

JUDGES AS GATEKEEPERS TO MEDIATION: THE RUSSIAN CASE

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I. INTRODUCTION

Mediation has only recently been formally embraced in Russia. Though parties have long been encouraged to settle their disputes outside court,¹ the use of mediators has been authorized only since January 2011, when the Russian law on mediation went into effect.² Judicial officials hoped that the introduction of mediation would diminish the punishing caseload by diverting cases. Scholars and community activists hoped that mediation would open a route to greater societal harmony by allowing disputants a greater role in resolving their own problems. Significant sums were poured into creating mediation centers across Russia, many of which organized

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¹ Russia's procedural law requires judges to make parties aware of their right to settle. GRAZHDANSKII PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [GPK RF] [Civil Procedural Code] art. 150 (Russ.), available at http://www.consultant.ru/popular/gpkrf/8_16.html; ARBITRAZHNO-PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 49 (Russ.), available at http://www.consultant.ru/popular/apkrf/9_7.html. If the parties present their settlement agreement (*mirovoe soglasenie*) to the court before the judge renders her decision, then the plaintiff is entitled to receive half of his filing fee back from the court. NALOGOVYI KODEKS ROSSIISKOI FEDERATSII [NK RF] [Tax Code] art. 333.40(3) (Russ.), available at http://www.consultant.ru/popular/nalog2/3_7.html. Chapter 15 (arts. 138–42) of the APK RF details the requirements for *mirovoe soglasenie*. Filing fees are calculated as a percentage of the amount sought. NK RF, art. 333.21. Websites now exist that will calculate these fees, taking into account the specific features of the case. See, e.g., PROVORUB, <http://pravorub.ru/help/gosposhlina/> (last visited June 1, 2014).

² Federal'nyi Zakon RF ob Al'ternativenoi Protседure Uregulirovaniia Sporov s Uchastiem Posrednika (Protседure Mediatsii) [Alternative Procedure for the Resolution of Disputes with the Participation of Intermediaries (Mediation Procedure)], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2010, No. 31, Item 4162 [hereinafter Law on Mediation] (Russ.), available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=148723>. For an analysis of the debates surrounding the enactment of the law, see Kathryn Hendley, *What If You Build It And No One Comes? The Introduction of Mediation to Russia*, 14 CARDOZO J. CONFLICT RESOL. 727, 735–46 (2013).

pilot programs to cover the cost of mediators.³ Despite these efforts, Russians have generally resisted the lure of mediation.

Much ink has been spilt on speculation as to why mediation has been so slow to take hold in Russia.⁴ Given Russians' general preference for avoiding formal state institutions,⁵ many had assumed that they would leap at the chance to resolve disputes through mediation rather than using the courts.⁶ The success of the

³ In June 2013, a program to encourage mediation was initiated by the Moscow City *Arbitrazh* Court in collaboration with the Chamber of Commerce of the Russian Federation. Space for a "negotiating room" (*komnata primireniia*) was allocated, which was staffed with mediators three days a week. For the first six months (until the end of 2013), the mediators provided their services free of charge. Beginning in 2014, modest fees were charged. See generally *Komnata primireniia*, ARBITRAZHNI SUD GORODA MOSKVY [Moscow City Arbitrazh Court], <http://www.msk.arbitr.ru/node/14089> (2014) (Russ.). For more information on similar "negotiating rooms" at other *arbitrazh* courts, see TORGGOVO-PROMYSHLENNAI PALATA ROSSIISKOI FEDERATSII [Chamber of Commerce of the Russian Federation], *Matirialy* [Materials], <http://mediation.tpprf.ru/ru/materials/> (2014). Other pilot programs aimed at fostering mediation were aimed at the courts of general jurisdiction. See generally A.S. Krasnopevtsev, *Opyt primeneniia medatsii v mirovykh sudakh Sankt-Peterburga*, 3 TRETSEISKII SUD [Tret. sud] 144 (2011) (St. Petersburg); N.A. Plekhanova, *Primeneniia primiritel'nykh protsedur v Ivanovskoi oblasti*, 4 TRET. SUD 159 (2012); E.A. Smol'iannikova, *Rezultaty programmy "Razvitiie al'ternativnykh sposobov razresheniia sporov," realizuemoi Amerikanskoi assotsiatsiei iuristov v Rossii*, 5 TRET. SUD 179 (2011) (Rostov-on-Don).

