to settle their disputes at any point. Indeed, it is in the interest of the courts to avoid having to hold a full-fledged hearing and, instead, to endorse the negotiated agreement of the parties. These are known as *mirovye soglasheniia*.<sup>18</sup> Not only does this help man-

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that is unique to Russia, but is fairly common for transactions that span more than one country. It is particularly common for countries where doubts about the integrity of the judicial system have been raised. See, e.g., Guy Chazan, *Siberia Ruling Against BP Sends Chill Through Russia's Foreign Investors*, FINANCIAL TIMES, July 28, 2012, at 12. Glenn Hendrix, *The Experience of Foreign Litigants in Russia's Commercial Courts*, in ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES 94 (Peter Murrell ed., 2001) (study of the treatment of foreigners in the *arbitrazh* courts suggests that concerns about discrimination against foreigners are overblown). The Chamber of Commerce in Moscow has a well-respected arbitration tribunal that specializes in international transactions. For more information, see <http://arb.mostpp.ru/>. In addition, the well-known tribunals in Stockholm, London, and elsewhere are available. As with domestic arbitration, using international private arbitration requires the consent of both parties. Pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the so-called "New York Convention," to which Russia is a signatory, such awards can be enforced by Russian domestic courts. See generally *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (last visited Mar. 24, 2013). The *arbitrazh* courts hear only a handful of cases in which their assistance in enforcing foreign arbitral awards is sought. In 2011, there were 174 such cases (amounting to approximately 0.02 percent of all cases at the trial level). *Tablitsa osnovnykh pokazatelei raboty arbitrazhnykh sudov Rossiiskoi Federatsii v 2007-2011 gg.* (Aug. 2, 2012), <http://www.arbitr.ru/press-centr/news/totals/>.

<sup>17</sup> Kathryn Hendley, *Business Litigation in the Transition: A Portrait of Debt Collection in Russia*, 38 LAW & SOC'Y REV. 305, 314–17 (2004).

<sup>18</sup> The adjective comes from the word for peace—*mir*—which gives rise to a literal translation of "peaceful agreement." *Soglashenie* is one of several words that can be used for agree-

age the docket, but it also helps ensure that the will of the parties is respected. As a rule, the parties are more familiar with their dispute than the courts and can do a better job of finding a mutually acceptable resolution. The procedural codes governing the courts of general jurisdiction and the *arbitrazh* courts require judges to make the parties aware of their continuing right to settle.<sup>19</sup> The *Arbitrazh* Procedural Code (“APK”) has always been more open to settlement than has the Civil Procedure Code (the *Grazhdanskii Protsessual’nyi Kodeks* or “GPK”). While the GPK took a minimalist approach by merely obligating judges to acquaint parties with their right to settle, the APK devoted an entire chapter to settlement.<sup>20</sup> This portion of the code began with a declaratory provision that calls on *arbitrazh* judges to take measures to encourage settlement.<sup>21</sup> Parties were authorized to “conclude settlement agreements or engage in other settlement procedures provided they do not violate federal law.”<sup>22</sup> Elsewhere in the code, judges were empowered to delay the proceedings to give the parties time to negotiate.<sup>23</sup> But the APK did not specifically endorse mediation.<sup>24</sup> Moreover, while observing *arbitrazh* court hearings in various locales across Russia over the past decade, I noticed that judges tended to pay more attention to the letter than to the spirit of this aspect of the APK. They rarely failed to include the right to settle when listing the parties’ rights at the outset of the case. All too often, however, this notice was given in a rapid monotone that did not invite discussion. The reasons why most *arbitrazh* judges

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ment in Russian. In contrast to the other choices (e.g., *dogovor*, *kontrakt*), it typically refers to a more informal agreement.

<sup>19</sup> ARBITRAZHNO-PROTSESSUAL’NYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 49; GRAZHDANSKII PROTSESSUAL’NYI KODEKS ROSSIISKOI FEDERATSII [GPK RF][Civil Procedure Code] art. 150.

<sup>20</sup> ARBITRAZHNO-PROTSESSUAL’NYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration] ch. 15. This chapter was one of the innovations of the reworked code passed in 2002. The provisions included in this chapter are designed to encourage both the judge and the parties to settle the case. They specify the requirements for a *mirovoe soglasenie*, and obligate the court to endorse such agreements. See Kathryn Hendley, *Reforming the Procedural Rules for Business Litigation in Russia: To What End?*, 11 DEMOKRATIZATSIYA 363 (2003) for more on the changes introduced to the APK in 2002.

<sup>21</sup> ARBITRAZHNO-PROTSESSUAL’NYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration] art. 138, pt. 1.

<sup>22</sup> *Id.* at art. 138, pt. 2.

<sup>23</sup> *Id.* at art. 158.

<sup>24</sup> The closest the statute comes to endorsing mediation is in the article authorizing delays, in which a reference is made to submitting the case to an “intermediary” (*posrednik*), who is akin to a mediator. *Id.* at art. 158, pt. 2. See *infra* pp. 512–513 for a discussion of the decision to shift from using a purer Russian term for mediation, namely *posrednichestvo*, to *mediatsiia*, an English language cognate that is less familiar to Russians.

have taken a passive approach has less to do with their attitude toward ADR than with their desire to process cases as expeditiously as possible in order to ensure compliance with the statutory deadlines for resolving cases.<sup>25</sup>

Concurrent with the passage of the law on mediation in July 2010, the text of the APK and GPK was changed to reflect the legalization of mediation. For example, the article of the APK that had previously authorized parties to make use of any procedure aimed at settlement not prohibited by law was amended to refer to mediation. The new text reads: "Parties can regulate their disputes by concluding settlement agreements or making use of any settlement procedure, including mediation, if it is not prohibited by federal law."<sup>26</sup> Likewise, the article that allows judges to delay cases to facilitate settlement talks now includes a specific reference to mediation.<sup>27</sup> The website of the Higher *Arbitrazh* Court has a link on its main page to a list of the advantages of using mediation.<sup>28</sup>

The changes to the GPK went deeper. The GPK now requires judges to affirmatively question parties about whether they want to settle the case or seek help from a mediator.<sup>29</sup> Given the powerful influence of the statutory deadlines, perhaps the most important change is to allow judges to delay cases for up to sixty days to facilitate resolving the case through mediation.<sup>30</sup> These amendments represent a qualitative shift in the institutional attitude toward me-

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<sup>25</sup> For discussion of the perverse and unintended consequences of the strict statutory deadlines for resolving cases, see Kathryn Hendley, *Are Russian Judges Still Soviet? An Analysis of the Effort to Introduce Adversarialism to the Russian Arbitrazh Courts*, 23 POST-SOVIET AFF. 240 (2007). In light of several decisions from the European Court of Human Rights, Russian litigants are now entitled to seek damages from the courts when their cases have taken too long. See *O kompensatsii za narushenie prava na sudoproizvodstvo v razumnyi srok ili prava na ispolnenie sudebnogo akta v razumnyi srok.*, ROS. GAZ. (May 4, 2010), <http://www.rg.ru/2010/05/04/razumnisrok-dok.html>. This has only reinforced the tendency of Russian judges to endeavor to decide cases as quickly as possible. Allowing delays for settlement risked possible violation of the statutory deadlines. See generally Vladimir K. Andreev & Sofiiia V. Rozina, *O prave na sudoproizvodstvo v razumnyi srok*, ROSSIJSKOE PRAVOSUDIJE [RUSS. JUST.], no. 6, 2011, at 23.

<sup>26</sup> ARBITRAZHNO-PROTESSUAL'NYI KODEKS ROSSIJSKOI FEDERATSII [APK RF] [Code of Arbitration] art. 138, pt. 2.

<sup>27</sup> *Id.* at art. 158, pt. 2.

<sup>28</sup> Greetings from Chairman of the Supreme Commercial Court of the Russian Federation, Commercial Courts in the Russian Federation, <http://www.arbitr.ru/conciliation/> (last visited Aug. 10, 2012).

<sup>29</sup> GRAZHDAJSKII PROTESSUAL'NYI KODEKS ROSSIJSKOI FEDERATSII [GPK RF][Civil Procedure Code] arts. 150, 172 (2012).

<sup>30</sup> ARBITRAZHNO-PROTESSUAL'NYI KODEKS ROSSIJSKOI FEDERATSII [APK RF][Code of Arbitration] art. 158, pts. 2, 7; GRAZHDAJSKII PROTESSUAL'NYI KODEKS ROSSIJSKOI FEDERATSII [GPK RF][Civil Procedure Code] art. 169.

diation. Whether they will have the desired effect of stimulating widespread use of mediation remains to be seen.

### III. THE ADOPTION OF THE LAW ON MEDIATION

The law on mediation was passed in July 2010, and went into effect at the beginning of 2011. Prior to that, mediation took place on an informal basis and disputants could turn to third parties for help. Centers offering mediation services sprang up in disparate parts of Russia.<sup>31</sup> But without clear and binding rules about the interplay between the courts and mediation, the role of mediation was destined to be peripheral. Even with the law, there are no guarantees that Russian litigants will opt for mediation over litigation. After all, legislation authorizing private arbitration of economic disputes has been on the books for decades and relatively few disputants have made use of it.<sup>32</sup>

Unraveling the legislative history of the law on mediation has proven difficult. This is not unique to this particular law. As a rule, Russian legal scholars take little interest in the process by which laws are adopted, preferring to focus on the final language. But the story of this law is worth investigating. Both the general approach and the terms themselves changed significantly as between the early drafts of the law and the final version.

