RUSSIA AND THE UNCITRAL INSTRUMENTS ON ENFORCEMENT OF INTERNATIONAL COMMERCIAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

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The UNCITRAL Working Group is currently developing an instrument on the enforcement of settlement agreements reached as a result of international commercial mediation. The instrument is aimed at creating a mechanism for simplified and accelerated enforcement of out-of-court settlement agreements concluded by the parties following such procedures (mediated agreements). Such international instrument, if implemented by states, can play a very positive role in the development of an out-of-court settlement of international commercial disputes through mediation, adding further certainty to the outcome of such a settlement. Adoption of this instrument would be useful for Russian participants in the foreign commerce, as well as for the development of the Russian legal system.

It would be useful to develop and then implement such instrument in the form of an international convention and amendments to the UNCITRAL Model Law on International Commercial Conciliation 2002. At the same time, the form of amendments to the UNCITRAL Model Law would allow to better take into account the specific needs of the Russian legal system and provide protection from the risks of abuse of the mechanism of simplified enforcement of mediated agreements.

The absence in Russia as well as in some other countries of the mechanisms for the simplified enforcement of out-of-court settlement agreements does not

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impede the implementation of such instrument. The UNCITRAL mechanism for simplified enforcement of settlement agreements provides an opportunity for the courts to minimize the risks of abuse on a case-by-case basis. It is generally balanced and takes into account the interests of the parties as well as public interests.

At the same time, while considering such implementation it will be necessary to elaborate further on the issues related to the need to combat the abuses.

Keywords: UNCITRAL; mediation; settlement agreement; mediated agreement; alternative dispute resolution (ADR); enforcement of arbitral awards.

В настоящее время Рабочая группа ЮНСИТРАЛ ведет подготовку документа о приведении в исполнение международных коммерческих мировых соглашений, достигнутых в рамках посредничества (процедуры медиации). Он направлен на создание механизма упрощенного и ускоренного приведения в исполнение внесудебных мировых соглашений, заключаемых сторонами по итогам таких процедур. Этот документ в случае его имплементации государствами может сыграть весьма позитивную роль в развитии внесудебного урегулирования международных коммерческих споров посредством медиации, внеся дополнительную определенность в результат такого урегулирования. Имплементация данного документа в случае его принятия ЮНСИТРАЛ была бы полезна для российских участников внешнеэкономического оборота, а также для развития российской правовой системы.

Разработка и последующая имплементация такого документа возможна как в форме международной конвенции, так и в форме поправок к Типовому закону ЮНСИТРАЛ о международной коммерческой согласительной процедуре 2002 г. В то же время форма поправок к типовому закону позволит в большей степени принять во внимание специфические потребности российской правовой системы и обеспечить защиту от рисков злоупотреблений механизмом упрощенного и ускоренного приведения в исполнение медиативных соглашений.

Имплементации подобного документа не препятствует отсутствие в России, а также в некоторых других странах механизмов упрощенного принудительного исполнения внесудебных мировых соглашений. Предусмотренный в документе ЮНСИТРАЛ механизм предоставляет возможность судам снизить риски злоупотреблений в каждом конкретном случае. Этот механизм в целом является сбалансированным и учитывает интересы сторон и публичные интересы.

В то же время работа по имплементации потребует для минимизации возможных злоупотреблений дополнительного рассмотрения всех возникающих вопросов.

Ключевые слова: ЮНСИТРАЛ; медиация; мировое соглашение; медиативное соглашение; альтернативное разрешение спора (АРС); приведение в исполнение арбитражных решений.

1. Introduction

When the international business chooses between the dispute settlement procedures, it usually pays attention to sustainability and enforceability of the result. This follows, in particular, from the global survey made within the recent Global Pound conference series: 52 % of those polled saw the demand for certainty and enforceability of outcomes as a key influencer on such decision[1].

As regards international arbitration, its legal result consists in an arbitral award, which, if necessary, can be internationally enforced through the mechanism established in the New York Convention in 1958. The court considering an application to enforce the award shall grant it without any further trial on the merits. The party against whom the award is enforced may invoke a very limited number of grounds for the court to refuse it.

Things are quite different with international dispute settlement by mediation. Its legal result consists in a settlement agreement reached with the assistance of a mediator («settlement agreement»). Should a party fail to fulfill it, the other party would have to commence litigation or arbitration against it through an ordinary procedure, often time-consuming and costly. This discourages use of international mediation which is a valuable tool for a smooth development of the world economy and has a great potential to harmonize turbulent business relations. Therefore the problem of establishing a special mechanism for international enforcement of mediated settlement agreements has come into international agenda.

In other words, a cross-border settlement agreement is usually considered as a contract and is internationally enforceable in the same way as other

[1] *Th.J. Stipanowich*, What Have We Learned from the Global Pound Conferences? (27 November 2017) <http://arbitrationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/> (last accessed – 29 January 2018).

contracts. Meanwhile, currently UNCITRAL carries out work to make it internationally enforceable in a way similar to foreign arbitral awards.

UNCITRAL Working Group has focused on working out draft instruments on enforcement of international commercial settlement agreements resulting from mediation[1] in the form of a convention and, as an alternative, amendments to the UNCITRAL Model Law on International Commercial Conciliation 2002 (hereinafter – Draft Convention, Draft Model Law; in total – Draft). At its 68th session on 5–9 February 2018 in New York the Working Group including the Russian delegation continued its work on preparation of the Draft.

This paper analyzes whether it makes sense for Russia to take part in such international convention or to adopt legislation following the proposed amendments to the said Draft Model Law.

