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ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES AND RUSSIA: A COMPARATIVE EVALUATION

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I. INTRODUCTION

Legal dispute resolution, protection of citizens' and enterprises' rights, and defense of societal interests have traditionally been performed by a strong and independent judiciary branch of power. An efficient and well-organized court system are the necessary attributes of any law-abiding country.

Access to courts is indispensable in the spheres of criminal, administrative and constitutional law as courts are important guarantors of justice in these areas. But litigation is not always necessary or expedient in the private sphere, namely in matters regulated by civil and contract law. Equal partners of these relations have an opportunity to settle their disputes on their own or to use other methods of settling disputes.

Nowadays the practice of out-of-court means of dispute resolution is mostly characteristic of the legal system in the United States. These methods are an alternative to litigation, which despite its usefulness and significance for society, is a very formal, expensive, time-consuming and complicated process for disputing parties. The need to find other means that are simpler, less expensive, faster and more efficient has led to the

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use of “non-formal justice” for legal disputes resolution. The methods of such non-formal jurisdiction are known as alternative dispute resolution (“ADR”).

Unlike the United States with its extensive experience in alternative dispute resolution, this institution is in its infancy in Russia. Russia is only now developing an interest in out-of-court methods of dispute resolution. With economic changes, the number of new legal disputes has increased significantly. Russian courts of general jurisdiction are overloaded by civil cases. Ordinary litigation has become too expensive for the majority of the Russian people. In such conditions Russian society needs less expensive, more flexible alternatives to litigation.

The purpose of this paper is to compare the ADR experiences in the United States and the Russian Federation, and to consider some methods for its development in modern Russian society.

II. BACKGROUND OF ADR IN THE UNITED STATES

Beginning in the late 1960's, American society witnessed an extraordinary flowering of interest in alternative forms of dispute resolution. Part of the ADR movement responded to the civil rights strife. In the 1964 Civil Rights Act, Congress established the Community Relation Service of the Justice Department to assist courts in settling intractable racial and community disputes. The Ford Foundation established the National Center for Dispute Settlement and the Institute of Mediation and Conflict Resolution to study dispute settlement mechanisms.¹

Courts also became involved. At the 1976 Pound Conference,² leading jurists and lawyers expressed concern about increasing expense and delay for parties in a crowded justice system. A task force resulting from the conference was intrigued by Professor Frank Sander's vision of a court that included a dispute resolution center where parties would be directed to the process most appropriate for a particular type of case. The task force recommended public funding of a pilot program using mediation and arbitration, and the American Bar Association's new

1. See Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1 (1985).

2. The Conference was named after Professor and Dean Roscoe Pound, honored on the seventieth anniversary of his famous presentation before the members of the American Bar Association in 1906.

committee on dispute resolution encouraged the creation of three model “multidoor courthouses.”³

Since then, alternative methods have developed from elements of procedural reform into an integral part of the American legal system. At present many kinds of ADR exist in the United States. American lawyers count about twenty different alternative proceedings for settling legal disputes.⁴ There are primarily three well-known processes – negotiation, mediation, and arbitration. Elements of these processes have been combined in a number of ways to create a rich variety of so-called “hybrid” dispute resolution techniques such as the mini-trial, early neutral evaluation, med-arb, rent-a-judge, and the ombudsman. All of these methods could be described as non-court or private ADR practices.

In addition to the private sector, ADR programs have been implemented into the public justice system. The Civil Justice Reform Act of 1990 was created as a pilot program to develop cost and delay reduction in the federal district courts. As a result, different kinds of pre-trial alternatives have become available in the American courts: court-annexed arbitration, mediation, summary jury trial, and early neutral evaluation.

Moreover, the ADR movement is gaining new legislative support. In 1998, Congress adopted the Alternative Dispute Resolution Act, which requires federal district courts to establish at least one ADR program and to develop procedural rules for its wide and active use.⁵ Other efforts to improve and unify regulation deal with arbitration and mediation. The proposed Uniform Mediation Act and the Revised Uniform Arbitration Act has also been created. Both of these drafts are slated for final approval by the National Conference of Commissioners on Uniform States Laws (“NCCUSL”).⁶

A hallmark of the success of the American ADR movement is the strong support from non-profit professional organizations such as the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution. These organizations provide

3. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 8 (3d ed. 1999).