The initial drafts were published in the journal, *Treteiskii sud*.<sup>33</sup> They represented the collective efforts of a working group that was brought together by the Moscow Chamber of Commerce.

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<sup>31</sup> Not surprisingly, the early nodes of activity track the locations of scholars who took an interest in mediation. Examples include the department of conflictology at St. Petersburg State University (the home of O.V. Allekhverdova, E.N. Ivanova, and A.D. Karpenko), and the law faculties at Ural State Law Academy (the home of S.K. Zagainova) and Voronezh State University (the home of E.I. Nosyreva). While they maintained their intellectual interest, publishing many articles on the general topic of mediation, these pioneers started to offer their services and mediators and to train others as mediators. Many of them were active in drafting and/or offering advice about the legislation on mediation as it evolved.

<sup>32</sup> From the outset, the Russian civil code has contemplated the existence of *treteiskie sudy* (Art. 11, GK RF 1994). The current law on *treteiskie sudy* was passed in 2002 (*O treteiskikh sudakh* 2002). Prior to that, their operations were governed by a web of regulations (Vinogradova 1997). In 2011, the Constitutional Court upheld the constitutionality of having cases resolved by *treteiskie sudy* in the face of a challenge (Postanovlenie 2011).

<sup>33</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETISKII SUD, no. 4, 2005, at 14; Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETISKII SUD, no. 5, 2005, at 6; Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (mediatsii)*, TRETISKII SUD, no. 5, 2006, at 14.

Among the participants were the former chairman of the Moscow city *arbitrazh* court (A.K. Bol'shova), the chief editor of *Treteiskii sud* (G.V. Sevast'ianov), as well as representatives from the Chamber of Commerce and several well-respected scholars. E.I. Nozyreva, the head of the civil procedure department at the law faculty of Voronezh State University, coordinated the group and synthesized the discussion into a coherent document.<sup>34</sup>

The working group took the UNCITRAL Model Law on International Commercial Conciliation as its starting point (UNCITRAL 2002). Its task was to adapt the provisions of this model law to Russian circumstances. The embrace of the model law reflected the group's belief that mediation was going to be primarily a tool for expediting commercial disputes. This also helps explain why the Chamber of Commerce, which had long been a leader in ADR in the commercial context, took a leadership role in developing the mediation law, and why the Russian Union of Industrialists and Entrepreneurs participated actively.

In December 2006, the draft of the working group was forwarded to the Duma.<sup>35</sup> Its sponsors within the Duma were V.N. Pligi and P.V. Krasheninnikov. The draft made its way through a first reading, but then got stalled. Ultimately, it was withdrawn from consideration. In 2010, then-President Medvedev introduced a different draft.<sup>36</sup> Most credit Tsisana A. Shamlikashvili, the president of the Moscow-based Center for Mediation and Law, with preparing the new draft. The scholarly community was disappointed to have its work sidelined. Nozyreva wrote that the new draft "needs considerable revisions. In the form submitted, it is unlikely to facilitate the use and dissemination of mediation in Russia."<sup>37</sup> But the members of the working group and their scholarly colleagues saw the handwriting on the wall. They recognized

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<sup>34</sup> Nosyreva developed an interest in mediation when she spent a year in the U.S. as a Fulbright fellow. She wrote a book about the U.S. experience with ADR and became active in pushing for the full legalization of mediation in Russia. See E.I. NOSYREVA, *AL'TERNATIVNOE RAZRESHENIE SPOROV v SSHA* (2005). Others have also advocated for the expansion of mediation in Russia by drawing on the experience of other countries. See, e.g., E.N. Popadenko, *Mediatsiia kak sredstvo razresheniia ugovovno-pravnykh konfliktov*, *TRETEISKII SUD*, no. 5, 2010, at 155; V.D. Sidorov, *Ob opyte i praktike vedushchikh zapadnykh tsemtrov mediatsii*, *TRETEISKII SUD*, no. 4, 2007, at 118; N. Podoloskaia & V. Mikhal'chenkova, *Novyi Federal'nyi Zakon Avstrii "O posrednichestve po grazhdanskim delam"*, *TRETEISKII SUD*, no. 4, 2004, at 33.

<sup>35</sup> A copy of the transmittal letter is replicated in *TRETEISKII SUD*, no. 1, 2007, at 5.

<sup>36</sup> Proekt. Federal'nyi zakon, *Ob al'ternativnoi protsedure uregulirovanii sporov s uchastiem posrednika (protsedure mediatsii)*, *TRETEISKII SUD*, no. 2, 2010, at 24.

<sup>37</sup> E.I. Nosyreva, *Spetsial'noe pravovoe regulirovanie posrednichestva (analiz zakonoproekta)*, *TRETEISKII SUD*, no. 2, 2010, at 39, 44. Interestingly, Nosyreva used the more purely

that the presidential endorsement made passage of the new draft inevitable. They registered their objections in the pages of *Treteiskii sud*<sup>38</sup> but were powerless to stop the juggernaut. Several scholars told me that they were asked to soft pedal their objections by Duma insiders, and were told that the shortcomings of the law would be fixed before the second reading. Yet a comparison of the draft and the law as enacted show that very few changes were made. The law went through the legislative process at lightning speed. It was introduced in March 2010 and received final approval in July 2010.

### A. *Differentiating Between the Early Drafts and the Final Version of the Law*

Space constraints make a detailed accounting of the differences between the early drafts and the final version of the law impractical. Instead, I focus on two key shifts. The first change is reflected in the terminology used. The second goes to the substance and scope of the law.

#### 1. Terminology

The two drafts published in 2005 stuck fairly closely to the phrasing of the UNCITRAL law. The drafts were titled “On conciliation procedure with the participation of an intermediary” (*O primiritel’noi protsedure s uchastiem posrednika*).<sup>39</sup> The final law, in contrast, was entitled “On the alternative procedure for regulating disputes with the participation of an intermediary (the procedure of mediation).”<sup>40</sup> The shift from conciliation to alternative

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Russian word for mediation, namely *posrednichestvo*. One of her critiques of the new draft was its abandonment of that terminology.

<sup>38</sup> E.I. Nosyreva, *Spetsial’noe pravovoe regulirovanie posrednichestva (analiz zakonoproekta)*, *TRETEISKII SUD*, no. 2, 2010, at 39; O.V. Allakherdova, *Kommentarii k zakonoproektu*, *TRETEISKII SUD*, no. 2, 2010, at 62; D.L. Davydenko, *Kommentarii na zakonoproekty, vncennyye Prezidentom RF*, *TRETEISKII SUD*, no. 2, 2010, at 48; M.E. Morozov, *Otzyv na projekt Federal’nogo zakona “Ob al’ternativnoi protsedure uregulovaniia sporov s uchastiem posrednika (protsedure mediatsii)”* [Response to the draft Federal law “On alternative procedure for regulating disputes with the participation of mediators (the procedure of mediation)”], *TRETEISKII SUD*, no. 2, 2010, at 56.

<sup>39</sup> Projekt. Federal’nyi zakon, *O primiritel’noi protsedure s uchastiem posrednika (posrednichestve)*, *TRETEISKII SUD*, no. 4, 2005, at 14; Projekt. Federal’nyi zakon, *O primiritel’noi protsedure s uchastiem posrednika (posrednichestve)*, *TRETEISKII SUD*, no. 5, 2005, at 6.

<sup>40</sup> *Ob al’ternativnoi protsedure uregulovaniia sporov s uchastiem posrednika (protsedure mediatsii)*, *ROS. GAZ.* (June 30, 2010), <http://www.rg.ru/2010/07/30/mediacia-dok.html>.

dispute resolution might seem trivial, but it arguably represents a principled change in the law's goals. Conciliation is one type of ADR, but it differs from mediation in that the conciliator is expected to take an active role in shaping the resolution.<sup>41</sup> However, in mediation, the mediator is more of a facilitator and the parties themselves are responsible for finding a solution. By limiting the reach of the law to conciliation, the initial drafts were less ambitious. As adopted, the law contemplates both conciliation and mediation.

