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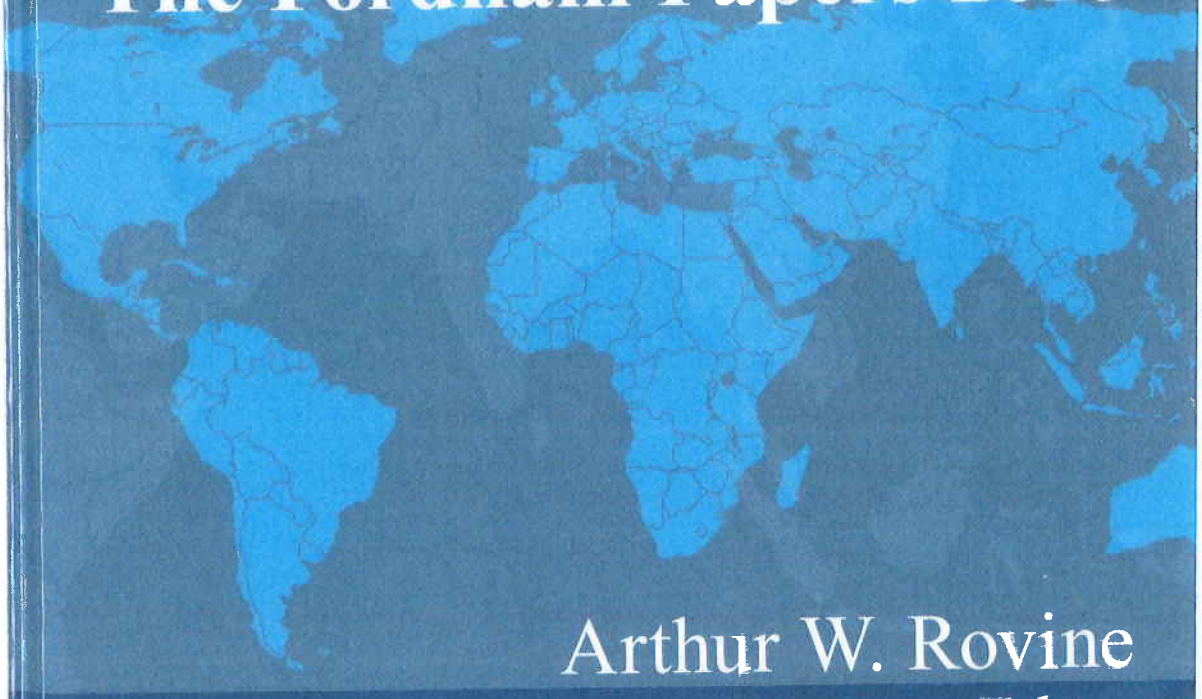

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Lessons from Russian Mediators

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INTRODUCTION

In December 2009, I had the good fortune of traveling to Moscow, with Magistrate Judge Robert Levy, as guests of the Department of Justice Office of Prosecutorial Development and Training (OPDAT) and the State Department. We were originally charged with providing a training of Commercial Mediators for the Russian Chamber of Commerce. The training later evolved into an International Conference on Commercial Mediation held on December 3, 2009 at the Chamber of Commerce's ceremonial building, the former Moscow Stock Exchange. The commercial mediation training was restructured as a "Master Class" for roughly 30 mediators, and held the following day.

In advance of our trip, we were asked to comment on a proposed Bill on Mediation that was supported by the Russian Chamber of Commerce and being submitted to the Duma. This author's comments on the Mediation bill were translated into Russian, and reviewed by the Chamber of Commerce proponents—a number of whom were lawyers—in advance of our arrival. The day before the International Commercial Mediation Conference, we met at the Chamber of Commerce to discuss the Bill and our Comments. The seriousness with which the Comments were considered and the Russian response were impressive.