The legal analysis in this paper is limited to Russian law only.

2. Essence of the Draft

The Draft aims to provide an opportunity to give legal effect and enforce settlement agreements outside the country of their conclusion in a simple and convenient way. With this aim, a party would need to apply at the court (or other competent authority) of the state where the agreement is sought to be relied upon. As the New York Convention of 1958, the Draft provides a limited list of grounds to refuse such application, such as an incapacity of the party, nullity of the agreement under the applicable law, and some others. Therefore, it is not about an automatic coercive enforcement of settlement agreements, but, in fact, it is *just about reducing the range of possible grounds for the court to refuse recognition and enforcement*.

[1] A/CN.9/WG.II/WP.205/Add.1 – Settlement of commercial disputes – International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/22/PDF/V1708322.pdf?OpenElement> (last accessed – 29 January 2018).
Initially the Working Group used the term «conciliation», but at its 67th session the Working Group reached a shared understanding that the terms «conciliation», «conciliator» and other similar terms should be replaced with the terms «mediation», «mediator» and corresponding terms in the instruments as well as in the UNCITRAL Conciliation Rules (1980) (see: A/CN.9/WG.II/WP.205 – Settlement of commercial disputes – International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation. Note by Secretariat, para. 4 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/16/PDF/V1708316.pdf?OpenElement> (last accessed – 29 January 2018)).

The Draft deals specifically with *international* «settlement agreements». An agreement is international if at least two parties to the settlement agreement have their places of business in different states; or the state in which the parties to the settlement agreement have their places of business is different from either: (i) the state in which a substantial part of the obligations under the settlement agreement is to be performed; or (ii) the state with which the subject matter of the settlement agreement is most closely connected[1].

The Draft does not cover enforcement of those settlement agreements, which have been approved by the court judgment in the state of their conclusion or by an arbitral tribunal as an arbitral award on agreed terms[2]. The agreements approved by the court judgment can be enforced abroad in the same manner as ordinary foreign judgments (and there are other international instruments for that, *e.g.* treaties on legal assistance and the Hague Choice of Court Convention of 2005). Foreign arbitral awards on agreed terms are subject to enforcement abroad like ordinary foreign arbitral awards in accordance with the New York Convention of 1958.

So, the essence of the Draft consists in creating a mechanism for a simplified cross-border enforcement of extrajudicial settlement agreements similar to the mechanism of simplified cross-border enforcement of arbitral awards established in the New York Convention of 1958 and in Art. 35 (Grounds for Refusing Recognition or Enforcement) of the UNCITRAL Model Law on International Commercial Arbitration.

3. Legal Effect and Enforcement of Settlement Agreements in Russian Law

At present, the following regime for enforcement of settlement agreements operates in Russia. A settlement agreement on a dispute arising out of civil legal relations, concluded by the parties as a result of mediation, conducted without referring the dispute to court or arbitral tribunal, is, in itself, a civil contract. Protection of rights violated as a result of failure to properly perform such contract is carried out by ways provided for by civil law[3].

An agreement concluded by the parties as a result of mediation, conducted after the referral of the dispute to litigation, may be approved by the

[1] Draft Convention, Art. 3(1); Draft Model Law, Art. 15(4).

[2] Draft Convention, Art. 1(3); Draft Model Law, Art. 15(3).

[3] Federal Law of 27 July 2010 No. 193-FZ (as amended on 23 July 2013) «On Alternative Procedure for the Settlement of Disputes Involving a Mediator (Mediation Procedure)» (hereinafter – Law on Mediation), Art. 12(4).

court as a settlement agreement in accordance with procedural legislation. The resulting ruling is enforceable as a court judgment on the merits or, as appropriate, legislation on arbitration[1]. If the parties concluded a settlement agreement after the referral of the dispute to arbitration they may ask the arbitral tribunal to render a consent award enforceable in the same way as an arbitral award on the merits.

Consequently, if a settlement agreement is concluded out-of-court, it is enforceable likewise as any other contract: through filing an appropriate claim at competent court or arbitral tribunal.

Russian legislation does not provide for a special procedure for enforcement of international settlement agreements.

Therefore, in Russian law now there is no special regime for enforcement of settlement agreements: it remains the same as for other contracts.

4. Advisability of Russia's Implementation of the Draft from Different Perspectives

4.1. Improvement of the Environment for Foreign Commerce and Investment Attractiveness of Russia

As follows from the mentioned above, in Russian law if a party to an out-of-court settlement agreement fails to perform its obligations voluntarily, the other party will be forced to file a claim at court or arbitral tribunal in ordinary proceedings. The proceedings can be very time-consuming: in states courts, due to several levels of judicial review; in arbitration, taking into account overall lengthy procedure. They also often prove costly, especially for foreign parties, and their outcome is frequently uncertain. As a result, parties tend to view the settlement agreement as an instrument that is not effective enough, and the attempt to settle the dispute peacefully – as a waste of time and other resources. Therefore they seek to resolve their disputes by litigation or arbitration, rather than settle them amicably. This prejudices the good business relations of the parties, which entails loss of profit. It also contributes to increasing the burden of caseload on judges.

In international business disputes, it is especially important for the parties to ensure the sustainability of the result of the dispute settlement terms: the legal force and enforceability of the settlement agreement in the jurisdiction where the counterparty and / or its property are located. This is connected to the additional difficulties for the foreign party to protect

[1] Law on Mediation, Art. 12(3).

their rights abroad (foreign legal system, costs for legal representatives, differences in legal culture).