One of the most noticeable changes between the 2005 drafts and the 2006 draft was the choice of what Russian word to use for the word "mediation." In the 2005 drafts, the working group used a familiar Russian word—*posrednichestvo*—for mediation and a related word—*posrednik*—for mediator. While not entirely abandoning that terminology, the 2006 draft also used anglicized words (*mediatsiia* and *mediator* respectively), as did the version of the law ultimately adopted. The root of the first choice (*posredi*) translates as "in the middle." The definition of *posrednik* in the standard Russian dictionary is "person or organization who conducts negotiations between parties."<sup>42</sup> Russian-English dictionaries give mediator and intermediary as the top definitions.<sup>43</sup> Given this, why did the drafters of this law feel the need to augment the law? In my interviews with Russian mediation scholars, I received remarkably consistent answers to this question. All of them pointed to the negative connotations of the terms "*posrednik*" and "*posrednichestvo*"

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<sup>41</sup> It appears that the working group equated mediation and conciliation. When defining conciliation, it included a parenthetical with the word for mediation. *Ob al'ternativnoi protsedure uregulirovaniia sporov s uchastiem posrednika (protsedure mediatsii)*, ROS. GAZ. (June 30, 2010), <http://www.rg.ru/2010/07/30/mediacia-dok.html>. Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETSEISKII SUD, no. 4, 2005, at 14; Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETSEISKII SUD, no. 5, 2005, at 6; Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (mediatsii)*, TRETSEISKII SUD, no. 5, 2006, at 14. To be fair to the members of the working group, many scholars view mediation and conciliation as synonymous. Compare Reinhold Fahlbeck, *The Role of Neutrals in the Resolution of Interest Disputes in Sweden*, 10 COMP. LAB. L. 391, 391 (1989) ("[I]n Sweden, there is no difference in meaning or practice between conciliation and mediation."), with Richard B. Sappey, *Review of Mediation of Industrial Disputes by J.J. Macken and Gail Gregory*, 18 COMP. L. L. & POL. REV. 315 (1997) ("Given the use of closely related terms, it is wise to be clear about mediation, and to distinguish it from conciliation and arbitration."). Whether conciliation and mediation will come to be seen as interchangeable from a legal point of view remains to be seen.

<sup>42</sup> E.I. Nosyreva & I.A. Sternin, *Posrednichestvo' ili "mediatsiia": k voprosu o terminologii*, TRETSEISKII SUD, no. 1, 2007, at 9 (from the Russian dictionary compiled by S.I. Ozegov and published in 1983).

<sup>43</sup> RUSSIAN-ENGLISH DICTIONARY (A.I. Smirnitsky ed., 1973).

from the 1990s.<sup>44</sup> They reminded me that these terms were often used to describe the shady deals and the key players in them that characterized this decade. They feared that if these words continued to be used, their negative connotations would come to be associated with mediation.<sup>45</sup> Thus, a groundswell developed to use the English cognate “*mediator*.”<sup>46,47</sup> Conceding that the use of the Anglicized terms (*mediatsiia* and *mediator*) had become widespread among scholars, they argued that these words would be completely alien to ordinary Russians and reminded their colleagues that law ought to be written in the vernacular of those most likely to use that law.<sup>48</sup> In essence, they were arguing that couching this new institution in unfamiliar terminology was likely to complicate its acceptance by ordinary Russians. Whether they were right is unknowable. The fact remains that both the law and the public discussion have increasingly been framed in terms of *mediatsiia* rather than *posrednichestvo*.<sup>49</sup>

## 2. The Substance and Scope of the Law

Turning now to the substance of the law, the version enacted covered more ground than did the drafts that came out of the working group. Yet the various versions of the law had a common core. For example, all renderings shared a commitment to the basic principles of mediation, such as voluntariness of the process, confidentiality, impartiality and independence of the mediator, and

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<sup>44</sup> See generally Seymour M. Hersh, *The Wild East*, THE ATLANTIC MONTHLY, June 1994, at 61; VIKTOR M. SERGEEV, THE WILD EAST: CRIME AND LAWLESSNESS IN POST-COMMUNIST RUSSIA (1998); PETER WESTIN & JODY LANFREY, THE WILD EAST: NEGOTIATING THE RUSSIAN FINANCIAL FRONTIER (2001).

<sup>45</sup> See, e.g., Kira Latukhina, *Sud dobroj voli: V Rossii vvoditsia al'ternativnaia protsedura uregulirovaniia sporov*, ROS. GAZ. (July 8, 2010), <http://www.rg.ru/2010/07/08/mediacia.html>.

<sup>46</sup> E.I. Nosyreva & I.A. Sternin, *Posrednichestvo' ili "mediatsiia": k voprosu o terminologii*, TRETEISKII SUD, no. 1, 2007, at 9, 10–11.

<sup>47</sup> See O.M. Dement'ev, *Primiritel'nym protseduram – gosudarstvennyi podkhod*, TRETEISKII SUD, 2007, at 122 (openly supporting the position advocated by Nosyreva and Sternin). E.I. Nosyreva, *Spetsial'noe pravovoe regulirovanie posrednichestva (analiz zakonoproekta)*, TRETEISKII SUD, 2010, at 39, 41 (reiterating the argument in her critique of the final version of the law).

<sup>48</sup> They noted that the term *posrednik* had already been used in the *arbitrazh* procedural code as well as in the law on collective bargaining with no ill effects. They also pointed out that *mediatsiia* had been defined in the dictionary of foreign words as applicable solely to international disputes. E.I. Nosyreva & I.A. Sternin, *Posrednichestvo' ili "mediatsiia": k voprosu o terminologii*, TRETEISKII SUD, no. 1, 2007, at 9. Neither *mediator* nor *mediatsiia* is included in a 1979 Russian-English Dictionary. RUSSIAN-ENGLISH DICTIONARY (A.I. Smirnitsky ed., 1973).

<sup>49</sup> More recently, some scholars have begun to draw a distinction between the two terms. A.D. Karpenko, *Terminy mediatsii kak element razvitiia praktiki v Rossii*, TRETEISKII SUD, no. 3, 2011, at 120 (arguing that *posrednichestvo* has a broader connotation than *mediatsiia*).

equality of the parties.<sup>50</sup> All versions of the law allowed for mediation at any stage of the process. They also guaranteed that mediators could not later be called as witnesses to what happened during mediation.<sup>51</sup> The parties themselves are barred from revealing information gleaned during mediation in any subsequent proceeding.<sup>52</sup> This is essential to preserving the integrity of the process and convincing potential participants that what is said during mediation cannot later become fodder for one's opponents if mediation flounders. If successful, the understanding of the parties is memorialized in a mediation agreement, which is then endorsed by the court (assuming it does not violate the law in any way).<sup>53</sup>

The scope of the law changed dramatically over time. The initial draft focused primarily on commercial disputes.<sup>54</sup> This is not surprising given its origins in the UNCITRAL model law. For example, this early draft disallowed mediation for disputes where jurisdiction had been ceded to the *treteiskie sudy*, a provision that was consistently included in later drafts as well as in the final version of the law.<sup>55</sup> Subsequent drafts broadened the coverage to include civil cases more generally. The language of the 2006 draft

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<sup>50</sup> Proekt. Federal'nyi zakon *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETEISKII SUD, no. 4, 2005, at art. 4; Proekt. Federal'nyi zakon, *Ob al'ternativnoi protsedure uregulirovanii sporov s uchastiem posrednika (protsedure mediatsii)*, TRETEISKII SUD, no. 2, 2010, at art. 3. For background on these principles, see KOMMENTARIJ K FEDERAL'NOMU ZAONU "OB AL'TERNATIVNOI PROTSEDURE UREGULIROVANIIA SPOROV S UCHASTIEM POSREDNIKA (PROTSEDURE MEDIATSIJ)" chs. 3, 5 (S.K. Zagainova & V.V. Larkov eds., 2011); KOMMENTARIJ K FEDERAL'NOMU ZAKONU "OB AL'TERNATIVNOI PROTSEDURE UREGULIROVANIIA SPOROV S UCHASTIEM POSREDNIKA (PROTSEDURE MEDIATSIJ)" 28–29 (M.O. Vladimirova & V.A. Khokhlov eds., 2011). M.Iu Lebedev, *O korrektnosti vydelenia bespristrasnosti I nezavisimosti mediatora v kachestve printispa provdeniia protsedury mediatsii*, TRETEISKII SUD, no. 6, 2011, at 133 (criticism of the drafters' decision to call for both independence (*nezavisimost'*) and impartiality (*bespristrasnost'*) of mediators in Article 3, thereby implying a distinction between these concepts).

<sup>51</sup> D.L. Davydenko, *Riski dlja razvitiia primiritel'noi praktiki v Rossii*, TRETEISKII SUD, 2007, at 122, 124 (arguing that the APK ought to be amended to clarify that mediators could not give evidence. To date, this has not happened).

<sup>52</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETEISKII SUD, no. 4, 2005, at arts. 13–14; Proekt. Federal'nyi zakon, *Ob al'ternativnoi protsedure uregulirovanii sporov s uchastiem posrednika (protsedure mediatsii)*, TRETEISKII SUD, no. 2, 2010, at art. 5.

<sup>53</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETEISKII SUD, no. 4, 2005, at art. 17; Proekt. Federal'nyi zakon, *Ob al'ternativnoi protsedure uregulirovanii sporov s uchastiem posrednika (protsedure mediatsii)*, TRETEISKII SUD, no. 2, 2010, at art. 12.

<sup>54</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETEISKII SUD, no. 4, 2005, at art. 2, pt. 4.