⁴ See generally A.D. Karpenko, *Kriterii uspekhnosti medatsii*, 2 TRET. SUD 164 (2013); V.V. Lisitsyn, *Primiritel'noe prosrednichestvo i medatsiia v Rossii: problem stanovleniia i perspektivy razvitiia*, 4 TRET. SUD 150 (2012); Svetlana Fedorovna Litvinova, *Analiz nalichiiia v Rossii usloviiia razvitiia medatsii*, 1 ARBITRAZHNYI I GRAZHDANSKII PROTSESS [ARB. I GRAZH. PROTSESS] 8 (2013) (Russ.); Irina Valentinovna Reshetnikova, *I snova o medatsii. Kakoi ei byt' v Rossii?* 1 ZAKON 84 (2014) (Russ.).

⁵ Social scientists have long argued that Russians prefer informal methods of dispute resolution. See generally Kathryn Hendley, Peter Murrell & Randi Ryterman, *Law, Relationships, and Private Enforcement: Transactional Strategies of Russian Enterprises*, 52 EUR-ASIA STUD. 627, 637–40 (2000); Marina Kurkchian, *The Illegitimacy of Law in Post-Soviet Societies*, in LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 26, 31 (Denis J. Galligan & Marina Kurkchian eds., 2003). Nor is this a recent predilection. Historians argue that this preference for resolving problems informally dates back centuries. See Edward L. Keenan, *Muscovite Political Folkways*, 45 RUSS. REV. 115, 116, 119, 124–36 (1986). Indeed, historians of the late Tsarist period debate whether peasants were willing to use the *volost'* courts, created as part of the so-called Great Reforms of the 1860s. Some take the position that peasants generally took matters into their own hands, which sometimes resulted in barns being burned down or horse thieves being hanged. See STEPHEN P. FRANK, *CRIME, CULTURAL CONFLICT, AND JUSTICE IN RURAL RUSSIA, 1865–1914*, 248, 297 (1999). Others who have delved into the archives of the *volost'* courts argue that peasants made active use of them. See JANE BURBANK, *RUSSIAN PEASANTS GO TO COURT: LEGAL CULTURE IN THE COUNTRYSIDE, 1905–1917*, 195–96 (2004).

⁶ Russia is not bereft of alternative dispute resolution. Many disputes between Russian businesses and foreign companies are resolved through private commercial arbitration, a practice that dates back to the Soviet era. See Elliott Glusker, *Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications*, 10 PEPP. DISP. RES. L.J. 595, 597–600 (2010). Domestically, private commercial arbitration is available through the *treiteiskie sudy*. E.A. VINOGRADOVA, *TRETEISKII SUD V ROSSII* (1993) (Russ.). Such domestic tribunals

comrades' courts of the Soviet era, in which problems between neighbors were sorted out with the help of a third party who held the nominal title of judge but was not a state official, provides evidence of the potential for alternative dispute resolution in Russia.⁷ But mediation—even the word—is unfamiliar to most Russians. As they learn more about the process, mediation may grow more appealing to them. In the short run, many commentators have pointed to the role of judges as a key factor in litigants' decision about whether to use mediation. In an odd twist, the Russian law contemplates mediation only after a dispute is brought to court. In cases amenable to mediation, judges are supposed to discuss this option with the parties. If they are willing, then the judge suspends the case for up to sixty days to give them the chance to find a solution with the help of a mediator. When they reassemble, if the mediation has been successful, then the judge reviews the agreement reached and typically endorses it.⁸ If not, then the case resumes. The effect is to make Russian judges the gatekeepers to mediation. Given the low level of awareness of mediation, judges' attitudes towards this new procedure inevitably shape litigants' receptivity. Judges' behavior is no less important. Those who simply go through the motions, without explaining how mediation works, are likely to get few takers. On the other hand, judges who take

are not much used, although some large companies have set up these tribunals internally to handle disputes among their divisions. For insight into how this works at Gazprom, see *Interv'iu s Iu.N. Kolmazevym*, 5 TRET. SUD 11 (2013) (Russ.). For the results of a survey of users of *treteiskie sudy*, conducted by the All-Union Center for the Study of Public Opinion, see *Press-vypusk no.2409* [Press release], *Institut treteiskogo razbiratel'stva v Rossii: mnenie iuridicheskogo soobshchestva*, WCIOM.COM, <http://wciom.ru/index.php?id=268&uid=114500> (Sept. 24, 2013) (Russ.). As I have argued elsewhere, the relative speed and low cost of the *arbitrazh* courts diminishes the incentives for looking elsewhere. See Kathryn Hendley, *Business Litigation in the Transition: A Portrait of Debt Collection in Russia*, 38 LAW & SOC'Y REV. 305, 314–17 (2004).