Thus, the lack of a uniform legal mechanism for cross-border recognition of the legal force and enforcement of settlement agreements hinders the referral of the parties to amicable dispute settlement, in particular to mediation.

When making the decision to conclude a deal with a Russian party, it is important for the foreign party to make sure that in case of a dispute the parties will be able to effectively resolve it without resorting to court, and the concluded settlement agreement, if necessary, can be enforced in Russia without resorting to a lawsuit. Such confidence may become a decisive factor in favor of concluding a deal with a Russian business entity.

Russian participants in foreign trade are also interested in the result of the dispute settlement procedure which has legal force, in particular in the country of location of the foreign counterparty enterprise or their property, and is enforceable through a simple and straightforward procedure[1]. The Draft aims to ensure such result.

Consequently, the implementation of the Draft will make the outcome of the dispute settlement of international commercial disputes more sustainable and increase the investment attractiveness of Russia.

4.2. Development of Mediation of Economic Disputes in Russia and Beyond

Mediation is a technology for an amicable settlement of commercial and other disputes. Potentially it has a positive social and economic potential for Russian society, which stands out as highly contentious, with abounding conflicts[2]. At the same time, state courts are unable to cope with the resolution of these conflicts. Thus, the Russian courts of general jurisdiction an-

[1] This is indicated by Russian researches (see, *e.g.*: *O.V. Dmitriev & A.A. Furtak*, Nekotorye aspekty ispolneniya mediativnogo soglasheniya [Some Aspects of the Execution of the Settlement Agreement], Vestnik Omskogo universiteta [Bulletin of Omsk University], 2013, No. 3, p. 249–253).

[2] The advisor to the President of the Russian Federation V.F. Yakovlev noted that *«the ability to correctly resolve conflicts can significantly reduce discords in society. Over the past decades conflicts in society has increased dramatically. Our task is to find various ways to reduce conflicts. But more important is the ability to adequately exit conflicts, the ability to settle them based on the balance of conflicting parties' interests»* (Nemetskie i rossiyskie yuristy obsudili v TPP RF sovremennuyu praktiku i perspektivy razvitiya arbitrazha i mediatsii v Rossii i Germanii [German and Russian Lawyers Have Discussed in the Chamber of Commerce and Industry of the Russian Federation Modern Practice and the Prospects of Development of Arbitration and Mediation in Russia and Germany] (22 September 2015) <http://tpprf.ru/ru/news/nemetskie-i-rossiyskie-yuristy-obsuzhdayut-v-tpp-rf-sovremennuyu-praktiku-i-perspektivy-razvitiya-ar-i98167/> (last accessed – 29 January 2018)).

nually consider about 15 million cases[1], and state commercial courts – about 1.5 million cases[2]. Average caseload of a judge constitutes several hundreds of cases *per annum*[3].

The burden on judges is therefore extremely high and reduces the possibility of in-depth consideration of each dispute and the quality of the judgments rendered by the court. In this regard, it is necessary to support and develop mediation in every possible way, which the Russian top political leaders repeatedly draw attention to[4]. This also applies to commercial disputes.

Nowadays, mediation in Russia is practiced but uncommon. One of the reasons consists in the lack of trust towards the results of the procedure, the settlement agreement, or more specifically, towards its enforcement.

The Draft, as noted above (see Part 2), precisely aims at the creation of an international mechanism for a simplified enforcement of settlement agreements.

Its implementation will benefit amicable resolution of the controversies between parties to foreign economic transactions. It will give the parties confidence in the sustainability of the result of the dispute settlement procedure, increase legal certainty and promote a more active resort to mediations by the parties. Thus, the parties will be able to settle disputes more effectively themselves, rather than by a court decision or arbitral award. In such way adoption of the Draft Convention or Model Law will lead to implementation of legal rule *favor conciliationis* (favorizing reconciliation of disputing parties) contained in Russian procedural legislation[5].

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1 So, in 2015, courts of general jurisdiction examined in the first instance with a ruling (court order) about 16 million cases (see: Byulleten' Verkhovnogo Suda Rossiyskoy Federatsii [Bulletin of the Supreme Court of the Russian Federation], 2017, No. 1, p. 46).

2 Information on the practice of applying the Law on Mediation for 2015 (approved by the Presidium of the Supreme Court of the Russian Federation on 22 June 2016) (placed in the Russian law database «ConsultantPlus»).

3 «Sudya – ne mashina dlya prinyatiya resheniy» [«A judge is not a machine for making decisions»]: Interview with the Director General of the Judicial Department at the Supreme Court of the Russian Federation Alexander Gusev (6 December 2016) <https://iz.ru/news/649322> (last accessed – 29 January 2018).

4 For example, ex-President of Russia D.A. Medvedev, already in 2010 noted that *«the institution of mediation is without a doubt an absolutely positive thing. …This is just what has been suffered, what can be done quickly, without using the state machine and what is highly efficient»* («Institut mediatsii – absolyutno pozitivnaya veshch» [«Institution of Mediation is an absolutely positive thing»] <http://www.mediacia.com/news/133.html> (last accessed – 29 January 2018)).

5 Russian Commercial Procedure Code, Art. 190; see also Arts. 2 (*«The tasks of legal proceedings in arbitration courts shall be... 6) assistance in the formation and development of partnership business relations, the formation of customs and ethics of business turnover»*) and 138(1)

4.3. Development of the Russian Legal System

The implementation of the UNCITRAL Draft will entail further development of the Russian legal system: by creating a mechanism for enforcing international settlement agreements, it will also be logical to subsequently simplify the procedure for enforcing *domestic* settlement agreements (*i.e.* on disputes between Russian persons and without a foreign element).