<sup>55</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETEISKII SUD, no. 4, 2005, at art. 2, pt. 3; Proekt. Federal'nyi zakon, *Ob*

noted that mediation was available for labor and family disputes, as long as existing law did not provide otherwise.<sup>56</sup> This provision carried over to the law as enacted, which also included a clause that contemplated mediation in any type of civil case, regardless of whether it originated in the courts of general jurisdiction or the *arbitrazh* courts.<sup>57</sup> The law provides that mediation is prohibited whenever it is provided by federal law, and concretized this by forbidding mediation in collective labor disputes.<sup>58</sup> The law also proscribes mediation in cases that involve third parties and/or issues of public concern.<sup>59</sup>

What are the implications of the scope of the law as enacted? Foreclosing mediation in cases where third parties are brought in probably makes sense. As disputes expand to include multiple parties, coordinating mediation sessions becomes increasingly difficult. Given the emphasis on resolving disputes quickly, which hangs over dispute resolution in Russia whether carried out by mediators or judges, mediating cases with a large number of parties is not terribly workable. Whether this provision should operate as a blanket prohibition on mediation in disputes between shareholders is unclear. In my interviews, some *arbitrazh* judges told me that the high likelihood that third parties would need to be brought in has led them to discourage such litigants from opting for mediation. Yet other *arbitrazh* judges disagreed strongly, arguing that mediation is ideally suited to such disputes because they typically arise from hurt feelings and have relatively little to do with law. They told me that even when the legal issue presented by the case is resolved, litigants who fall into this category often find some new pretext to revive the dispute. These judges advocate mediation, reasoning that the procedural informality of mediation allows the parties to get to the root of the problem, thereby permitting a more permanent solution. My fieldwork suggests that there is considerable variation in how this part of the law is being interpreted. There is no doubt that time will bring greater regularity.

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*al'ternativnoi protsedure uregulirovanii sporov s uchastiem posrednika (protsedure mediatsii)*, TRETSEISKII SUD, no. 2, 2010, at art. 1, pt. 5.

<sup>56</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (mediatsii)*, TRETSEISKII SUD, no. 5, 2006, at art. 2, pt. 2.

<sup>57</sup> Proekt. Federal'nyi zakon, *Ob al'ternativnoi protsedure uregulirovanii sporov s uchastiem posrednika (protsedure mediatsii)*, TRETSEISKII SUD, no. 2, 2010, at art. 1, pts. 2, 4.

<sup>58</sup> *Id.* at art. 1, pt. 5. Chapter 61 of the Russian labor code governs the resolution of collective disputes. TRUDOVOI KODEKS ROSSIISKOI FEDERATSII [TK RF][Labor Code] No. 197-FZ, with amendments through Aug. 1, 2012. <http://base.garant.ru/12125268/>.

<sup>59</sup> Proekt. Federal'nyi zakon, *Ob al'ternativnoi protsedure uregulirovanii sporov s uchastiem posrednika (protsedure mediatsii)*, TRETSEISKII SUD, no. 2, 2010, at art. 1, pt. 5.

The law says nothing about criminal cases. This has been uniformly interpreted as a general prohibition on the use of mediation for criminal cases.<sup>60</sup> For the most part, this is entirely appropriate. In order to work, mediation requires parties to be relatively equal. However, the heavy hand of the state in criminal prosecutions makes this difficult to achieve. Plea-bargaining can be seen as a type of ADR, in that it foregoes the rigmarole of the trial. Countries like Russia with civil law legal traditions have historically eschewed plea-bargaining,<sup>61</sup> but this position has changed in recent years.<sup>62</sup> Beginning in 2001, Russia introduced a “special process” (*osoboi poriadok*) for cases in which the defendants acknowledge their guilt. In 2010, 63.9% of convictions in Russia’s courts were obtained through this mechanism.<sup>63</sup>

Whether mediation could be useful in criminal case in which the prosecutors play no role is open to interpretation. In the aftermath of altercations leading to minor physical injuries, victims in Russia can press charges even when the police see the harm as too minor to warrant their attention.<sup>64</sup> These cases can proceed and are known as “private prosecutions” (*chastnye obvineniia*) because the victims are called upon to act as the prosecutors. In reality, however, it is judges who take on the usual prosecutorial tasks of investigating what happened and assembling the evidence. This burden falls on the justices of the peace (“JPs”), whose courts have jurisdiction over this category of cases.<sup>65</sup> A common theme in my interviews with JPs was their aversion to cases of *chastnye obvineniia*. Their distaste stemmed from the messiness of these

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<sup>60</sup> For an argument in favor of allowing mediation in criminal cases, especially those arising in the JP courts and those involving juveniles, see E. Markovicheva, *Perspektivy razvitiia instituta mediatsii po ugovornym delam*, MIROVOI SUD’IA, no. 11, 2009, at 12.

<sup>61</sup> See generally JOHN HENRY MERRYMAN AND ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 125–133 (2007).

<sup>62</sup> See generally STEPHEN C. THAMAN, *WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL* (2010).

<sup>63</sup> Peter H. Solomon, Jr., *Sdelka s pravosudiem po russki: znachenie osobogo poriadka sudebnogo razbiratel’stva*, SUD’IA, no. 9, 2011, at 48, 48.

<sup>64</sup> Article 22 of the Criminal Procedure Code (UPK) authorizes private prosecution for minor offenses akin to battery, pursuant to articles 115, part 1, and 116, part 1, of the Criminal Code (UK).

<sup>65</sup> Article 3 of the law governing JP courts grants these courts jurisdiction over all criminal cases for which the maximum punishment is incarceration for three years. *Federal’nyi zakon ot 17 dekabria 1988 g., No. 188-FZ, “O mirovykh sud’iakh v Rossiiskoi Federatsii,”* with changes through July 18, 2011, (Aug. 7, 2012), <http://base.garant.ru/12113961/>. For an analysis of the many amendments to this law, see Kathryn Hendley, *Assessing the Role of the Justice-of-the-Peace Courts in the Russian Judicial System*, 37 REV. CENT. & E. EUR. L. 1 (2012).

cases, which in practical terms translated into a huge time sink for them. As a result, they strongly encouraged settlements. In 2011 almost two-thirds of these cases were settled.<sup>66</sup> They would seem to be fertile ground for mediation, as they typically involve neighbors or family members whose squabbles devolve into fisticuffs. Often the squabble itself is only the tip of an iceberg of grievances that can be better explored through mediation than through the judicial process.<sup>67</sup> In my conversations with them, JPs frequently described themselves as mediators in these cases. As I discuss below, in the experiment on the use of mediation carried out in the St. Petersburg JP courts from 2008 to 2011, participants in cases of *chastnoe obvinenie* were among the most likely to be open to mediation. Unfortunately, the law on mediation prevents them from being diverted to mediators.

Another issue on which the final law diverges from the early drafts is the prerequisites for serving as a mediator. The working group's drafts took a minimalist approach, simply providing that a mediator had to be "qualified and unbiased." The parties were entitled to impose additional requirements.<sup>68</sup> Given that the participation of disputants is voluntary, it makes sense that they would have the right to up the ante. Later drafts added the common sense requirement that mediators could not have a criminal record.<sup>69</sup> As enacted, the law did not step away from any of these basic prerequisites. But it reframed the concept of mediator by distinguishing between "professional" and "non-professional" mediators.<sup>70</sup> The requirements for non-professional mediators are akin to those for all mediators under the earlier drafts. They cannot have a criminal record or have been declared legally incompetent. This version adds a minimum age of eighteen.<sup>71</sup> Professional mediators, by contrast, must be at least twenty-five years old. They also must possess a university degree (though type of degree is not specified) and have successfully completed a training course in me-

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<sup>66</sup> For a fuller discussion of the settlement process, see Kathryn Hendley, *The Unsung Heroes of the Russian Judicial System: The Justice-of-the-Peace Courts*, (Working Paper 2012).

<sup>67</sup> For background on *chastnoe obvinenie*, see A. Balashov & G. Mergalieva, *Pravovai priroda primireniia po delam chastnogo obvineniia*, *MIROVOI SUD'IA*, no. 8, 2007, at 5.

<sup>68</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, *TRETEISKII SUD*, no. 4, 2005, at art. 7.

<sup>69</sup> Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (mediatsii)*, *TRETEISKII SUD*, no. 5, 2006, at art. 2, pt. 2.

<sup>70</sup> *Ob al'ternativnoi protsedure uregulirovaniia sporov s uchastiem posrednika (protsedure mediatsii)*, *ROS. GAZ.* art. 15, pt. 2 (June 30, 2010), <http://www.rg.ru/2010/07/30/mediacia-dok.html>.

<sup>71</sup> *Id.* at art. 15, pt. 2.

diation techniques.<sup>72</sup> Only these professional mediators are legally entitled to handle disputes that have been referred from the courts.<sup>73</sup> Whether trial lawyers (*advokaty*)<sup>74</sup> should be able to work as mediators has been the subject of heated debate.<sup>75</sup> The law is silent on this specific question. The federal association of *advokaty* issued an “explanation” (*raz’iasnenie*) that endorsed having *advokaty* work as mediators, albeit in a rather lukewarm fashion.<sup>76</sup>

Naturally imposing an obligation to obtain training before becoming a mediator raises a series of practical questions. Everyone agreed that the few training centers operating when the law was adopted were unlikely to be able to meet the demand for training.<sup>77</sup> The law itself contemplated that a standard course would be approved by the state.<sup>78</sup> Several proposals were put forward to the Ministry of Education. Although most of the scholars with whom I spoke supported the proposal from Voronezh, which was spearheaded by Nosyreva, the Ministry opted for the program developed by the Moscow-based Center on Mediation and Law.<sup>79</sup> This program required 120 hours of training to become a mediator and also established more advanced courses of study. The sug-

<sup>72</sup> *Id.* at art. 16, pt. 1.

