NEW RUSSIAN LEGISLATION ON MEDIATION

30 August 2010

To Our Clients and Friends:

On July 27, 2010, the President of the Russian Federation signed into law the Federal Law *On an Alternative Dispute Resolution Procedure Involving an Intermediary (Mediation)* (the "Law on Mediation") and the complementary federal law *On Amendments to Certain Legislative Acts of the Russian Federation Following Adoption of the Federal Law On an Alternative Dispute Resolution Procedure Involving an Intermediary (Mediation)* (the "Complementary Law"). Both laws will enter into force on January 1, 2011.

The adoption of the Law on Mediation will facilitate the implementation of a new type of dispute resolution procedure in Russia using a mediator. Such a procedure was not previously provided for under Russian law. Although there were technically no obstacles to the parties resolving any dispute that may have arisen in the course of negotiations through an intermediary, there was no regulatory framework governing such procedure, and this gave rise to a great many questions, such as the binding nature of any agreement reached by the parties, what qualifications the mediator should have, whether the courts or any other competent bodies could require disclosure of information from the mediator, etc.

In introducing the institute of mediation into national legislation, Russia is moving in step with a general global trend as expressed in the adoption of Directive 2008/52/EC of the European Parliament and of the Council of the European Union of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters and the UNCITRAL Model Law on International Commercial Conciliation, many provisions of which have for the most part been reflected in the Law on Mediation.

We highlight below certain key provisions of the Law on Mediation and the Complementary Law.

PRINCIPAL FEATURES OF MEDIATION

Mediation is a dispute resolution procedure that involves an independent third-party individual acting as an intermediary (mediator). This is an alternative procedure to dispute resolution by a court or arbitral tribunal.

The principal difference between the mediation procedure and arbitration is that arbitration is a more formal process, which concludes with the arbitral tribunal handing down an award that is binding on the parties and may be enforced through the courts under a writ of execution.

Mediation is a far less formal procedure, which does not result in the mediator handing down a decision, but rather helps the parties to reach a mutually satisfactory resolution of their dispute. The agreement reached by the parties as a result of mediation is classified as a transaction, and not a judgment of a court enforceable under a writ of execution.

The procedure set forth in the Law on Mediation provides that mediation should be based on the mutual intent of the parties arising from the principle of voluntary exchange. The principle of voluntary exchange runs all the way through the mediation procedure, making it truly flexible and responsive to the wishes of the parties and allowing either party to opt out of the mediation procedure at any time with no reason being given. The process of mediation is also based on the principles of confidentiality, cooperation and equality of the parties in the proceedings, as well as the impartiality and independence of the mediator.

SCOPE OF MEDIATION

The Law on Mediation provides for the option of using mediation in resolving civil law disputes, including those involving commercial and other economic activity. While in Europe mediation generally may not be used to resolve labor and family law disputes, in Russia the Law on Mediation explicitly provides for such option (other than in the case of collective bargaining disputes). Additional categories of disputes may become eligible for mediation, but only if explicitly provided for in subsequent Russian federal law.

As in Europe, the mediation procedure in Russia cannot be applied to disputes involving the public interest, including taxation, customs, administrative and other similar disputes.

Mediation cannot be used to resolve disputes where it may affect the rights of third parties not involved in the mediation, or affect the public interest, such as disputes arising in the course of bankruptcy proceedings.

The Law on Mediation does not require that eligible disputes contain an international element; the mediation procedure is available in Russia for both domestic and international commercial disputes.

The parties may elect to apply the mediation procedure either prior to referring the dispute for resolution to a competent court or after commencement of judicial proceedings (see below).

MEDIATORS AND MEDIATION INSTITUTIONS

The parties may appoint one or more mediators to help resolve the dispute. Potential mediators or the procedure for appointing a mediator may be agreed by the parties in a mediation clause, an agreement on mediation or any other method.

Each mediator must be an individual (not a legal entity), although the parties may apply to a specialized mediation institution to help arrange the procedure and suggest candidates (or even to appoint the mediator, if the parties so agree). At present such specialized mediation institutions have yet to be created.

The mediators may be either non-professional intermediaries, or mediation professionals; the persons in each of these categories are subject to specific qualification requirements. If a dispute was referred to a court or to arbitration prior to commencement of the mediation procedure, the mediation may only be conducted by professional mediators. It is not essential that mediators be qualified lawyers, but professional mediators must have a degree from a higher education institution and have completed a special mediation course as part of a program that has been approved by the Russian Government and granted the relevant certificate.

Mediators may not be government officials, persons affiliated with either of the parties to the dispute, or other persons whose impartiality and independence may be called into question.

The Law on Mediation envisages the formation of self-governing bodies of professional mediators, which may, in particular, develop and set standards and professional codes of conduct for mediators.