At the same time, it would be reasonable to start the reform from the agreements on the settlement of *international* commercial disputes: in such transactions, the parties are usually most professional and able to protect their interests when negotiating agreements.

Consequently, the implementation of the Draft in Russia would positively impact Russian business turnover and, above all, Russian foreign economic activity. It will also contribute to further development of the Russian legal system.

5. Enforcement of Settlement Agreements in the Context of Russian Legal Culture

5.1. Insignificance of Mediation Experience in Russia as an Argument against the Implementation of the Draft in Russia

At present commercial disputes involving Russian parties are infrequently settled through mediation. Therefore, the very problem of improving the enforcement of settlement agreements has not yet been recognized as urgent by the Russian participants in international business turnover. This problem is rather familiar to companies in those countries, whose legal culture has already accumulated more significant experience in applying mediation. For example, the problem is known to the US companies, which more often conclude settlement agreements with each other, and also with parties from other countries[1]. Accordingly, they better understand the benefits of a simplified enforcement. That is why the USA is the initiator of the idea for the Draft[2].

(*«The arbitral tribunal shall take measures to reconcile the parties, assist them in settlement of the dispute»*).

[1] *E.I. Nosyreva*, Alternativnoe razreshenie sporov v SShA [Alternative Dispute Resolution in the USA], Moscow: Gorodets Publishing House, 2005.

[2] The Government of the United States of America submitted to the UNCITRAL Secretariat a proposal in support of future work in the area of international commercial conciliation. Its English version was submitted to the Secretariat on 30 May 2014 (see: A/CN.9/822 – Proposal by the Government of the United States of America: future work for Working Group II <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/822&Lang=E> (last accessed – 29 January 2018)).

So, in its comments in relation to the Draft Russia stated that *«[i]n the Russian Federation, the practice of using mediation/conciliation proceedings in commercial relations is currently in the very early stages of development. The business community in the Russian Federation has not yet gained the necessary experience for a broad application of this alternative method of settling disputes and differences of opinion in both domestic and international trade»*[1].

Scarcity of such experience does not mean, however, that it is too early to introduce the simplified mechanism for enforcement of settlement agreements. First of all, as a result of the implementation of the Draft, Russian participants in foreign economic activity will be able to take advantage of the simplified mechanism of enforcing the settlement agreement *on par* with foreign ones. Disputes arising in the conduct of international business are very diverse and can be settled on different terms. So, the terms of the settlement agreement, in many cases, can include obligations of an American or European company to pay money to a Russian legal entity. In that case, the simplified mechanism for enforcement will be very useful for the Russian party.

Secondly, the practice of mediation in Russia is not that small. As noted above, above 1000 cases annually settle by mediation[2].

Thirdly, one of the deterrents for the development of mediation is the absence of a simplified mechanism for enforcing a settlement agreement: Russian participants in foreign trade (their lawyers) fear that the outcome of the mediation will be insufficiently stable (not completely definitive), unlike judicial decisions. In favor of this, in particular, speak the results of the survey conducted by N.I. Gaidaenko Schaer: 86 % of respondents considered it necessary to legislatively enhance legal certainty and enforceability of the result of the agreement, reached by parties through extrajudicial mediation[3].

Many specialists from various countries of the world express the opinion that the attractiveness of amicable dispute resolution will increase if the

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[1] A/CN.9/846/Add.4 – Settlement of commercial disputes – Enforcement of settlement agreements resulting from international commercial conciliation/mediation – Compilation of comments by Governments, para. 4 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/041/89/PDF/V1504189.pdf?OpenElement> (last accessed – 29 January 2018).

[2] Information on the practice of applying the Law on Mediation for 2015 (approved by the Presidium of the Supreme Court of the Russian Federation on 22 June 2016) (placed in the Russian law database «ConsultantPlus»).

[3] *N.I. Gaidaenko Schaer*, Yuristy, sud'i i al'ternativnye sposoby razresheniya sporov: itogi odnogo oprosa [Lawyers, Judges and Alternative Dispute Resolution: The Results of a Poll], Treteyskiy sud [Arbitration Court], 2015, No. 1(97), p. 122–123.

settlement agreement reached during such procedure will use the regime of accelerated enforcement in a manner similar to the arbitral award[1].

Postponing adoption of a new mediation-enhancing legislation until a large mediation practice develops creates a «vicious circle»: the practice of mediation will not grow, because the legal environment is not favorable enough, and the environment will not improve, because considerable practical experience has not been accumulated. The Draft helps to «break» such a vicious circle.

In view of this, insignificance of mediation experience in Russia does not constitute a convincing argument against the implementation of the Draft in Russia.

5.2. Does Availability of Arbitration Make Mediation Unnecessary?

Russia also argues that *«as practice shows, the availability of international arbitration procedures to contractors on the whole meets the demand dictated by the current level of development of international economic relations. Almost all international contracts drawn up in the vast majority of commercial transactions in international commercial trade include an arbitration clause. This allows contractors who have reached a settlement agreement resulting from mediation/conciliation proceedings to have such an agreement enforced, having requested an arbitral tribunal to convert their settlement agreement into an arbitral award on agreed terms»*[2]. However, is it not necessary to establish favorable legal conditions for the parties so that they can settle their disputes without resorting to arbitration? Definitely yes, given huge expenses and time required for an international arbitration.

Furthermore, if the parties commence arbitration after their dispute is already settled, merely to render a consent award, this raises doubt as to international enforceability of such award because existence of a pending dispute constitutes a precondition of a genuine arbitration[3].