<sup>73</sup> *Id.* at pt. 3.

<sup>74</sup> Like most European countries, Russia has a divided bar. *Advokaty* are primarily trial lawyers; *Iuristy* tend to focus on transactional work. These boundaries, which were well defined during the Soviet era, have blurred in the decades since the collapse of the Soviet Union. For more background, see Kathryn Hendley, Peter Murrell, & Randi Ryterman, *Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises*, 26 L. & SOC. INQUIRY 685, 689–90 (2001).

<sup>75</sup> E.g., Olesia Kuznetsova, *Advokaty ne dolzhny byt’ mediatorami* (June 30, 2011), <http://kvnews.ru/archive/2011/jur25%281002%29/law/17868/> (reporting on a round-table on the topic conducted at the Omsk oblast’ *arbitrazh* court); A.M. Ponasiuka, *Vypolnenie advokatom roli mediatora kak osobyi vid advokatskoi deiatel’nosti*, *ADVOKAT*, no. 9, 2010, at 24.

<sup>76</sup> M.E. Seneniako, *Raz’iasneniia po voprosu o vozmozhnosti sovmeshcheniia advokatskoi deiatel’nosti s deiatel’nost’iu mediatora na professional’noi ili ne professional’noi osnove*, (Aug. 9, 2012) [http://www.fparf.ru/mediaciya/adv\\_mediat.htm](http://www.fparf.ru/mediaciya/adv_mediat.htm).

<sup>77</sup> KOMMENTARIJ K FEDERAL’NOMU ZAONU OB AL’TERNATIVNOI PROTSEDURE UREGULIROVANIJA SPOROV S UCHASTIEM POSREDNIKA (PROTSEDURE MEDIATSII) 190 (S.K. Zagainova & V.V. Larkov eds., 2011).

<sup>78</sup> *Ob al’ternativnoi protsedure uregulirovaniia sporov s uchastiem posrednika (protsedure mediatsii)*, *ROS. GAZ.* art. 16, pt. 2 (June 30, 2010), <http://www.rg.ru/2010/07/30/mediacia-dok.html>.

<sup>79</sup> *Postanovlenie Konstitutsionnogo Suda RF ot 26 maia 2011, no. 11-P*, “*Po delu o proverke konstitutsionnosti polozhenii punkta 1 stat’i 11 Grazhdanskogo kodeksa RF, punkta 2 stat’i 1 Federal’nogo zakona ‘O treteiskikh sudakh v RF,’ stat’i 28 Federal’nogo zakona ‘O gosudarstvennoi registratsii prav na nedvizhimoe imushchestvo i sdelok s nim,’ punkta 1 stat’i 33 i stat’i 51 Federal’nogo zakona ‘Ob ipoteke (zaloge nedvizhimosti)’ v sviazi s zaprosom Vysshego Arbitrazhnogo Suda RF*, *ROS. GAZ.* (June 8, 2011), <http://www.rg.ru/2011/06/08/ksrf-dok.html>.

gested lesson plan laid out a course of lectures. One critique thereof advocated increasing the time spent on practical skill-building.<sup>80</sup>

My conversations with Russian scholars of mediation suggest that these decisions to create two types of mediators and to require extensive training are some of the most controversial aspects of the law. One commentary describes the creation of professional and non-professional mediators as “not entirely successful.” No one seems entirely sure what purpose is served by having the category of non-professional mediators. Many scholars also expressed disappointment with the state-endorsed training program. While no one questioned the need for training, some saw the length as overkill designed more to allow training centers to charge high fees. Those who developed the program disagreed. They thought that a center would have to obtain state approval to conduct this training. In the words of Shamlikashvili, the President of the Moscow-based Center for Mediation and Law, the question of how mediators should be trained remains “very sensitive.”<sup>81</sup> In an interview published in a special issue of *Zakon* devoted to mediation, she made it clear that her preference would be for specialized mediation centers to have primary responsibility for training.<sup>82</sup> In another article in that issue, Svetlana K. Zagainova, the director of the Center for Mediation associated with the Urals State Law Academy, defended the practice of training mediators through centers for continuing education at established law schools.<sup>83</sup> In discussions with law professors from St. Petersburg, and Voronezh, support for Zagainova’s position was universal.<sup>84</sup>

The obligation imposed by the law is to create “self-regulating organizations” (*samoreguliruemye organizatsii* or “SRO”) of mediators.<sup>85</sup> In theory, these SROs would operate as a clearing

<sup>80</sup> *Poiasnitel'naia zapiska k Tipovoi programme podgotovki mediatorov*, TRETEISKII SUD, no. 6, 2011, at 144.

<sup>81</sup> Interview with Tsisana A. Shamlikashvili, “Sovremennaia pravovaia pomoshch' tiagoteet ne k sostiazatel'nomu, a k sotrudnichaiushchemu sposobu zashchity interesov”, *ZAKON*, no. 3, 2012, at 38, 41.

<sup>82</sup> *Id.*

<sup>83</sup> Svetlana K. Zagainova, *O kompleksnom podkhode k razvitiu mediatsii v Rossii*, *ZAKON*, no. 3, 2012, at 51, 53–54.

<sup>84</sup> Many clinics operating under the auspices of law schools offer programs designed to acquaint students with mediation. These clinical programs are not aimed at producing professional mediators. See generally I.N. Luk'ianova, *Prepodavanie mediatsii v iuridicheskikh klinikakh*, in *RAZVITIE MEDIATSII V ROSSII: TEORIIA, PRAKTIKA, OBRAZOVANIE* 88, 93 (E.I. Nosyreva & D.G. Fil'chenko eds., 2012).

<sup>85</sup> *Ob al'ternativnoi*, *supra* note 36, at art. 18.

house or informal licensing agency for mediators. To date, however, not a single SRO has been created. Perhaps the requirement to have either twenty-five entrepreneurial organizations or 100 individuals to set up an SRO explains why.<sup>86</sup> Almost all of the scholars with whom I spoke saw this SRO construct as inappropriate and unworkable in the context of mediation.<sup>87</sup>

#### IV. THE LAW ON MEDIATION IN ACTION

Much more important than the wording of the law is its use. As I have argued elsewhere, the supply of laws and legal institutions by the state can be a hollow victory if societal demand is lagging.<sup>88</sup> In an ironic twist, the demand for mediation training has far outpaced the demand for mediation services.<sup>89</sup> In talking with those engaged in the training mission in Moscow, St. Petersburg, Ekaterinburg, and Voronezh, several common themes emerged. There was general agreement that most of those seeking training were not expecting to find work, even on a part-time basis, as a mediator. Instead, they were interested in learning more about techniques to bring parties together that they could use in their work lives. A wide variety of professionals signed up for this training, including lawyers and psychologists.

The trickier question is why mediation has proven to be such a tough sell to the Russian public. To be fair, the law has only been in effect for about eighteen months, so any determination as to the relevance of mediation is clearly premature. At this point, it would be unfair to describe Russians as having an aversion to mediation or even a negative attitude. A more accurate characterization

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<sup>86</sup> *O samoreguliruemymkh organizatsiakh*, ROS. GAZ. art. 3, pt. 3 (Dec. 6, 2007), <http://www.rg.ru/2007/12/06/samoreg-dok.html>.

<sup>87</sup> E.g., D.G. Fil'chenko, *Samoregulirovnie deiatel'nosti posrednikov: neobkhodimost' ili prezhdvremennaia mera?*, TRETSEISKII SUD, no. 2, 2010, at 74. Not surprisingly, Shamlikashvili was an exception. She defended the idea of SRO's, both in conversations with me and in public interviews. She explained that her center was working collaboratively with other organizations interested in mediation, and did not rule out the possibility that an SRO would grow out of this. *Sovremennaia pravovaia pomoshch' tiagoteet ne k sostiazatel'nomu, a k sotrudnichaiushchemu sposobu zashchity interesov*, ZAKON, no. 3, 2012, at 38, 41.

<sup>88</sup> Kathryn Hendley, *Legal Development in Post-Soviet Russia*, 13 POST-SOVIET AFF. 231 (1997).

<sup>89</sup> A good illustration is data provided by the Center for Mediation at the Ural State Law Academy. In 2010, 77 people completed its specialized course for preparing mediators, a five-fold increase over 2009. URALS STATE LAW ACADEMY, <http://www.usla.ru/ch.php?mid=139&cid=139&obid=2373> (last visited Aug. 14, 2012).

would be ignorance, which is entirely understandable. Yet the slow pace of demand for mediation in both the *arbitrazh* courts and the courts of general jurisdiction deserves further discussion. I begin by laying out the limited data on use, and then analyze the reasons for the less-than-robust demand.