COMMENCEMENT OF MEDIATION PROCEDURE

The mediation procedure may only commence pursuant to the voluntary intent of the parties, as expressed in a written agreement between them.

The Law on Mediation differentiates between two types of agreements between the parties to a dispute; an "agreement on mediation," or mediation clause, i.e., an agreement in principle to resolve existing or potential disputes between the parties by means of mediation, and an "agreement to mediate a dispute," *i.e.*, an agreement to mediate a particular dispute or disputes between the parties, containing a number of mandatory provisions, such as on the nature of the dispute, choice of mediator(s), allocation of costs, etc.

The "agreement to mediate a dispute" is mandatory for the commencement of any mediation procedure, while the mediation clause is not a mandatory pre-requisite for applying the mediation procedure. The parties may enter into an "agreement to mediate a dispute" without having first executed a mediation clause.

A mediation clause may be expressly included in an agreement (similarly to an arbitration clause) or executed as a separate agreement. In either case, if the parties have executed an

agreement with a mediation clause, then a court generally will not accept a matter for hearing until the parties have submitted to mediation or agreed otherwise (see below).

Pursuant to the Law on Mediation, mediation proceedings are deemed to commence on the date when the parties enter into an "agreement to mediate a dispute" in respect of a specific dispute that has arisen between them.

The Complimentary Law contains a key provision that protects the parties from the possible expiration of the statute of limitations relating to their dispute while the mediation is in progress. That law specifically provides that the execution of an "agreement to mediate a dispute" stays the statute of limitations period applicable to the dispute, as set forth in the Civil Code of the Russian Federation, from the date of execution of such agreement and until the mediation procedure is completed.

HOW MEDIATION AFFECTS ARBITRATION AND LITIGATION PROCEEDINGS

The Law on Mediation stipulates that the parties may agree to mediate a dispute either in advance of litigation or arbitration proceedings or during the course of such proceedings (such option remaining available until the court or arbitration tribunal, as applicable, issues a final judgment or award in resolution of the dispute).

The Law on Mediation provides that, where the parties have executed a mediation clause requiring them to attempt to mediate a dispute over a certain period before submitting the dispute to court or an arbitration tribunal, Russian courts and arbitration tribunals shall give effect to such obligation until it has been complied with, "except to the extent necessary for a party, in its opinion, to preserve its rights"[1]. Furthermore, amendments to the Federal Law On Arbitral Tribunals (Courts) (2002) introduced by the Complementary Law and taking effect from January 1, 2011 exclude the possibility of referring contractual disputes to a domestic arbitral tribunal[2] if the contract in question contains a mediation clause.

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[1] *This vague (and potentially broad) exception repeats the wording of the UNCITRAL Model Law on Commercial Conciliation (2002), which Russian legislators used as a basis for drafting the law. It remains to be seen how, exactly, this provision will be interpreted in Russian legal practice.*

[2] *Arbitration tribunals in Russia comprise international commercial arbitration tribunals (such as the ICAC with the Chamber of Commerce and Industry of the Russian Federation), acting on the basis of the Russian Federation Law "On International Commercial Arbitration" (1993) and primarily dealing with international commercial disputes, and domestic arbitration tribunals acting pursuant to the Federal Law "On Arbitration Tribunals (Courts)" (2002) and normally dealing with domestic commercial disputes. To date, the express prohibition on arbitrating a dispute arising out of a contract with a mediation clause was only included in the latter law with respect to domestic arbitration.*

However, the Law on Mediation also expressly provides that, despite the parties entering into an "agreement on mediation" or an "agreement to mediate a dispute", and even despite the actual initiation of mediation proceedings, neither party is precluded from submitting the dispute to court or an arbitration tribunal "unless otherwise provided in a federal law." At present, the prohibition of referring contractual disputes to domestic arbitration where a contract contains a mediation clause appears to be the only such exception (see above).

Where the parties have reached an "agreement to mediate a dispute" after a particular dispute has been submitted to a court or an arbitration tribunal, the litigation or arbitration proceedings are suspended for a maximum period of 60 days to allow the parties time for mediation.

MEDIATION PROCEDURE AND TIMING

The Law on Mediation contains only a few rules concerning the mediation procedure, leaving further details to the parties' discretion. For example, it provides that, unless the parties agree otherwise, the mediator shall not make his or her own recommendations to the parties concerning the possible terms of settlement. It also provides that a mediator may not subvert one party's interests or treat the parties unequally.

The period during which the mediation procedure is to be conducted should be set forth in a written agreement to mediate a dispute. The parties and the mediator are to make all efforts to complete the procedure within 60 days, though "in exceptional cases" the parties may, with the mediator's consent, extend this term. The mandatory limit on the duration of the mediation procedure is 180 days in all cases except mediation that is initiated after commencement of arbitral or litigation proceedings. In the latter case, the limit is 60 days, which coincides with the maximum period for suspension of litigation proceedings to allow for mediation, as provided in the Complementary Law.