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[1] A/CN.9/514 – Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, para. 77 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V02/544/93/PDF/V0254493.pdf?OpenElement> (last accessed – 29 January 2018).

[2] A/CN.9/846/Add.4 – Settlement of commercial disputes – Enforcement of settlement agreements resulting from international commercial conciliation/mediation – Compilation of comments by Governments, para. 4.

[3] *Y. Kryvoi & D. Davydenko*, Consent Awards in International Arbitration: From Settlement to Enforcement, Brooklyn Journal of International Law, Vol. 40 (2015), No. 3, p. 845–849 <https://papers.ssrn.com/abstract_id=2580572> (last accessed – 29 January 2018).

In view of this, a simplified enforcement of mediated settlement agreements remains important notwithstanding availability of arbitration.

5.3. Combating Possible Abuse of the Simplified Mechanism by Dishonest Parties

5.3.1. Third Parties' Rights and Public Interests

At present, the level of legal culture in Russia is generally insufficiently high. In these circumstances, some dishonest participants in business turnover will definitely try to abuse the simplified enforcement mechanism of settlement agreements, *e.g.*, to cover illegal transactions, or for money laundering or tax evasion.

As known, dishonest persons try to use, *inter alia*, arbitration for illegal purposes: such parties initiate arbitral proceedings and eventually obtain an arbitral award in order to cover up the illegal transfer of money or other property. A similar possibility appears for them also through the use of cross-border settlement agreements: under the guise of the settlement agreement unscrupulous parties can effect a cross-border payment that does not have lawful grounds. However, the very possibility of abuse of the simplified mechanism for enforcing international commercial settlement agreements does not mean that such mechanism should be abandoned, as discussed in the framework of UNCITRAL. Above all, the mediation procedure itself aims at ensuring that the interests of the party are duly taken into account and reflected in the settlement agreement.

Studies of statistical data on the activities of Russian state courts have shown that the actions of the mediators in 2015 have been disputed neither in the courts of general jurisdiction, nor in the state commercial courts. Information on filing court claims against mediators (*e.g.*, on compensation for damages caused by the mediation procedure) remains unavailable. Cases of challenging validity of settlement agreements are rare. At the same time, according to statistical information from the Supreme Court of the Russian Federation, in 2016 mediation was successfully applied in 1223 cases[1], in 2015 in 1115 cases and in 2014 in 1329 cases respectively[2], which are rather considerable numbers.

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[1] Consolidated statistical data on the activities of federal courts of general jurisdiction and justices of the peace for 2016, No. 2 «Report on the Work of Courts of General Jurisdiction on the Review of Civil, Administrative Cases at First Instance», sec. 4 <http://www.cdep.ru/index.php?id=79&item=3832> (last accessed – 29 January 2018).

[2] Information on the practice of applying the Law on Mediation for 2015 (approved by the Presidium of the Supreme Court of the Russian Federation on 22 June 2016) (placed in the Russian law database «ConsultantPlus»), secs. 1 and 2.

Therefore, the risk of concluding a settlement agreement that grossly violates third parties' rights or public interests is not very significant.

Aside from that, the Draft is about enforcing contracts concluded between professional participants in foreign economic transactions. As a rule, each of them usually has in-house lawyers or consultants and procedures for internal approval of transactions that ensure the agreements being in accordance with the interests of the company.

Furthermore, the Draft contains a number of safeguards that allow counteracting the abuses and otherwise protecting public interests. Thus, when considering the issuance of a writ of execution to a settlement agreement, the court has the right to:

• any necessary document in order to verify that the [conditions] [requirements] of the Convention have been complied with[1]. This gives the court broad powers: if the judge doubts the legality of the transaction, then he or she has the right to demand proof of its legality;

• determine the law applicable to the operation and enforcement of the settlement agreement, if the parties have not agreed upon such law[2];

• refuse to enforce the settlement agreement, if this would contradict the public policy of Russia[3]. The application of public policy reservation allows to prevent significant violations in each particular case[4];

• refuse to enforce the settlement agreement if the dispute is not capable of settlement by mediation under Russian law[5]. For example, according to Art. 1(5) of the Law on Mediation, it does not apply if the dispute affects or may affect the rights and legitimate interests of third parties, not participating in the mediation procedure, or public interests.

It is also stipulated in the Draft that the state, upon accession to the Convention has the right to declare that the Convention does not apply to the settlement agreement, to which it is a party or any of its governmental agencies[6]. Russia should make such a reservation. This would prevent the risk of internationally enforcing a dishonestly concluded settlement

[1] Draft Convention, Art. 4(4); Draft Model Law, Art. 17(4).

[2] Draft Convention, Art. 5(1)(b); Draft Model Law, Art. 18(1)(b).

[3] Draft Convention, Art. 5(2)(a); Draft Model Law, Art. 18(2)(a).

[4] *D.L. Davydenko & A.N. Khizunova*, Znachenie i funktsii ogovorki o publichnom poryadke v inostrannom i rossiyskom prave [The Meaning and Function of the Reservation on Public Policy in Foreign and Russian Law], Zakon [Statute], 2013, No. 2, p. 31–38.

[5] Draft Convention, Art. 5(2)(b); Draft Model Law, Art. 18(2)(b).

[6] Draft Convention, Art. 8(1)(a).

agreement (*e.g.*, as a result of bribery) against a Russian governmental agency.