⁷ The Russian literature on mediation does not reference the comrades' courts as an institutional predecessor to mediation. When I query present-day judges about these courts, they almost seem embarrassed by them. They are always quick to remind me that those who officiated at the comrades' courts were carrying out their social duties; they were not part of the state-sponsored judicial system (although anyone dissatisfied with the outcome of his claim in the comrades' courts could pursue it to a regular trial court). Perhaps these judges distance themselves because the comrades' courts were more concerned with inculcating the values of Communism than with following the law. For more on the comrades' courts, see GEORGE FEIFER, *JUSTICE IN MOSCOW* 113–29 (1964); Yoram Goralzki, *Delegalization in Russia: Comrades' Courts in Retrospect*, 48 AM. J. COMP. L. 103 (1998); Gordon Smith, *Popular Participation in the Administration of Justice in the Soviet Union: Comrades' Courts and the Brezhnev Regime*, 49 IND. L.J. 238 (1974).

⁸ Law on Mediation, arts. 4, 13–14. For more on the “mediation agreements” that emerge from the mediation process, see V.V. Lisitsyn & A.A. Furtak, *K voprosu o pravovoi prirode mediativnogo soglasheniia*, 4 TRET. SUD 84 (2012) (Russ.).

the time to walk parties through the potential benefits of mediation may have more success. Whether already overworked judges are willing to do more than the bare minimum is unclear.

In this Article, I investigate the role of judges in mediation in Russia. Using a mixed-methods approach that draws on my fieldwork in Russian courts as well as a 2013 survey of Russian judges, I explore their attitudes towards mediation and their willingness to recommend it to litigants. I use the survey data to inquire into the factors that tend to predict both their attitudes and behavior vis-à-vis mediation. The analysis reveals a remarkable division between judges' attitudes and their behavior. The surveyed judges are generally enthusiastic about the introduction of mediation, but this enthusiasm is not always reflected in their behavior. Many are reluctant to recommend mediation, and only a handful have presided over cases in which the parties opted for mediation. For both judges and litigants, their lack of familiarity with the nuts and bolts of mediation constitutes a barrier to their willingness to try this alternative to litigation. Looking more broadly at mediation as an example of legal development, it serves as yet another lesson of the risk of implementing reforms before creating a demand for them among potential users.⁹ Supplying new institutions, even when they have proven themselves elsewhere, may be necessary, but it is far from sufficient for success.

II. METHODOLOGY

My research focuses on the *arbitrazh* courts, the hierarchy of courts that resolves economic disputes in Russia.¹⁰ Since the introduction of mediation in 2011, I have spent time in Ekaterinburg, Moscow, St. Petersburg, and Voronezh, both observing the work of the *arbitrazh* courts and talking with scholars active in the local centers devoted to promoting the use of mediation. This fieldwork has given me the opportunity to observe a multitude of cases and

⁹ See generally Kathryn Hendley, *Legal Development in Post-Soviet Russia*, 3 POST-SOVIET AFF. 231 (1998); Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT'L L.J. 95 (2004).

¹⁰ In addition to the *arbitrazh* courts, Russia has a hierarchy of courts of general jurisdiction that handle cases involving individuals (rather than firms), as well as a stand-alone constitutional court. For an overview of the Russian legal system, see Kathryn Hendley, *Russian Federation*, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1377 (Herbert M. Kritzer ed., 2002) and PETER MAGGS, WILLIAM BURNHAM & GENNADY DANILENKO, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION (5th ed. 2012).

to see for myself the various approaches taken by Russian judges to mediation. I then had the chance to talk with these judges about the potential and reality of mediation. These encounters yielded wide variation among judges in terms of knowledge about, and commitment to, mediation.

In an effort to get a broader cross-section of experience, I collaborated on a survey of *arbitrazh* judges with researchers at the Higher *Arbitrazh* Court, then the top appellate court within the system. The qualitative fieldwork provided a starting point when developing the survey instrument. Judges were asked a range of questions about the use of mediation by litigants in their courts and about their attitudes toward mediation more generally. A series of demographic questions were included as controls, though the anonymity of respondents was carefully preserved. The survey was distributed via secure internal internet network to twenty *arbitrazh* courts between August and November of 2013.¹¹ The judges at the selected courts received an email requesting their participation in the survey. Participation was entirely voluntary. Judges received no reward for responding, nor were they punished for not responding. Judges could access the survey by clicking on a link created through Survey Monkey that was embedded in the email. We received 297 responses. As between the courts, the response rate varied wildly from participation by almost all the judges in a region to participation by only a handful.¹² The reasons for these variations are unclear, though likely depend on the commitment of the leadership of the various courts to the project. It is not surprising that the highest participation rates were in regions such as Sverdlovsk (Ekaterinburg), Voronezh, and Tatarstan (Kazan), with established mediation centers that have worked with the courts to train judges on how mediation works.¹³ Hypothesizing that attitudes and behavior would be heavily influenced by knowledge of the mechanisms of mediation, we endeavored to create a sample that was fairly evenly divided between those from regions with mediation centers and those without. Given the vicissitudes of the survey, it is somewhat remarkable that the sample includes an almost equal