4. See Tom Arnold, *Why ADR? Alternative Dispute Resolution: How to Use it to Your Advantage*, ALI - ABA COURSE OF STUDY 19 (1996).

5. See John Bickerman, *Great Potential*, *DISPUTE RESOLUTION MAGAZINE*, Fall 1999, at 3.

6. The text of the Proposed Uniform Mediation Act with the prefatory and Reporter’s notes is available at <<http://www.pon.harvard.edu/guests/uma>>.

The Revised Uniform Arbitration Act (RUAA) was finally approved by NCCUSL in August 2000 and has now been submitted to the legislatures in all States. See <<http://www.adrworld.com>>.

legal communities with education, research, and alternative procedures in the area of ADR. They also play an important role in the creation of standards of ethics and professional responsibility for neutral persons in charge of resolving disputes.

The final point to be noted is the effort made by the American legal education system. Many law schools include courses on alternative dispute resolution in their curricula and have university-based conflict resolution programs.⁷ Courses on ADR, arbitration, mediation, and negotiation serve to orient students away from traditional litigation and towards dispute resolution.

Alternative dispute resolution has thus become institutionalized in the United States. This has been made possible because ADR provides society as a whole with definite benefits. Alternative dispute resolution helps to:

- cut parties' time and expenses;
- reduce court's caseloads and expenses;
- improve public satisfaction with the justice system;
- preserve parties' relationships;
- provide early and speedy settlement;
- provide accessible forums to people with disputes;
- teach the public to try procedures that are more effective than violence or litigation for settling disputes.⁸

The United States is not alone in its interest in developing and improving alternatives and supplements to litigation. Nor is it alone in reviving interest in the theory and processes of dispute resolution generally.⁹ The ADR movement has evolved in other countries, mostly in the common law systems such as Canada, the United Kingdom, Australia, and New Zealand.

7. For a list of graduate, international, and undergraduate programs in the United States current through August 1998, see 16 ALTERNATIVES 118-21 n.8 (Sept. 1998).

8. See GOLDBERG, ET AL., *supra* note 3, at 3.

9. See KARL J. MACKIE, A HANDBOOK OF DISPUTE RESOLUTION: ADR IN ACTION (Sweet and Maxwell 1991). Mackie also noted that "revival" is the most appropriate term in this context since too much can be claimed for ADR as a modern movement. Many of the techniques adopted in ADR, such as mediation, have an ancient history or have been used for decades in some fields such as labor relations or international affairs. *Id.* at 1-2.

Questions arise as to whether ADR can only develop effectively in the United States and other common law countries, and how great an impact the specifics of a legal system have on the ADR movement.

III. ADR IN CIVIL LAW COUNTRIES

Obviously, the wide implementation of ADR in the United States has been caused by factors predetermined by certain peculiarities of the American legal system, including the structure of the courts, the types of civil proceedings, and the nature of the legal profession. These peculiarities are based on the common law system to which the United States adheres.¹⁰ Like most European countries, the Russian Federation uses the civil law system which, was influenced by ancient Roman law. The main distinguishing feature of this system is that legislation is the primary source of law; court decisions must be based solely on statutory law. The question arises whether the concept of alternative dispute resolution is contrary to the civil law or civil law philosophy.