### A. *Evidence on the Use of the Law*

Even before the law was passed, mediation enthusiasts were attempting to encourage litigants to use mediation to resolve their disputes. Several pilot projects were undertaken in regions where non-governmental organizations that provided mediation services or where scholars intrigued by mediation were located. Those with closer relationships with the courts tended to have more success. In Rostov-na-Donu, the Rule of Law Initiative of the American Bar Association provided funding for an NGO, the Center for Alternative Resolution of Disputes (*Tsentr vnesudebnogo razresheniia sporov*), that offered mediation services.<sup>90</sup> Training on the potential benefits of mediation were made available to justices-of-the-peace (“JP”), and brochures were prepared for distribution to disputants. The ABA funding covered the costs of mediation as a way to jump-start interest. Yet during the four years of the project, only a handful of litigants took their cases to the center.<sup>91</sup> In an effort to make sense of this, one Rostov JP with whom I spoke in the summer of 2011 pointed to two inter-related factors. The biggest stumbling block, in her view, was the general lack of familiarity with mediation. She said that the brochure helped, but was not sufficient on its own. The fact that no one was available on site to explain how mediation worked was the nail in the coffin. Even those who expressed interest were deflated when told that they would have to go to the center which was located elsewhere in Rostov-na-Donu.<sup>92</sup>

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<sup>90</sup> For more information on the Center, see <http://mediaciarostov.ru/>. For more on the work of ABA-ROLI in Russia, see AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/europe\\_eurasia/russia.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/russia.html) (last visited Mar. 12, 2013).

<sup>91</sup> E.A. Smol'iannikova, *Rezultaty programmy "Razvitiie al'ternativnykh sposobov razresheniia sporov," realizuemoi Amerikanskoi assotsiatsiei iuristov v Rossii*, *TRETEISKII SUD*, no. 5, 2011, at 179.

<sup>92</sup> The U.S. Russia Foundation for Economic Advancement and the Rule of Law (“USRF”) (<http://www.usrf.ru/>) supported a similar project in Pskov that was run through the Center for Sustainable Development ([www.CSDPR.ru](http://www.CSDPR.ru)). Judicial training and brochures advertising the

By contrast, the pilot programs in Ekaterinburg and St. Petersburg were organized differently. Rather than expecting disputants to travel to a separate center, several courts allocated space so that mediators could be immediately available to litigants. Though the mediation sessions themselves were conducted elsewhere, the on-premises mediators were able to strike while the iron was hot. In cases where the judges felt mediation would be appropriate and where the parties were open to the idea, the judge would stay the proceedings to allow the parties to learn more about this new problem-solving tool. The large number of courts in these two cities made it impossible to staff all courthouses with mediators. A few courts were chosen to lead the experiment. In both locations, the projects were supported by the local judicial department (which is responsible for managing the courts of general jurisdiction), as well as by the leading law school in the area.<sup>93</sup>

The St. Petersburg pilot program ran for three years and concluded in fall 2011.<sup>94</sup> It was initially conceived as a way to relieve the pressure on overworked judges.<sup>95</sup> During the life of the program, 138 cases were diverted to mediation. Slightly more than half (72% or 52.2%) were criminal cases involving a “private prosecution” (*chastnoe obvinenie*) and the remainder (68% or 47.8%) were civil cases. About half (66% or 47.8%) resulted in a settlement between the parties that removed the case from the dockets of the JP courts. Aleksandr S. Krasnopevtsev, the deputy head of the St. Petersburg judicial department who presented these data at a conference in St. Petersburg in December 2011, was somewhat discouraged by them. Given that the JP courts he supervised heard

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Center’s services attracted few clients, even though all the costs associated with mediation were being underwritten by the grant.

<sup>93</sup> In St. Petersburg, the department of conflictology of St. Petersburg State University (<http://www.conflictology.spb.ru/>), which has been training mediators and offering mediation services since the early 1990s, collaborated in the experiment. In Ekaterinburg, it was the Center for Mediation (<http://www.mediation-ural.com/>), which is affiliated with the Urals State Legal Academy.

<sup>94</sup> The Ekaterinburg pilot program is ongoing. In fall 2011, the Center for Mediation received a grant from USRF that will allow it to provide mediation free of charge. Though no results have been released, mediators from Ekaterinburg with whom I spoke in October 2011 reported a steady number of cases. Its own data seem to belie this claim. In 2010, it handled twenty-seven cases, of which two-thirds first sought mediation after the case had been filed in the courts. URALS STATE LAW ACADEMY, <http://www.usla.ru/ch.php?mid=1436&cid=13&obid=2371> (last visited Aug. 14, 2012). Eighty percent of the cases that were mediated resulted in settlements. A.E. Solokhin, *Osobennosti i perspektivy sudebnoi meditsii v Rossii*, TRETSEISKII SUD, no. 5, 2011, at 142, 144.

<sup>95</sup> A.S. Krasnopevtsev, *Opyt primeneniia medatsii v mirovykh sudakh Sankt-Peterburga*, TRETSEISKII SUD, no. 3, 2011, 144, 144–45 (2011).

an average of over 250,000 cases per year from 2008-2011, 138 cases over thirty-six months is a mere drop in the bucket and did little to lessen the burden on judges from the crushing caseload.<sup>96</sup> In addition, the decision to exclude criminal cases from the purview of the mediation law means that about half of the cases handled as part of the experiment would now be ineligible for mediation. During the experiment, the cost of mediation was born by the judicial department. Even so, relatively few litigants were willing to try it. He anticipated that even this limited demand for mediation would dry up once parties had to pay for it themselves.

The story is similar in the *arbitrazh* courts. The first case resolved through a mediation agreement took place in Rostov-na-Donu in April 2011. It was a dispute between entrepreneurs centering on rights-of-way on a parcel of land. At the urging of the judge, the parties sought the help of a mediator through the Rostov Chamber of Commerce. Each side scaled back its demands a bit, leading to an agreement which was subsequently endorsed by Rostov oblast' court. In an unusual move, the decision was published in the pages of *Treteiskii sud*.<sup>97</sup> But rather than being the harbinger of future cases, the annual report of the Higher *Arbitrazh* Court reports it as one of only four cases decided in 2011 with the help of mediators.<sup>98</sup>

### B. *Proposed Institutional Changes to Spur Use*

The evidence, which is admittedly premature and anecdotal, is not encouraging. During 2011–12, I attended several conferences focusing on the prospects for mediation in Russia. How to stimulate greater use of mediation was a hot topic among the participants. Some agitated for institutional reforms. They pointed to the experience of many Western countries, where litigants became ac-

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<sup>96</sup> Information about the number of cases heard by the JP courts of St. Petersburg, available at <http://mirsud.spb.ru/21/2135> (last visited Mar. 6, 2013).

<sup>97</sup> *G.I. Ivaniuty v. OOO Proizvodstvennoe predpriiatie "Iugrostant," Delo No. A53-18815/10, decided on April 20, 2011, by the Arbitrazh court of Rostov oblast', TRETEISKII SUD, no. 3, 2011, at 138. Decisions of the arbitrazh courts are generally accessible through the court websites.*

<sup>98</sup> *Analiticheskaiia zapiska k statisticheskomu otchetu o rabote arbitrazhnykh sudov Rossiiskoi Federatsii v 2011 godu* (Aug. 6, 2012), <http://www.arbitr.ru/press-centr/news/totals/> (last visited Aug. 6, 2012). It is worth noting that the report uses *posrednik* as the word for mediator rather than the anglicized term of *mediator*.

climated to mediation only when they were forced to try it.<sup>99</sup> To that end, they favored making mediation mandatory in certain categories of cases. However, not only would this require legislative changes, but also funding to support this mandatory mediation as well as the creation of a bureaucracy to pick and maintain state-sponsored mediation. My sense is that Russian officialdom has little enthusiasm for such changes.

The Higher *Arbitrazh* Court has gone down a different road. Changes have been proposed to the APK that will allow courthouse personnel to offer conciliation services.<sup>100</sup> In drafting the revisions, the staff of the Court took inspiration from the law in Belarus,<sup>101</sup> where conciliation has grown increasingly popular. Aleksei E. Solokhin, a senior staff member who took a leadership role in this process, notes that in 2009, 18% of all civil disputes in Belarus were settled without a hearing on the merits. During the first half of 2010, this percentage increased to 29%.<sup>102</sup> Following the Belarus example, the amendments to the APK would open the door to having court clerks and retired judges work with parties to resolve cases before the merits have been considered by the court. At a meeting of the Presidium of the Higher *Arbitrazh* Court on December 22, 2011, the most prominent scholars and activists on mediation were in attendance and expressed strong opposition to these institutional changes. The outsiders argued that opening the door to mediation within the courts by courthouse personnel would have the effect of crippling any effort to build demand for media-

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<sup>99</sup> The move to mandatory mediation in the U.S. has had its ups and downs. See generally Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479 (2010); Ari Davis, Note, *Moving From Mandatory: Making ADR Voluntary in New York Commercial Division Cases*, 8 CARDOZO J. CONFLICT RESOL. 283 (2007); Roselle Wissler, Note, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLIAMETTE L. REV. 565 (1997). Mandatory mediation elsewhere has also had its problems. E.g., Phyllis E. Bernard, *Begging for Justice? Or, Adaptive Jurisprudence? Initial Reflections on Mandatory ADR to Enforce Women's Rights in Rwanda*, 7 CARDOZO J. CONFLICT RESOL. 325 (2006).