This paper reports on the three elements of this trip: the Conference, the Commercial Mediation Training, and the Bill. We have been informed that, in the wake of these events, the Bill, in amended form, was adopted by the Duma. The Bill has been signed by the President and comes into effect on January 1, 2011.[1]

[1] A copy of the amended Bill (referred to herein as the "Amended Bill") may be found in Russian at http://www.mediacia.com/files/Documents/zakon%201.pdf, and in expedited English translation (subject to correction) at http://www.mediacia.com/files/Documents/Law_eng1.pdf. Readers fluent in Russian and English

Enforceability of mediation settlement agreements seemed to be a serious concern that we heard expressed with some frequency during our visit to Moscow. The Bill and the Amended Bill address this concern, making it plain that a settlement agreement is enforceable, and providing that it can be confirmed by a court or arbitral tribunal.[61]

PARTING SHOTS

Enactment of the Mediation Bill contains tremendous promise for the growth and development of mediation in Russia, and for the values of freedom and self-determination that the Bill zealously guards and promotes. It is interesting whether the degree of regulation and governmental power that is behind the Bill will be the paradoxical use of force that lets flower an entirely non-coercive and creative modality, supporting harmony and resolution.

involving mediator shall be considered as mediation clause ***provided that the agreement is concluded in writing.***" Amended Bill, Article 7.1 (emphasis added).

[61] Bill, Article 18; Amended Bill, Article 12.3.

a mediation unless authorized by the Court.[53] That provision did not remain in the Amended Bill. The Amended Bill contains fuller and more detailed elaboration of various types of privileged communications, including: willingness to mediate, opinions or offers, declarations (admissions), and readiness to accept an offer to settle.[54] It is also possible that the Amended Bill has curtailed protections of the original Bill against mediators' or organizations' being summonsed or interviewed as witnesses about facts learned in mediation.[55] The Amended Bill appears not to mention subpoenas and witnesses directly and qualifies limits on learning information from mediators by providing: "[i]t is not allowed to request information on mediation procedure from a mediator and from the organization carrying out activity on provision of mediation procedure, save for the cases provided by federal laws and unless the parties have agreed otherwise."[56]

WRITINGS REQUIRED: AGREEMENTS TO MEDIATE, PROPOSALS TO MEDIATE, SETTLEMENT AGREEMENTS

The need for a writing is seen at nearly every key stage: in the creation of agreements to mediate,[57] in proposals to mediate,[58] and to obtain an effective, enforceable settlement agreement arising out of the mediation.[59] Interestingly, Article 5.1 of the original Bill not only stated that an agreement to mediate needed to be in writing, but went further *expressly to invalidate* oral agreements to mediate. Laudably, the Amended Bill appears to have deleted the provision that expressly invalidates oral agreements to mediate.[60]

[53] Bill, Article 14.5.

[54] Amended Bill, Article 5.3.

[55] Bill, Article 14.4.

[56] Amended Bill, Article 5.4.

[57] Bill, Article 5.1; Amended Bill, Articles 7.1, 8.1.

[58] Amended Bill, Article 7.5. The original Bill does not appear explicitly to have required a writing for a proposal to mediate; *see, e.g.*, Bill, Article 7.2, 7.3.

[59] Bill, Article 17.1; Amended Bill, Article 12.1. Both versions require that the Settlement Agreement contain certain information identifying the parties, the subject matter of the dispute, the mediation procedure, the mediator, along with the settlement agreement's obligations, terms and conditions of performance.

[60] Article 7 of the Amended Bill appears to be where one would find any provision expressly invalidating oral agreements to mediate; yet, fortunately, no express invalidation clause remains in the Amended Bill. Of course, it still includes terms stating affirmatively that the mediation agreement is in writing, *e.g.*: "... Any reference in the agreement to the document containing conditions of dispute resolution

party freedom to bind oneself—this is the nature of freedom of contract. Accordingly, pre-mediation agreements to mediate—even for a given period of time or until the mediator declares an impasse—can also be an expression of party self-determination that should be upheld.

With these thoughts on self-determination in mind, we can take a look at the Mediation Bill's efforts to protect voluntariness in the termination of the mediation. Article 16 provides that a mediation may be terminated by: the parties' concluding a settlement agreement, the mediator's declaring an impasse, the parties jointly applying to the mediator to terminate the mediation, any party's written statement refusing to continue in mediation, or the expiration of the date provided by the parties for mediation.[48] Thus, any party at any time can call a halt to the mediation under the Bill and under the Amended Bill, as well.[49] Again, there is an open question what this provision does to mandatory mediation agreements which require the parties to mediate in good faith for a minimum time or those which provide that the parties must mediate until the matter is settled or the mediator declares an impasse.