Alternative methods for resolving legal disputes are related to elements of the legal system which are minimally connected with and impacted by common law. Conflicts between people arise irrespective of the legal system existing in their country. Efforts to find ways out of conflicts are natural for all people. Their desire to settle a dispute ought to be supported by any law-abiding country by establishing simple, lawful and clear procedures. Hence, alternative dispute resolution is not only a legal construction; it is also a certain type of thinking and a philosophy leading to compromise, agreement, and peaceful resolution. The psychological boon of the ADR concept consists of a shift from the stereotype of litigation to an opportunity for using less stressful and time-consuming, more flexible and informal dispute resolution methods. It is fair to conclude that alternatives to litigation per se are universal and could be applied to any country regardless of local conditions and rules.¹¹

Contemplating the current position of ADR in civil law countries, it is interesting to note that there are many different out-of-courts methods of

10. "Common law," as the term is used in Anglo-American terminology, comprises the body of principles and rules which derive their authority solely from the usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs. BLACK'S LAW DICTIONARY 189 (6th ed. 1991). See also Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, 60 ARBITRATION 78, n.2 (May 1994).

11. The universal character of alternative methods and the possibility of their unification can be judged by such world famous institutions as International Commercial Arbitration and Ombudsman.

dispute resolution in Europe, including Russia. Individuals, corporations, and government agencies use these methods widely, but do not realize that such actions might be characterized at the common law as an alternative to litigation.¹² In other words, there is no developed concept of alternative dispute resolution in Europe. Nevertheless, in practice there exists in all civil law countries, a great deal of non-official mediation, conciliation, and the like within the framework of normal arbitral proceedings and – at least in some civil law countries – within the framework of regular state court proceedings. Arbitration has become very attractive and popular in the commercial area – both domestic and international. Many civil law countries have revised their arbitration laws during the last decades.¹³ Also, a number of contracts, such as joint venture agreements, provide for settlement routes before a binding procedure can be embarked upon.¹⁴

An example of the legislative framework existing in civil law countries can be illustrated by the experience of Argentina. In October 1995, Argentina enacted a law on mediation and conciliation. In part to alleviate the problem of court overcrowding, this law provided for mandatory mediation of most civil cases.¹⁵

Orientation of civil law countries toward wider implementation of alternative methods tends to develop slowly. New approaches to improving court policy through applying alternatives have been worked out. The European Union Committee of Ministers' recommendations emphasizes the necessity of assisting with agreements of disputing parties out of court, before or during trial. To reach this goal, the European Union suggests that its member countries:

- envisage pre-trial agreement procedures along with reciprocal stimuli or other means of dispute resolution outside the framework of a court trial;

12. See H. BROWN & A. MARIOTT, *ADR PRINCIPLES AND PRACTICE* (Sweet and Maxwell 1993).

13. See Pieter Sander, *ADR in Civil Law Countries*, *ARBITRATION* 35 (Feb. 1995).

14. See Otto De Witt Wijnen, *ADR: The Civil Law Approach*, *ARBITRATION* 38, 39 (Feb. 1995).

15. Argentine Law No. 24.537 "Mediation and Conciliation." Once a case is filed in an Argentine court it is assigned to a mediator, who is scheduled to begin within 60 days of notification of the respondent and relevant third parties. See Ethan Burger et al., *Making Mediation Work in Russia and Ukraine: The Need for an Appropriate Legal Framework*, 16 *ALTERNATIVES* 171, 173 n.11 (Dec. 1998).

- consider as one of the major tasks of judges the responsibility to seek an agreement between conflicting parties and to reach a settlement before or during any stage of a court procedure;
- to consider lawyers' efforts to seek agreements of parties before or during court proceedings as an ethical obligation, or to persuade competent institutions to consider such efforts as lawyers' ethical obligations.¹⁶

These recommendations are occurring in Russia as well as other civil law countries.

IV. THE CURRENT POSITION OF ADR IN THE RUSSIAN FEDERATION

It has been noted that Russia is revealing a growing interest in out-of-court methods of dispute resolution. This manifests itself in a number of ways. Let us consider two of the most important factors reflecting the current position of ADR in Russia:

- realization by the society of the need to create a parallel system of "non-formal jurisdiction"; and
- legislative tendencies toward development of alternative forms and improvement of proceedings.