<sup>100</sup> *Federal'nyi zakon o vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v sviazi s sovershenstvovaniem primiritel'nykh protsedur*, (Aug. 10, 2012), <http://www.arbitr.ru/conciliation/improvement/>.

<sup>101</sup> *Khoziaistvennyi Protessual'nyi Kodeks Respubliki Belarus'*, ch. 17, (Aug. 13, 2012), <http://www.pravo.by/main.aspx?guid=3871&p0=hk9800219&p2={NRPA}>.

<sup>102</sup> A.E. Solokhin, *Razvitie instituta primiritel'nykh protsedur v arbitrazhnom protsesse: sudebnoe posrednichestvo*, in RAZVITIE MEDIATSII V ROSSII: TEORIIA, PRAKTIKA, OBRAZOVANIE 147, 149 (E.I. Nosyreva & D.G. Fil'chenko eds., 2012).

tion.<sup>103</sup> The chair of the Court, Anton A. Ivanov, was largely dismissive of these criticisms. He did not see it as an either/or situation. He argued that this new mechanism, which is labeled “judicial mediation” (*sudebnaia mediatsiia*) in the new law, could work in parallel with the already authorized forms of mediation. Valerii V. Lisitsyn, the author of one of the leading monographs on mediation in Russia and a professor at the Russian Academy of Justice, proposed that the name of the official be changed from “judicial mediator” (*sudebnyi mediator*) to “judicial conciliator” (*sudebnyi primiritel'*). He commented that this change would be consistent with the Belarus law.<sup>104</sup> The draft was transmitted to the Duma without this change, but it has lain dormant. Whether these changes will be incorporated into the APK is unclear.

### C. *Constraints on the Use of the Law*

Searching for the proverbial silver bullet is always seductive, but whether these institutional changes would spur greater use of mediation by Russians is questionable. After all, in the pilot programs, every effort was taken to make opting for mediation as painless as possible, including subsidizing the cost, and this did little to increase usage. At the same time, everyone agrees that the prospect of having to pay for mediation acts as a deterrent.<sup>105</sup> Elsewhere, cost is typically seen as an advantage for mediation due to the exorbitant costs associated with litigation. The relatively low cost of litigation in Russia blunts this argument in favor of mediation. Though the filing fees strike outsiders as low, Russian litigants regularly grouse about them. Few believe that they are prepared to ante up additional funds to pay the costs associated with mediation. These costs are linked to the time required to resolve the dispute. For complex business disputes, getting to the

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<sup>103</sup> The U.S. has a wealth of experience with court-based conciliation and mediation. *E.g.*, Sandra S. Beckwith, *District Court Mediation Programs: A View From the Bench*, 26 OHIO ST. J. ON DISP. RESOL. 357 (2011); Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008).

<sup>104</sup> On this point, Lisitsyn was not entirely accurate. Article 156 of the Economic Procedural Code of Belarus authorizes judges to appoint a “conciliator” (*primiritel'*) from among several categories of courthouse personnel, but this official is never called a “judicial conciliator.” *Khoziaistvennyi Protssessual'nyi Kodeks Respubliki Belarus'*, (Aug. 13, 2012), <http://www.pravo.by/main.aspx?guid=3871&p0=hk9800219&p2>.

<sup>105</sup> *E.g.*, Lazarev, *supra* note 14.

bottom of the problem can be time-consuming. One analyst calculated that, for a dispute in which ten million rubles is at issue, the cost of going to *arbitrazh* court would be 200,000 rubles, whereas mediation would cost an additional 214,000 to 530,000 rubles, depending on what center is used.<sup>106</sup> In my interviews with judges, many described the low filing fees as double-edged sword.<sup>107</sup> They have opened the courthouse doors to one and all, but arguably have made it too easy to file a lawsuit. All are in accord on the political unacceptability of raising filing fees.

If mediation is being resisted even when it is free, then perhaps there are cultural constraints at work. According to the judges with whom I spoke in both the *arbitrazh* courts and the courts of general jurisdiction, Russian litigants are bewildered by mediation. Using an anglicized word (*mediatsiia*) rather than the Russian word (*posrednichestvo*) contributes to the problem, though as I noted above, the negative baggage of the Russian variant would have created its own difficulties.<sup>108</sup> Whether time will take care of the problem is doubtful. An affirmative effort will have to be undertaken to educate Russians about mediation and its potential benefits. Outreach efforts have been made by the various centers of mediation that dot the Russian landscape, but they have proven inadequate.<sup>109</sup> Illustrative of the low literacy when it comes to mediation is the response of a name partner in a major Moscow law firm as to whether he would advise his clients to use this mechanism. He said that he doubted his clients would be willing to forego the enforcement power of the court.<sup>110</sup> In reality, however, the law contemplates that the agreements resulting from the medi-

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<sup>106</sup> V.O. Abolinin, *Pozvolit li rossiiskaia biznes-mediatsiia sekonomit'*, TRETEISKII SUD, no. 6, 2010, at 123, 126. At the current exchange rate of approximately thirty rubles to the dollar, the base cost would be \$6,666.67. Resorting to mediation would add \$7,133.33 to \$17,666.67.

<sup>107</sup> E.g., Lazarev, *supra* note 14, at 117. Lazarev serves as a judge on the Sverdlovsk oblast' *arbitrazh* court.

<sup>108</sup> An anecdote from my fieldwork helps illustrate the dilemma. When discussing the lack of popular appeal of mediation with a court administrator in Pskov during lunch, he asked our waitress whether she knew what the word "mediation" meant. She did not. Along similar lines, when I spent time observing courtroom procedures, litigants' first reaction to judges' suggestions of mediation was consistently to ask what it was.

<sup>109</sup> Poland passed a law on mediation in 2005 in the hopes that it would help to cut down on the backlog in its courts. Due to a "lack of awareness and education," mediation has not yet caught on. Joanna Wasik, Note, *Court Delays in Poland: Mediation as a Way Forward in Commercial Disputes*, 43 GEO. J. INT'L L. 959, 979 (2012).

<sup>110</sup> *Opros iurfirm*, *supra* note 9, at 44.

ation process be endorsed by the court, rendering them as enforceable as any court decision.<sup>111</sup>

Judges told me that when they present mediation as an option, litigants are usually unfamiliar with how it works. They also report that litigants are often confused by why they are being asked to work out a resolution with their counterpart. Judges say that Russians come to court only as a last resort. Put more bluntly, litigants tell judges that if they were capable of resolving the dispute on their own, they would not have brought the case to court. Judges' efforts to explain the facilitative role of the mediator tend to fall on deaf ears. Of course, this assumes that judges are making a genuine effort to convince the parties to try mediation. In my experience, this is a mixed bag. Some judges see the potential of mediation, while others are so focused on the need to manage their docket efficiently that they pay lip service to settlement options, preferring to retain control.

The evidence on settling cases indicates that Russians tend to pursue civil cases to judgment once they have entered the judicial system.<sup>112</sup> Unlike in the United States, where parties often file a complaint as a way to jump-start negotiations,<sup>113</sup> Russian plaintiffs expect to see the case through to the end. As a result, the percentage of cases that drop out along the way is relatively low. Of those, the number that are settled through formal agreements is even smaller; only a handful are resolved through mediation. Table 1 shows that 19% of cases decided by the *arbitrazh* courts in 2011 were terminated short of decision. Of these, less than 15% were resolved through *mirovye soglasheniia* or formal agreements approved by the court. The fact that only four cases were decided with the assistance of mediators vividly shows the minimal role of mediation.<sup>114</sup> More generally, the data presented in Tables 1 and 2 suggest that Russians are not interested in settlement. They but-

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<sup>111</sup> *Ob al'ternativnoi*, *supra* note 2, at art. 12.

<sup>112</sup> For an overview of the history of settlement in Russia, see N.N. Zipunnikova & Iu.N. Zipunnikova, *Ideia primireniia v istoriia rossiiskogo grazhdanskogo protsessa (zakonodatel'noe zakreplenie i doktrinal'noe obosnovanie)*, *ARBITRAZHNYI I GRAZHDANSKII PROTSESS*, no. 9, 2011, at 10.

<sup>113</sup> See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). For a critique of Galanter, see John Lande, *Shifting the Focus From the Myth of 'The Vanishing Trial' To Complex Conflict Management Systems, Or I Learned Almost Everything I Need To Know About Conflict Resolution From Marc Galanter*, 8 CARDOZO J. CONFLICT RESOL. 191 (2006).

<sup>114</sup> *Analiticheskaiia zapiska k statisticheskomu otchetu o rabote arbitrazhnykh sudov Rossiiskoi Federatsii v 2011 godu*, 5 (Aug. 6, 2012), <http://www.arbitr.ru/press-centr/news/totals/> (last visited Mar. 12, 2013).

gress the arguments of Russian judges that their entreaties to litigants to resolve disputes on their own are ineffective. Over time, as parties repeatedly demonstrate their indifference to settlement, the enthusiasm with which judges pursue it naturally ebbs.