CONFIDENTIALITY

The Bill[50] and Amended Bill[51] contain admirably comprehensive provisions protecting the confidentiality of mediation communications and providing for a mediation privilege. It should be noted that, unlike the provisions of the Uniform Mediation Act, there is no express language permitting the mediator to own the privilege. The mediator is bound not to disclose confidential mediation communications *unless* ***the parties*** *agree to the disclosure.*[52] The original Bill had provisions expressly protecting mediators and organizations from being targets of detective operations or investigations concerning

[48] This final provision appears to contemplate a mediation term defined by the writing pursuant to which the parties are participating in mediation.

[49] Amended Bill, Article 14.4. Interestingly, the Amended Bill provides that the mediation is terminated under this provision when the mediator receives the written statement of refusal to continue. This can be helpful in determining the end point of the time for which a mediator can bill. It is conceivable that a mediator can be caucusing with one party while the terminating party's termination notice is "in the mail." Under this provision, the mediator should be paid for that final caucus time.

[50] Bill, Article 14.

[51] Amended Bill, Article 5.

[52] Bill, Article 14.1, 14.2; Amended Bill, Article 5.1, 5.2.

an international treaty[44] providing for alternate rules concerning mediation.[45] Interestingly, the corresponding provision in the Amended Bill, Article 1.2, omits identification of the groups covered.[46] Accordingly, it is possible that the Amended Bill is limited to activities within Russia and might not affect mediation clauses relating to international transactions. It will be interesting to see how broadly Russian courts interpret the scope of this Amended Bill, and whether mandatory mediation clauses in international agreements will be honored and effected independently from this 30 day default provision.

The concerns on the 30 day default provision extend further in considering other provisions of the Bill that protect the typically laudable value of party choice and self-determination.[47] There has been interesting discussion in the U.S. and elsewhere over the last two decades of whether mandating mediation is inconsistent with the principle of party self-determination. In real practice, however, the use of court mandated mediation and of pre-dispute mediation clauses has been widespread. A working distinction seems to have been drawn, however, between requiring the horses to be led to water (by mandate or agreement), but then letting them decide how, whether, and how much they choose to drink. Self-determination within the process has been key. Moreover, the majority would no doubt agree that it is a part of

[44] Article 1.2 provides: "Where an international treaty to which Russia is a party stipulates for rules other than those specified by the Russian Federation legislation on mediated conciliatory procedure, the international treaty provisions shall prevail."

[45] If the Bill had not been amended, given the impact of this 30 day default provision on mandating mediation, there would be an open question whether non-Russian parties who would like to preserve meaningful mediation clauses should seek to develop an international treaty overriding the Bill, or to lobby for a technical amendment to the Bill in this regard.

[46] Article 1.2 provides: "This Federal law regulates the relations connected with application of mediation procedure regarding disputes, arising out of civil matters, including situations connected with realization of enterprise and other economic activities, as well as regarding disputes arising out of labor relations and family relations." http://www.mediacia.com/files/Documents/Law_eng1.pdf. Notably, this provision entirely omits the identification of these "activities" as those "by Russian and foreign corporations, citizens of the Russian Federation, foreign nationals, and stateless persons." (Bill, Article 2.1)

[47] Standard 1 of the Model Standards of Conduct for Mediators, prepared in 1994 and revised in 2005, by the American Arbitration Association, American Bar Association, and then SPIDR (later ACR), *e.g.*, identifies party self-determination as a "fundamental principle of mediation practice." Nevertheless, it recognizes that "a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards." http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf

textually indicated, reading might stretch Article 2.3 to include the scenario of a court's or arbitration tribunal's "proposal" that a matter go to mediation. The broad construction is even less likely since, by its terms, Article 2.3 states that the Bill does not apply. If it did not apply, it would make no sense to provide for Court or arbitration tribunal proposals of mediation, as contemplated by Article 7.1 at all.