At the same time, taking into account the risk of abuse of the simplified mechanisms for enforcement of the settlement agreement, consideration should be given to the possibility for establishing additional guarantees (model legislative provisions) in the Convention, verifying the content of such agreements. Such guarantees may be, for example, the mandatory notary form of the agreement and its analogues; requirements for mediators: availability of professional status, registration in the register or participation in a self-regulated organization for mediators, availability of a mediator's signature on the agreement and others.

5.3.2. Violation of a Party's Rights

A dishonest party may abuse the simplified order of enforcement of settlement agreements against the other party. For instance, the settlement agreement may be concluded on disadvantageous terms for one of the parties due to the presence of a conspiracy with its representative or the defiance of the party's will, or due to inequality of bargaining power.

However, the Draft contains means to protect the rights of a *bona fide* party, against whom a settlement agreement is being enforced. Such party has the right to present evidence to the court that the settlement agreement is void, inoperative or incapable of being performed; or the obligations in the settlement agreement have been performed; or the settlement agreement is not binding, or is not final, according to its terms; or has been subsequently modified; or is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen[1].

In addition, the party has a right to refer to a competent court with a claim for recognizing the settlement agreement as invalid, or to use other remedies of similar nature. If, after that, the other party turns to the court to enforce the agreement, then the court may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security[2].

It seems that all of this allows preserving the balance of rights of the parties and protects against abuses of the mechanism.

[1] Draft Convention, Art. 5(1)(b), (c); Draft Model Law, Art. 18(1)(b), (c).

[2] Draft Convention, Art. 6; Draft Model Law, Art. 18(3).

Many of the mentioned mechanisms have long been used by the Russian courts when examining applications to issue writs of execution to arbitral awards[1].

Therefore, such mechanisms are known to Russian judges and have been tested in practice.

Aside from that, Russian courts have broad experience of examining applications on the approval of settlement agreements: a ground for refusal is breach of the law or a contradiction with the rights of other parties. To verify these circumstances, the courts also take appropriate measures, including demanding evidence.

In view of this, the risk in question does not seem to be significant, and there could be established adequate measures to minimize it, known to the Russian law and practice, and provided for by the Draft.

6. Other Pros and Cons

6.1. The Lack of Uniform International Standards for the Conduct of Mediation and Control over the Mediation Procedure

An analysis of the international experience in the regulation of mediation has shown that, at present, there is no uniformly accepted standard for the conduct of mediation and mediator training: different countries have their own standards[2]. As such, it does not pose a risk for Russia and its business turnover in case of the implementation of the Draft. The real risk consists in the improper conduct of mediation, leading to the conclusion of an agreement that grossly violates the interests of the party. This issue was examined above at Sec. 5.3.2. Aside from that, the Draft provides for the right of the party against whom the enforcement is sought, to refer to the following:

• there was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or

[1] Russian Commercial Procedure Code, Ch. 30, § 2.

[2] *N.I. Gaidaenko Schaer*, Al'ternativnye mekhanizmy razresheniya sporov kak unstrument formirovaniya blagopriyatnoy sredy dlya predprinimatel'skoy deyatel'nosti (opyt Rossii i zarubezhnykh stran) [Mechanisms of Alternative Dispute Resolution as a Tool of Creation of Favorable Environment for Entrepreneurial Activities (Experience of Russia and of the Foreign Countries)]: Monograph, N.G. Semilyutina (ed.), Moscow: INFRA-M, 2016 (placed in the Russian law database «ConsultantPlus»).

• there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement[1].

In those cases the court is to reject the enforcement of the settlement agreement.

It should be noted that the New York Convention of 1958 was adopted at a time when there was not yet a single standard of arbitration set out in the UNCITRAL Model Law on International Commercial Arbitration, which was adopted only in 1985. Nevertheless, this convention has become very successful, including in Russia[2].

Furthermore, the mediator, unlike the arbitrator, has no authority to make a binding decision for the parties on the substance of the dispute. Thus, the parties themselves determine the content of the settlement agreement.

Summing up, the existing risks of Russia's implementation of the Draft for Russia and its business turnover are not so significant as to outweigh the advantages associated with such implementation. At the same time, later it will be necessary to elaborate further on the issues related to the need to combat abuses, peculiar to states with a low legal culture.

6.2. Will Not the Mechanism Be Too Complex?

In its comments in relation to the Draft Russia also stated that the legal mechanism needed to enforce international settlement agreements is unlikely to be less complex than the current mechanism for enforcing international arbitral awards. In addition, to develop it will require unified solutions, which will be extremely difficult to achieve given the rather profound differences in approach in this matter among domestic legal systems, which largely reflect their prevailing cultural and legal traditions[3].

As a whole, the UNCITRAL legal mechanism is identical to the legal mechanism for enforcement of foreign arbitral awards that has long been

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[1] Draft Convention, Art. 5(1)(d), (e); Draft Model Law, Art. 18(1)(d), (e).

[2] ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, The Hague: ICCA, 2011, p. v <http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf> (last accessed – 29 January 2018).

[3] A/CN.9/846/Add.4 – Settlement of commercial disputes – Enforcement of settlement agreements resulting from international commercial conciliation/mediation – Compilation of comments by Governments, para. 4.

known to Russian law[1] and the issuance of writ of execution to domestic arbitral awards[2]. This mechanism is clearly more favorable for the creditor than filing a lawsuit.

Cultural differences are significant in disputes between individuals, especially in family or inheritance disputes, and disputes involving consumers. Therefore, these disputes are specifically excluded from the scope of the Draft[3]. In commercial disputes, especially international, these differences are minimal. Therefore, the creation of a uniform standards for the enforcement of international commercial settlement agreements is possible, despite the differences.