The interest in out-of-court dispute resolution procedures manifests itself, first of all, in the study of the experiences of other countries in which the above-mentioned forms are already well developed and have been successfully used.¹⁷ As a result, Russian theory acquired the term "alternative dispute resolution," hitherto unknown to Russian law.

The use of this term by Russian jurisprudence does not demonstrate a blind imitation of foreign terminology. Rather, it shows the interconnection of different legal systems in the modern world which

16. *See Access to Justice: Recommendations of the Committee of Ministers to Member Countries of the European Union*, 7 ROSS. IUST. 5, 8 (1997).

17. Interest in foreign experiences of implementing out-of-court methods was created by a Soviet-British seminar organized by the Institute of State and Law. *See Elena A. Vinogradova et al., Out-of-Court Methods of Legal Disputes Resolution in the USSR and United Kingdom*, 11 SOV. GOS. I PRAAVO 127, 127-130 (1990).

Among modern publications the author could name her book, ELENA NOSYREVA, ALTERNATIVE DISPUTE RESOLUTION OF CIVIL CASES IN THE USA (Voronezh University Press 1999).

may lead to international understanding of universal institutions. For example, international commercial arbitration is universally understood as an alternative form of dispute resolution.

The concept of “alternative dispute resolution” and its Russian counterpart are now being used extensively in Russian legal theory and practice, and are similar to earlier practices of “out-of-court forms” of conflict resolution. In this author’s opinion, this substitution reflects a transition to a qualitatively new stage in society’s attitude toward the status quo. The long-felt need of Russian society to create an alternative sphere is reflected in the current flurry of such practices, and in the emergence of the so-called public “movement for alternative dispute resolution.”

Unlike the United States, Russia does not have varied methods of alternative dispute resolution. Arbitration is the most widely used form of ADR, and is actively used in commercial dispute resolution.

These changes are demonstrated by the increasing practices of well-known authoritative bodies such as the International Commercial Arbitration Court, the Marine Arbitration Commission and the Arbitrage, set up at the Chamber of Commerce and Industry of the Russian Federation, and also by the creation of new arbitration institutes. In Moscow alone there are over forty, and within the system of the Chambers of Commerce and Industry there are twenty arbitration courts. In 1996, the total number of such institutes in Russia was about 250, and about 1500 arbitrators were on their lists.¹⁸

Aside from arbitration procedures, a certain type of reconciliatory proceeding has been created as a sort of claim order of dispute settlement, “friendly” negotiations and mediation directly initiated by parties to a legal conflict.

Russian practice has been influenced by the introduction of a peculiar and noteworthy innovation in some parts of the country, like the cities of St. Petersburg and Stavropol and the Voronezh region. This is the creation of centers for the promotion of dispute settlement or conflict resolution with the purpose of direct participation in conflict settlement and in training specialists in the alternative sphere.

18. See Elena A. Vinogradova, *Alternative Dispute Resolution*, VESTN. VYSSH. ARB. SUDA RF 89, 93 n.8 (1997).

One of the major activities of the Russian Foundation for Legal Reform is the formation of the “Development of Alternative Dispute Resolution Methods,” and the creation within the framework of this project of the Russian movement for alternative dispute resolution. The most significant result of this project was an international conference held for the first time in Russia on “Alternative Dispute Resolution Methods: Mediation and Arbitration,” jointly organized by the Russian Foundation for Legal Reform and the Canadian firm Gowlings International Inc. This conference was held in Moscow on May 29 and 30, 2000. It may be assumed that the conference, with its broad representation of over 200 participants from different regions of the Russian Federation, marked an official start in the direction of introducing alternative dispute resolution into the legal system of modern Russia.

These developments give credence to the assumption that in today’s Russia, it is possible to speak not only about the emergence of a movement in support of alternative dispute resolution, but also about its wide practice and gradual expansion. This, in turn, shows that Russian society has realized the need to improve both state and non-state systems of legal conflict resolution.

At present, legislative regulation of alternative resolution of civil disputes essentially consists of legal regulation of arbitration activities and numerous reconciliatory elements in civil proceedings.