TERMINATION OF MEDIATION PROCEEDINGS

Due to the voluntary nature of the mediation proceedings, the Law on Mediation provides that mediation may be terminated at any time by any of the parties simply by filing a notice to the mediator. A mediator may also terminate the proceedings if he or she reaches the conclusion that pursuing the proceedings further would be unproductive, after due consultation with all parties involved in the dispute. However, the Law on Mediation is not clear on the matter of whether the parties can then appoint a new mediator and make a further attempt to settle the dispute amicably by mediation.

Mediation proceedings will also terminate automatically if the applicable deadline imposed by the Law on Mediation or by the parties' agreement passes without the dispute being resolved.

MEDIATION AGREEMENT AND ENFORCEMENT

Where a dispute is settled by mediation the parties are to sign a written "mediation agreement" (*i.e.*, a settlement agreement). Pursuant to the Law on Mediation, such agreement must contain the names of the parties involved, the subject matter of the dispute, a description of the mediation procedure that was implemented, and the name(s) of the mediator(s). The "mediation agreement" must also set forth the parties' agreed obligations and the relevant timing and terms of the performance thereof.

The "mediation agreement" is to be performed by all parties voluntarily and in good faith.

The Law on Mediation also provides that a "mediation agreement" reached in the absence of litigation or arbitration proceedings is deemed to be a civil law transaction (contract), and all customary civil law remedies will be available in respect of such obligations, just as they are available for any other civil law transaction. The Law on Mediation expressly stipulates that, unless otherwise stated in the mediation agreement, such obligations are subject to set-off, novation, waiver of debt, release-money (break fees) and compensation for damages.

If a settlement in mediation proceedings (a "mediation agreement") is reached after commencement of litigation or arbitration proceedings, the court or arbitration tribunal "may approve such settlement as an amicable compromise (settlement) agreement, in accordance with the applicable procedural rules or rules on arbitration or international commercial arbitration," thus terminating the relevant arbitration or litigation proceedings. The mediation agreement is then enforceable as a settlement agreement in accordance with the applicable procedural rules. The court or arbitration tribunal may refuse to approve the settlement if it considers such settlement to be unlawful.

CONFIDENTIALITY AND DISCLOSURE, TESTIMONY

Pursuant to the Law on Mediation, all information exchanged by the parties or delivered to the mediator(s) in the mediation proceedings must be treated as confidential, unless the parties agree otherwise. Moreover, information disclosed to a mediator by one party may not be disclosed by the mediator to the other party without the former (disclosing) party's consent.

The Law on Mediation also provides that neither party may refer in litigation or arbitration proceedings to the other party's proposals, admissions or statements made in the course of mediation.

An additional important protection afforded by the Complementary Law is that mediators may not be called to testify in civil proceedings with respect to any of the circumstances learned by them during the mediation procedure.

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Debevoise has long been at the forefront of working to make international dispute resolution more efficient and effective. We are proud of the innovative ways in which we encourage our clients to consider all of their alternative dispute resolution ("ADR") options. Our International Dispute Resolution practice encompasses international litigation, arbitration, mediation and other forms of ADR. Our partners have often served as mediators and have represented parties in mediation.

We believe the hallmark of successful ADR is promotion of early and inexpensive dispute resolution. However, the first step is determining whether a particular dispute is suitable for resolution through ADR. To help our clients make this important judgment call, Debevoise was a pioneer in developing an ADR Screen and accompanying Workbook. Together, they facilitate objective decision-making about ADR. The Screen and Workbook, which significantly advanced efforts to incorporate ADR into the mainstream of legal practice, was first published in Alternatives to the High Costs of Litigation, in December 1994. This year, continuing our commitment to improve the ADR process, Debevoise issued a Protocol to Promote Efficiency in International Arbitration.

The Protocol, developed by members of the firm's International Dispute Resolution Group, identifies 25 specific procedures intended to make dispute resolution more efficient, including a section on Settlement Consideration, which advocates suggesting mediation, when appropriate, either at the outset of the case or after an exchange of submissions has further clarified the issues. Through the Protocol, the firm expresses its commitment to explore with its clients how such procedures may be applied in each case. No other law firm has made such a public and specific commitment to conduct international dispute resolution in this manner.

Please feel free to contact us for copies of the ADR Screen and accompanying Workbook or the Debevoise Protocol, which is also available on our website at:
www.debevoise.com/ArbitrationProtocol

We would be glad to answer your questions regarding the above and any related arbitration or litigation issues.

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