Returning to the impact of the original Article 7.2 on pre-dispute mediation clauses, we must observe that this provision could have had an adverse impact on domestic transactions as well as on international transactions over which the Mediation Bill might be deemed to govern. In the U.S. for a good number of years, companies have been inserting mediation clauses into a wide variety of contracts. Since 1984, CPR has promoted the CPR Corporate Pledge, in which at least 4,000 signatories, including most major U.S. corporations, accounting for half the U.S. gross national product, recognize that litigation has its costs and drawbacks, and that there are superior alternatives which should be considered when disputes arise.[43] Companies who have recognized litigation's drawbacks have also found fault with the costs and lack of control associated with arbitration, and routinely insert mandatory mediation provisions as a first step in the dispute resolution spectrum when negotiations break down. One wonders what these companies would do if they know that the Mediation bill's 30 day default provision can gut the mandatory nature of a mediation clause.

To understand the potential impact of the original Bill on relations with foreign parties, we turn to Article 2.1, which provides that the Bill applies to "relations associated with the settlement of disputes arising in civil circulation and in connection with entrepreneurial and other economic activities by Russian and foreign corporations, citizens of the Russian Federation, foreign nationals, and stateless persons." Hence, foreign corporations and foreign nationals engaged in commerce with Russian corporations or citizens come within the scope of the original Bill, unless the Bill is trumped by

[43] Commenting on the pledge, in a piece entitled "Why a Corporate Policy Statement on Alternatives to Litigation?" CPR's former President, James F. Henry, reports: "The CPR Corporate Pledge has been actively supported by the Business Roundtable, the National Association of Manufacturers, the American Corporate Counsel Association and leading industrial organizations. More than 4,000 operating companies have committed to the CPR Corporate Pledge, including most of the largest corporations—a broad cross-section of American business that accounts for about one half of the aggregate of the gross national product." *See*, http://www.cpradr.org/Portals/0/corporatepledge.pdf.

INITIATING THE MEDIATION, VOLUNTARINESS, AND IMPACT ON DOMESTIC AND FOREIGN TRANSACTIONS

The Bill appears to contemplate a mediation's initiation by a proposal of a Court or Arbitral tribunal,[39] or, upon a party's request, by proposal of a mediator or an Organization.[40] The proposal may be made before or after a case has been filed with a Court or an Arbitral tribunal.[41] The Bill protects the voluntariness of mediation by providing that unless a written notice of acceptance of a proposal to mediation is received by the proposing party within 30 days, or within such other term that is specified in the proposal, the proposed conciliatory procedure (mediation) shall be deemed rejected.[42]

The 30 day default provision can significantly limit the force of pre-dispute mediation clauses. To some degree, it might also impede the development of mandatory, court-annexed mediation in Russia. Turning first to the court-mandated arbitration issue, we should note that Article 7.1 contemplates judicial or arbitral tribunal proposal of mediation. While we know that a court's "suggestion" is often honored under fear of consequence, nevertheless, if any party is empowered to demur by not accepting the proposal within 30 days, there would be greater limits on the power of courts to mandate mediation than exist in many forums in the United States. There is some question whether Article 2 creates an exception, preserving the possibility of mandatory Court annexed mediation in Russia. Article 2.3 provides: "This Federal Law shall not apply where the parties are *assisted in their dispute settlement* by a judge or an arbitrator in court of justice or arbitration proceedings." (emphasis added) A plain reading of this provision suggests a more narrow construction—that it applies only where a judge or arbitrator is directly involved in settlement conferencing. Under that narrow reading, Article 7.2 would apply to most scenarios where a court might consider referring a matter to mediation; hence, it does create an impediment to the development of mandatory mediation in Russia. A broader, and less

[39] Bill, Article 7.1; Amended Bill, Article 7.2.

[40] Bill, Article 7.3; Amended Bill, Article 7.7.

[41] Bill, Article 7.1; Amended Bill, Article 7.2.

[42] Bill, Article 7.2; Amended Bill, Article 7.5. It is somewhat difficult to understand the translation of provisions in Articles 7 and 8 that might create other means of initiating and compelling conduct of mediation, and whether these mechanisms operate without requiring the use of a written proposal—that is subject to the 30 day default rule—in order to initiate a mediation. If they do, then the 30 day rule may be narrowly construed as a provision dealing with the offer and acceptance phase of the formation a mediation agreement, only where no agreement is formed. Further clarification of the meaning of these provisions is needed.