Arbitration falls within the jurisdiction of three acts which were adopted at different times: for dispute resolution with the participation of individuals (1964), for internal commercial dispute resolution (1992) and for international commercial dispute resolution (1993).¹⁹ The activities of Russian domestic and international arbitration, unlike those of the United States and many other countries, are traditionally regulated by different laws.²⁰

19 It is necessary to draw attention to the differences in terminology denoting arbitration in Russia. Arbitration of domestic commercial disputes has the name “treteiskii sud” which means literally the court of the third person. In the sphere of international commerce the term “arbitration” is used as it is the world over.

20. In respect to international arbitration there is a special law of the Russian Federation on International Commercial Arbitration of 1993. It is based on the UNCITRAL Model Rules. This fact is very important and means that Russian legislative regulation in the sphere of international arbitration follows the same pattern as many other countries including the United States, which have similar laws based on the above-mentioned uniform Rules. Further, the Russian Federation as a successor of the former Soviet Union has become a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958.

The need to improve legislation on arbitration, to make it correspond to the requirements of urgent practical issues, and to standardize the legislation predetermines the necessity of working out the draft of the unified federal law on arbitration. This has been developed over the last few years under the auspices of the Chamber of Commerce and Industry of the Russian Federation. In 1998, this draft was approved during its first reading by the State Duma of the Federal Assembly of the Russian Federation. Undoubtedly, this draft needs to be given prompt final approval and should be adopted. But the very fact of its existence reflects positive tendencies in the formation of legislative regulation of one of the leading alternative procedures.

Other private alternative procedures such as mediation and negotiations, although used in practice, are outside the official sphere of legal regulation. Thus, there are no guarantees of confidentiality in mediation, without which this institution, judging by experience in the United States, cannot operate effectively. With regard to negotiations, a corresponding clause is now frequently included in contracts by Russian entrepreneurs. However, in the majority of cases the clause has a formal character. In reality neither the disputing parties nor their representatives – the lawyers – are professionally ready to carry out negotiations.

American study of the modern Russian legal system has correctly noted that as a result of centuries of strict government market regulation, most Russians have not developed any significant entrepreneurial spirit. They have traditionally considered open compromise a sign of weakness.²¹ Compromise, reconciliation, and resolution are not part of Russian socialization. Conflict has always been regarded as unnecessary and contrary to the principles of Soviet society. Only one of two situations was possible – right or wrong. Victory for all participants in the conflict was not sought.²²

Overcoming these stereotypes would be an important step on the road to development of private alternative procedures. To this end, it is necessary, first of all, to develop a Russian negotiation theory, which requires special attention. Negotiations are not only an independent means of dispute settlement, they can be part of any other alternative procedure. Knowledge of theory and its applications will make it

21. See CH. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 330-31 (Michie Law Publishers 1997).

22. See Valeria Votchak, *The Movement Toward Conflict Management in the Former Soviet Union*, NAT'L INST. DISP. RESOL. F. 19 (Winter 1993).

possible to use different dispute resolution mechanisms successfully. Negotiation as a means of legal dispute settlement is the prerogative of the legal profession.

However, an approach to resolving legal conflicts can prevail in Russian legal education only with the input of a court procedure. This approach is reflected in various legal cases that students consider during tutorials and in publications on law practices. Out-of-court forms of dispute resolution are taught, as a rule, for not more than two hours during lectures on the law of civil procedure.

Some Russian state universities have developed corresponding teaching courses for law students. For example, in the last few years in the legal department of Voronezh State University students have been taught a special course "Arbitration (Treteiskie sudy) in the Russian Federation," comprising fundamentals of alternative dispute resolution in general and consisting of lectures and tutorials. The teaching of such courses should be based on the formulation of a new psychology of law students directed at alternative dispute resolution. The students need to be taught the theory of legal conflict, acquire skills for participating in reconciliatory procedures, and grasp the ethics of behavior necessary for persons engaged in independent and equitable conflict settlement. The United States' experience shows that successful ADR development is impossible without a new orientation. The lack of understanding of reconciliatory means of conflict settlement and the lack of drive on the part of the professionals (judges, lawyers, jurists, arbitrators) will not arouse an adequate interest among disputing parties.