¹¹ Bashkortostan, Cheliabinsk, Ekaterinburg, Ivanovo, Kareliia, Kazan, Kemerovo, Krasnoarsk, Moscow, Murmansk, Novgorod, Saratov, St. Petersburg, Sakhalin, Stavropol, Tyumen, and Voronezh.

¹² The response rates for each participating court: Bashkortostan (2%), Cheliabinsk (24%), Ekaterinburg (98%), Ivanovo (39%), Kareliia (18%), Kazan (77%), Kemerovo (13%), Krasnoarsk (19%), Moscow (18%), Murmansk (28%), Novgorod (64%), Saratov (50%), St. Petersburg (3%), Sakhalin (78%), Stavropol (56%), Tyumen (19%), and Voronezh (49%).

¹³ Other regions with mediation centers are Krasnoarsk, St. Petersburg, and Tyumen.

number of judges in each category, namely 149 judges from regions with mediation centers and 148 from regions without such resources. The analysis laid out below validates this hypothesis—greater familiarity with mediation gained through experience with a mediation center or acquaintance with a mediator tends to positively influence judges' attitudes and behavior regarding mediation.

I make no claim to having created a representative sample of *arbitrazh* judges. The survey is intended as a first effort to assess judges' attitudes and behavior regarding mediation. At present, the discussion of the reasons why so few have opted mediation has been entirely bereft of empirical data. The results of this collaborative survey provide a glimpse into the world of *arbitrazh* judges that allow for the formulation of more nuanced hypotheses that can then be tested with more carefully constructed samples.

III. BACKGROUND ON THE *ARBITRAZH* COURTS

Before delving into the results of my research, a few words of explanation about the *arbitrazh* courts are in order. These courts are a post-Soviet innovation, built on the institutional foundation of state *arbitrazh*, which was a quasi-administrative agency charged with resolving disputes between state-owned enterprises in the planned economy.¹⁴ The problems that arose between economic enterprises in the Soviet era had a specific character. Questions of quality and delivery time dominated, as one would expect in a system in which success was measured not by profit but by plan fulfillment. To resolve problems, managers' first response was typically to seek help either from their administrative superiors in the economic ministries or planning bureaucracy or from Communist Party officials, whose tentacles reached into every crevice of Soviet society.¹⁵ The only disputes that ended up in the state *arbitrazh* system were those that resisted resolution through these informal methods, perhaps due to their complexity or because one party

¹⁴ See generally Heidi Kroll, *Breach of Contract in the Soviet Economy*, 16 J. LEGAL STUD. 119 (1987); Stanislaw Pomorski, *State Arbitrazh in the U.S.S.R.: Development, Functions, Organization*, 9 RUTGERS-CAMDEN L.J. 61 (1977).

¹⁵ See generally JOSEPH S. BERLINER, *FACTORY AND MANAGER IN THE USSR* (1957); DAVID GRANICK, *THE RED EXECUTIVE: A STUDY OF THE ORGANIZATIONAL MAN IN RUSSIAN INDUSTRY* (1960).

wanted to signal to its superiors that its inability to fulfill its plan targets was beyond its control.