In view of this, this argument is not convincing.

6.3. Whether Special Regime for Enforcing International Settlement Agreements Can Be Harmoniously Integrated into the Russian Legal System

If Russia takes part in a convention based on the Draft or adopts legislation following the Draft Model Law, this will mean that cross-border settlement agreements will be enforced in a way different from domestic settlement agreements. However, such divergence between international and domestic dispute resolution rules is feasible. This is shown by the experience in successfully integrating international mechanisms in relation to international arbitral awards: the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention of 1958 have long been implemented into the Russian legal system with undoubted positive effect for the Russian foreign trade. Since long time enforcement of international and domestic arbitral awards is governed by different, though in many ways similar rules (see Sec. 6.2 above).

Aside from that, further consideration could be given to the possibility of developing an identical or similar mechanism for «domestic» settlement agreements.

In view of this, the special regime for enforcing international settlement agreements can be harmoniously integrated into the Russian legal system.

Consequently, the arguments against Russia's implementation of the Draft for Russia and its business do not outweigh the advantages of such implementation.

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[1] Russian Commercial Procedure Code, Ch. 31 (Proceedings on Cases on Recognition and Enforcement of Decisions of Foreign Courts and Foreign Arbitral Awards).

[2] Russian Commercial Procedure Code, Ch. 30, § 2.

[3] Draft Convention, Art. 1(2); Draft Model Law, Art. 15(2).

7. What Changes Need to Be Made to the Russian Legislation to Simplify the Order of Enforcement of Settlement Agreements in Accordance with the Draft

If Russia takes part in a convention based on the Draft or adopts legislation following the Draft Model Law, this will require the following changes to the Russian legislation. First of all, it will be necessary to amend the Law on Mediation, namely, to supplement it with a separate chapter «Recognition and Enforcement of International Mediated Agreements»[1]. It will provide for a procedure for the recognition and enforcement of international settlement agreements on commercial disputes in accordance with the Draft. It may be similar in structure to Sec. 3 (Enforcement of International Settlement Agreements) of the Draft Model Law.

Apart from that, the Law on Mediation will need to refer to the procedural legislation, for example, as follows:

«An international commercial settlement agreement, regardless of the country in which it was concluded, is recognized as binding and when a written application is submitted to the competent court, it is enforced subject to the provisions of the articles ..., as well as provisions of the procedural legislation of the Russian Federation».

Accordingly, it will be necessary to include into the Russian Commercial Procedure Code (or a similar code adopted in future) of the Russian Federation with a chapter on the recognition and enforcement / issuance of writ of execution for international settlement agreements on disputes arising from civil legal relations in the conduct of entrepreneurial (and other economic) activities. The chapter must apply where the party, against which an application for enforcement of the settlement agreement has been made, or the property of that party is located on the territory of Russia.

The chapter may be similar in structure to § 2 of Ch. 30 of the Russian Commercial Procedure Code.

The implementation of the Draft will not have a significant impact on the enforcement procedure because it will be carried out on the writs of execution issued by the Russian court upon the application of the party to the settlement agreement, in the same way as it is routinely done now on the writs of execution issued by the Russian court upon the application of the party to the arbitral award. Therefore amendments to the Federal Law of 2 October 2007 No. 229-FZ «On Enforcement Proceedings» appear unnecessary.

[1] Russian Law on Mediation uses the term «mediated agreement» (*«mediativnoye soglasheniе»*) to define settlement agreement.

8. Which Form of the Instrument is Preferable from the Ones Discussed in UNCITRAL?

UNCITRAL works out two instruments:
- Convention;
- Model Law (model legislative provisions).

Each of the discussed instruments is considered separately below.

8.1. Convention

The advantage of the convention as an instrument is that it creates a uniform legal regulation, mandatory for participating countries. In addition, such a convention, like the New York Convention of 1958, will prevail over the less favorable national legislation. This means that if the domestic legislation of a country does not provide for a convenient mechanism for enforcing international settlement agreements, then the parties (including, as appropriate, Russian participants in foreign trade) will still be able to enforce them in a simplified manner. From this point of view, the convention as an instrument is efficient.

Professor S.I. Strong from the University of Missouri conducted an international web survey on the development of the draft UNCITRAL convention on international commercial mediation. 74 % of the respondents (mainly lawyers) recognized the practicability of preparing and concluding a convention on the implementation of a settlement agreement, resulting from international commercial mediation[1]. However, a drawback of convention is that its entry into force, in view of its contractual nature, requires the consent of other states to participate. Many countries today have not expressed their opinion on the practicability of working on a new convention. In addition, as shown above, great differences exist between countries in regulating settlement agreements, as well as any agreements on dispute settlement, and also mediation, and there are no generally accepted standards. In Russia, same as in China, Croatia, Kazakhstan and Israel[2], unlike a number of other countries

[1] *S.I. Strong*, Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation (University of Missouri School of Law Legal Studies Research Paper No. 2014-28) <https://papers.ssrn.com/ abstract_id=2526302> (last accessed – 29 January 2018), p. 45. Geographical distribution of the respondents: 35 % from the USA, 11% from Great Britain, 27% from the rest of the countries in Europe, 13% from Asia (Ibid., p. 13).

[2] Law on Mediation, Art. 15(1).

(*e.g.*, France, Cyprus, Greece, Macedonia, Spain, Turkey)[1], the mediation law currently allows the activity of non-professional mediators who have not undergone special training. This raises doubts as to the quality of the resulting settlement agreements assisted by non-professionals.