Apart from private procedures, alternative dispute resolution includes reconciliatory procedures used in courts prior to the start of court proceedings. This is a separate sphere of legal regulation, a sphere of legal procedure.

During the last five years, Russian legislation in the area of procedure has been significantly renewed. In 1995, the Code of Arbitrary Procedure was adopted²³ and substantial changes in the Code of Civil Procedure were introduced. Both acts somewhat expanded the possibilities of peaceful dispute settlement, and include some elements of

23. It is important to note that this Code regulates the activities of the state courts of special jurisdiction which have been established for resolving commercial disputes. These are the so-called arbitration courts. Despite the similar terminology, these courts have nothing to do with private arbitration and private arbitration procedure.

reconciliatory proceedings. Thus, the signing of a voluntary settlement in civil cases in a court of general jurisdiction became possible not only during the proceedings but also at the preparatory stage. In state arbitration courts, one of the actions is the judge's efforts to reconcile the parties during the course of case preparation.

The introduction of the above norms is a partial but nevertheless important step on the road to the solution of civil procedure problems and to the introduction of alternative proceedings. The next step will be the introduction into the draft of a new Code of Arbitrary Procedure of an independent procedure of dispute settlement at the stage of case preparation for a hearing.

Thus, acting legislation and modern draft laws show the tendency toward the expansion of normative arbitration regulation and the separation of alternative reconciliatory procedures within the framework of civil and arbitration court proceedings.

The factors reflecting the practical needs of the society for alternative dispute resolution and the proper degree of legal regulation demonstrate that in present-day Russia, certain prerequisites for further progress in the sphere of ADR have been met. But it is too early to talk of sufficient development of the ADR sphere. This process cannot be hasty or forced. In the United States, for example, it took thirty years for that area to become an integral part of the legal system.

Certainly, in Russia this process will proceed at a different rate and will take a different course. It will be influenced by Russian historical and legal traditions, the peculiarities of its legal conscience, and economic and social conditions.

V. CONCLUSION

The comparative evaluation of some aspects of the alternative dispute resolution in the United States and Russia allows one to conclude that there is a certain similarity in tendencies of development in this sphere. Both in the United States and Russia the emergence of interest in alternative modes of legal conflict settlement is connected with society's disappointment with complicated and expensive systems of justice that contain intrinsic drawbacks.

The experience of both countries, each with a different legal system, confirms the fact that during a period of crisis for the judiciary, and with

its inability to deal with a growing volume of civil cases, the introduction of alternative procedures has become a necessary element of procedural reform. At the same time, alternative procedures do not and cannot replace the court system. They can be used as parallel modes without blocking the path to the litigation and without competing with it. The main approach to any problems connected with elaboration of ADR concepts should include the understanding of the fact that a developed ADR system, in the long run, satisfies the priorities of any rule-of-law state.

From the point of view of comparative law, the progress of alternative dispute resolution is not unlike the process of general legal development. Therefore, in conclusion, it would be appropriate to quote ADR authority Professor Frank Sander, who referred to the American legal system, but whose words can also be used to define the prospects of ADR development in Russia. "Ultimate success in the dispute resolution field will require a broad effort to expand our presently limited understanding. Progress will require continued experimentation and research, as well as attempts to conceptualize the field. Enhanced public education about the benefits to be derived from alternative modes of dispute settlement will be necessary. Above all, the ADR movement will require the broadened involvement and support not only of the legal and legal education establishments, but also of the political and social orders and the public at large. The potential benefits are simply too great to leave these challenges unmet."²⁴

24. See Frank E.A. Sander, *Dispute Resolution Within and Outside the Courts: An Overview of the U.S. Experience, Attorneys General and New Methods of Dispute Resolution* 13, 24 (National Association of Attorneys General and ABA, 1990).