On the other hand, Table 1 shows a fair amount of regional variation in the willingness of economic actors to settle their cases. Of particular interest is the track record of the Sverdlovsk *arbitrazh* court. The former chairman of this court, Irina V. Reshetnikova (who has since moved on to become the chairman of the cassation court for the Urals region), was an early supporter of ADR. She ensured that the *arbitrazh* judges of the Sverdlovsk *oblast'* court received training on how to encourage parties toward settlement. It is not surprising, therefore, that the percent of cases that are settled through *mirovye soglasheniia* is much higher for this court, both as a percentage of all cases decided and of those that are terminated prior to decision. Lazarev shows that, while the average rate of settlement is 18.94% of all decided cases, for more activist judges, the rate can range up to 39%.<sup>115</sup> In other *arbitrazh* courts where I spent time in 2012, such as the Moscow *oblast'* court and the Voronezh *oblast'* court, where I found judges to be openly contemptuous of the very idea of ADR, the percentages are much lower, reflecting the judges' disdain.

Table 2 explores these same questions for the JP courts. It confirms that litigants within these courts are even less inclined to settle. As a rule, Russian scholars pay most attention to the cases terminated as a percentage of the total cases resolved as a measure of the propensity to settle. This explains why Lazarev comments that this number has been stuck around the four percent mark.<sup>116</sup> But perhaps this is the wrong approach. A significant proportion of cases in the JP courts are resolved without a full hearing via a judicial order (*sudebnyi prikaz*), and are not viable candidates for termination.<sup>117</sup> If the cases decided through *sudebnye prikazy* are pulled out and the number of terminations is recalculated as a percentage of the adjusted total, the picture looks very different. For Russia as a whole about 13% of cases are abandoned. If we probe deeper and look at what portion of these cases are resolved through formal settlement agreements (*mirovye soglasheniia*), then

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<sup>115</sup> S.V. LAZAREV, OSNOVY SUDEBNOGO PRIMIRENIIA 100 (2011).

<sup>116</sup> Lazarev, *supra* note 14, at 119.

<sup>117</sup> See generally M.A. CHEREMIN, PRIKAZNOE PROIZVODSTVO V ROSSIISKOM GRAZHDANSKOM PROTSESSE (2001); S.K. Zagainova, *Ob osnovnykh tendentsiakh razvitiia prikaznogo proizvodstva*, MIROVOI SUD'IA, no. 4, 2007, at 15.

we see that they represent less than 20%. Once again, there is significant regional variation. But the bottom line is clear—settling is not part of the legal culture of Russia.

Openness to settling cases is critical to building support for mediation. Although efforts have been made to rewrite the key procedural codes to facilitate settlement and to preference mediation, judges and litigants have been slow to change their behavior. The Russian judicial system has been built to process cases quickly and inexpensively. Veniamin Iakovlev, the former chair of the Higher *Arbitrazh* Court, has commented that “the *arbitrazh* courts of Russia are one of the most ‘quick-acting’ courts, not only in our country, but in Europe and in the world.”<sup>118</sup> The APK mandates that cases must be decided within several months of filing,<sup>119</sup> and less than 10% of cases violate this rule.<sup>120</sup> The track record of the JP courts is even more impressive. Less than one percent of civil cases violate the statutory deadline.<sup>121</sup> So long as litigants receive cheap and quick service through the courts, their indifference to mediation makes good sense. Judges have a strong incentive to perpetuate this system, given that their chances for promotion and financial bonuses are linked to efficient management of their caseload.

## V. PERSPECTIVES FOR THE FUTURE

Perhaps the arguments in favor of mediation need to be rethought. Efficiency in terms of time and money has been persuasive in the U.S. setting, but the Russian context is different. Indeed, the initial expectations that diverting cases to mediation would ameliorate overloaded dockets have been unfulfilled. It might make more sense to emphasize the confidentiality of mediation as well as the capacity of mediation to get to the core of a dispute. These are qualities that distinguish mediation from the judicial process. Courts are now required to post all judicial acts (including opinions) on the web, limiting the ability of the parties to shield themselves from public scrutiny. In addition, the procedural

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<sup>118</sup> Lazarev, *supra* note 14, at 117.

<sup>119</sup> ARBITRAZHNO-PROFESSUAL’NYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 158.

<sup>120</sup> Lazarev, *supra* note 14, at 116.

<sup>121</sup> Kathryn Hendley, *The Unsung Heroes of the Russian Judicial System: The Justice-of-the-Peace Courts*, Table 2 (Working Paper 2012).

codes prohibit Russian courts from expanding the dispute beyond the questions posed in the pleadings, even if it becomes apparent that the case hinges on other issues. By contrast, mediators have no such limitations. They can go wherever the negotiations take them. The more elastic nature of mediation could be invaluable when dealing with disputes between former business partners (in the *arbitrazh* courts) or between family members (in the JP courts). At present, such disputes often boomerang back to the courts because the judicial decision, which resolved the narrow legal question posed, failed to address the deeper problems.

Mediation in the West is typically portrayed as a resounding success in the Russian scholarly press and the mass media. Presenting positive examples from abroad seems to be part of a strategy to “sell” mediation to the Russian public as a modern problem-solving mechanism. Lost along the way are the thoughtful critiques of mediation by Western scholars that might be useful to Russian policy makers.<sup>122</sup> Russian history is replete with examples of Western ideas and institutions that have been pushed on society as solutions to its woes only to be rejected when Russians feel betrayed when these ideas turn out to be more complicated than originally presented.<sup>123</sup> It would be a shame if mediation became the latest example of this phenomenon.

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<sup>122</sup> E.g., Richard M. Calkins, *Mediation: A Revolutionary Process That Is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1 (2011); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787 (2001); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1 (1991).

<sup>123</sup> E.g., Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT'L L.J. 95 (2004); STEPHEN F. COHEN, *FAILED CRUSADE: AMERICA AND THE TRAGEDY OF POST-COMMUNIST RUSSIA* 135–142 (2001); Kathryn Hendley, *Legal Development in Post-Soviet Russia*, 13 POST-SOVIET AFF. 231 (1997).

TABLE 1: INFORMATION ABOUT CASE DISPOSITION AT THE RUSSIAN ARBITRAZH COURTS, 2010-2011.

Court	2010					2011						
	Total cases decided	% of total cases terminated prior to decision	Settled cases as % of terminated cases (1)	Settled cases as % of total cases	Cases dropped by plaintiff as % of terminated cases	Cases dropped by plaintiff as % of total cases	Total cases decided	% of total cases terminated prior to decision	Settled cases as % of terminated cases	Settled cases as % of total cases	Cases dropped by plaintiff as % of terminated cases	Cases dropped by plaintiff as % of total cases
Russian Federation	1197103	20	15.8	3.2	67.5	13.5	1078383	19	14.4	2.7	70.4	13.4
Moscow City	155841	10.4	21.4	2.2	64	6.6	125821	11	19	2.1	61	6.7
Moscow Oblast	43329	18.5	13	2.4	74	13.7	45144	15.5	13.6	2.1	64.9	10.1
Sverdlovsk Oblast	48616	17.5	26.8	4.7	66.3	10.9	45525	15.4	23	3.6	65.3	10.1
St. Petersburg	77694	10.4	22.1	2.3	62	6.4	61611	10.8	20.3	2.2	65	7
Voronezh Oblast	12565	23	16	3.7	65	15	10728	22.2	16.2	3.6	67	14.9

(1) "Settled" cases refer to cases in which the parties have reached a "peaceful agreement" (*mirovye soglaseniia*). *Spravka ob unverzhenii mirovykh soglasenii arbitrazhnyimi sudami Rossiiskoi Federatsii v 2008-2011 gg.*, (Aug. 15, 2012), [http://www.arbitr.ru/press-centr/news/totals/index\\_ar.htm](http://www.arbitr.ru/press-centr/news/totals/index_ar.htm); unpublished reports on the work of the regional *arbitrazh* courts for 2010 and 2011 (available with the author).

TABLE 2: INFORMATION ABOUT CASE DISPOSITION AT THE RUSSIAN JUSTICE-OF-THE-PEACE COURTS, 2011.

Court	Total civil cases decided	Adjusted total(1)	% of total cases terminated prior to decision	% of adjusted total cases terminated prior to decision	Settled cases as % of terminated cases (2)	Settled cases as % of total cases	Settled cases as % of adjusted total
Russian Federation	9165323	3001930	4.3	13.1	17.5	0.7	2.3
Moscow City	199620	68895	4.8	14	11.8	0.5	1.7
Sverdlovsk Oblast	210180	84279	14.8	14.8	10.7	0.6	1.6
St. Petersburg	134231	12983	16.3	16.3	10.7	0.2	0.4
Rostov Oblast	186709	57614	1.9	1.9	65.8	0.4	1.2
Pskov Oblast	29363	5419	23.4	23.4	32.9	1.4	7.7

(1) Excludes cases resolved through "judicial orders" (*stadebnye prikazy*).

(2) "Settled" cases refer to cases in which the parties have reached a "peaceful agreement" (*mirovye soglaseniia*). Reports on the work of the JP courts for Russia and for several regions for 2011 (available with the author).