The mediation practice also remains very different, in many countries it is still developing. However, some countries, *e.g.* Algeria, indicated the usefulness of developing an international instrument to recognize and implement such agreements[2], even though there are no specific provisions in their legislation on international commercial mediation.

In the light of the above, a wide adoption by states of the mediation counterpart of the New York Convention of 1958 can hardly be predicted in a short term. However, the adoption of the convention and the participation of Russia in it, makes sense in the long run: it will benefit all those involved in international commerce.

8.2. Model Law

The efficiency of the model law as an instrument relates to the fact that each state (including Russia) can adopt an appropriate regulation independently of other states. Also, each state has the right to opt out at its own discretion from the provisions of the model law. For comparison, limitation on the adoption of a convention can only be made on a small set of issues.

Accordingly, the model law gives states more freedom of action than the convention. It allows for differences between countries better than the convention. Mediation, as a procedure, is less uniform than arbitration because arbitration, by its nature, is an adversarial procedure and, as such, in many significant aspects is analogous to litigation, and mediation, by its nature, constitutes negotiations.

As a result, the drawback of the model law is that the legal regulation of the conditions and the procedure for enforcing settlement agreements may vary from country to country. This can lessen legal certainty.

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[1] *St. Asproftas, G. Matteucci, F.N. Arslan, O. Tsiptse, Š. Mačiulis, D. Shimoni, R. Tena, M. Padeanu, S. Šimac, D. Davydenko, U. Caser, S.M. Fleury, M. Karaketov, E. Ruiz Alvarado, E. Spiroska, S. Zheng Tang, J. Glavanits, D. D'Abate, M. El-Banna, G. Subramaniam, C. Rogula, F. Kutlik & M. Cornelis*, ADR in 24 Countries: Mediators and Ombudsmen <https://www.academia.edu/attachments/55554425/download_file?st=MTUxOTQxOTE3MiwyMTMuMjQuMTMzLjExNywzNjc4Mjcy&s=swp-toolbar> (last accessed – 29 January 2018).

[2] A/CN.9/846/Add.3 – Settlement of commercial disputes – Enforcement of settlement agreements resulting from international commercial conciliation/mediation – Compilation of comments by Governments, p. 2 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/039/98/PDF/V1503998.pdf?OpenElement> (last accessed – 29 January 2018).

At the same time, given the lack of uniform standards of mediation procedure and of uniform rules governing settlement agreement, a model law appears to be more practical instrument at least in the short run. It would allow to better take into account particular concerns of Russia (same as many other jurisdictions), such as the necessity to efficiently counteract abuses and ensure consistence with regulation of domestic settlement agreements.

9. Conclusions

Based on the analysis of the Draft, the global experience in regulating enforcement of settlement agreements, the Russian legislation and the practice of mediation, it makes sense for Russia to implement a mechanism for enforcing international agreements, resulting from international commercial mediation.

In itself, the absence in Russia and some other countries of the mechanisms for the simplified enforcement of out-of-court settlement agreements[1] does not impede the implementation of the Draft. The possibility of establishing such a mechanism for cross-border commercial settlement agreements does not require the prior availability of such mechanisms in all countries.

The implementation of the Draft entails a risk of abuse of the simplified procedure for enforcing a settlement agreement by dishonest parties against the other party, as well as the risk of its unfair use by both parties, for example, to cover illegal transactions, money laundering or tax evasion. The risk is related to the absence of unified world standards for conducting mediation procedure, guarantees of its quality and requirements to the mediator. As result, some settlement agreements might be illegal and might grossly violate the interests of one of the parties, third parties or public interests.

However, the Draft contains a number of safeguards to counteract abuses and otherwise protect the legitimate interests of the state and individuals. Above all, the Draft does not provide for the automatic enforcement of settlement agreements. Instead, it establishes a procedure for issuing the writ of execution to such agreements with the participation of both parties by the competent body of the state (the court). During the course of such procedure, enforcement may be refused on a limited range of grounds.

In particular, Russian competent state court would have the right to require parties to provide the necessary documents to verify the legality of the transaction, and is authorized to refuse to enforce the settlement agreement

[1] The term «out-of-court settlement agreements» in this paper encompasses those concluded outside litigation and arbitration.

if this will contradict the public policy of Russia. The court could also refuse to enforce the agreement if the mediator has exerted undue influence on any party or did not disclose circumstances that could cause grounds to doubt his / her impartiality or independence.

Nevertheless, taking into account the risk of abuse of the simplified mechanism for enforcement of the settlement agreement, consideration should be given to the possibility of establishing additional guarantees in the instrument to verify the content of such agreements. Such guarantees can be, for example, the mandatory notary form of the agreement and its analogues; introducing special requirements for mediators: availability of professional status, registration in the register or participation in a self-regulated organization for mediators, availability of a mediator's signature on the agreement and others. In this regards a model law appears to be more flexible and practical instrument than a convention.

When implementing the Draft, Russia should limit the scope of the simplified enforcement mechanism by stipulating that it does not apply to settlement agreements to which Russia itself or any of its public institutions are a party. The Draft allows this to be done.

The UNCITRAL mechanism for simplified enforcement of settlement agreements provides an opportunity for the courts to minimize the risks of abuse on a case-by-case basis. It is generally balanced and takes into account the interests of the parties and public interests.

Similar mechanisms are already known to the Russian judicial practice regarding enforcement of international arbitral awards. Considerable experience in their application has been accumulated by the state courts. Therefore, that risk for the law of Russia is known and controllable.

At the same time, it will be necessary to elaborate further on the issues related to the need to combat abuses.