With the introduction of market institutions, the nature of disputes changed. Firms became more interested in compensatory damages for contractual breaches than in documenting late delivery or poor quality goods (though such disputes did not entirely disappear).¹⁶ As private entities, they also needed a forum where they could bring claims against the state. The state *arbitrazh* system was turned into a fully-fledged court system with the purpose of handling business disputes.¹⁷ Initially its jurisdiction was limited to cases involving legal entities (both firms and registered individual entrepreneurs), but in 2002, it was expanded to include all shareholder disputes, regardless of whether the shareholder is an individual or entity.¹⁸ These courts not only handle disputes between enterprises (and/or their shareholders), but also bankruptcies and disputes between enterprises and the state. Those who are dissatisfied with the outcome of their cases at the trial level can seek redress through the appellate process, first to the appellate courts and then to the cassation courts, which are part of the *arbitrazh* court hierarchy. Until recently, the Higher *Arbitrazh* Court served as the court of last resort within this hierarchy, but it merged with the Russian Supreme Court (previously the court of last resort for the courts of general jurisdiction) in August 2014. The Russian President, Vladimir Putin, first floated this idea at a policy conference in June 2013.¹⁹ It proceeded at lightning speed. Ignoring the protests of business lawyers and the opposition within the *arbitrazh* system, the legislatures (both national and regional) approved the necessary constitutional changes to eliminate the independent existence of the Higher *Arbitrazh* Court.²⁰ Cases ap-

¹⁶ For an overview of Russian industrial firms' disputing strategies, see Hendley, Murrell & Ryterman, *supra* note 6, at 627.

¹⁷ Kathryn Hendley, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 AM. J. COMP. L., 93, 96–111 (1998).

¹⁸ Kathryn Hendley, *Reforming the Procedural Rules for Business Litigation in Russia: To What End?*, 11 DEMOKRATIZACIYA 363, 367–68 (2003) (Russ.).

¹⁹ See Peter H. Solomon, Jr., *The Unexpected Demise of Russia's High Arbitrazh Court and the Politicization of Judicial Reform*, 147 RUSS. ANALYTICAL DIG. 2, 2–4 (2014) (Russ.), available at <http://www.css.ethz.ch/publications/pdfs/RAD-147.pdf>.

²⁰ The public has paid little attention to these reforms. In a November 2013 poll by the respected Levada Center, 51% had no opinion on the planned merger. The assessments of those who did weigh in were evenly divided between positive and negative. *Ob"edinenie Verkhovnogo i Vysshevo arbitrazhnogo sudov*, LEVADA TSENTR [Levada Ctr.] (Nov. 27, 2013), <http://www.levada.ru/27-11-2013/obedinenie-verkhovnogo-i-vysshego-arbitrazhnogo-sudov> (Russ.).

pealed from the lower *arbitrazh* courts will be heard by a separate panel of judges who were formerly on the Higher *Arbitrazh* Court.

Although many commentators have questioned the relevance of the *arbitrazh* courts, arguing that Russian firms prefer self-help remedies,²¹ the empirical data tell a different story. The caseload data collected by the courts show that the aggregate number of cases has increased over time. The number of cases heard annually by the *arbitrazh* courts grew from 338,162 in 2002²² to 1,409,545 in 2012,²³ more than a fourfold increase. Likewise, the per-judge workload has grown over time. In 1998, the average *arbitrazh* judge handled about twenty-four cases each month. By 2012, this number had more than doubled to sixty-six, though the number of judges did not keep pace.²⁴ In my interviews, judges routinely complained about the relentless pace of their work. Those surveyed confirmed this reality. A clear majority (55%) felt they were overworked, while only a handful (2%) said they had too little to do.²⁵ About half (46.8%) of those surveyed reported having to take work home almost every day. An additional 40% said they did so several times per week. Not only are the sheer numbers of cases high, but *arbitrazh* judges are also expected to work quickly. The procedural code establishes deadlines that are taken seriously. An ordinary civil case must be decided within three months of

²¹ See, e.g., Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996); Avner Greif & Eugene Kandel, *Contract Enforcement Institutions: Historical Perspectives and Current Status in Russia*, in ECONOMIC TRANSITION IN EASTERN EUROPE AND RUSSIA 291 (Edward P. Lazar ed., 1995); Jonathon R. Hay & Andrei Shleifer, *Private Enforcement of Public Laws: A Theory of Legal Reform*, 88 AM. ECON. REV. 398 (1998).

²² *Sudebno-arbitrazhnaia statistika o rabote arbitrazhnykh sudov v 1992–1994 godakh*, 4 VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VYSSHEGO ARB. SUDA ROSS. FED.] 75 (1995) (Russ.).

²³ *Spravka osnovnykh pokazatelei raboty arbitrazhnykh sudov Rossiiskoi Federatsii v 2011–2012 gg.* FEDERAL'NYE ARBITRAZHNYE SUDY ROSSIISKOI FEDERATSII [FASRF] [Federal Arbitration Courts of the Russian Federation], http://www.arbitr.ru/_upimg/BF8796D1244B55F004CA0BB3868259A4_6.pdf (Russ.).

²⁴ *Svedeniia o sudebnoi nagruzke v arbitrazhnykh sudakh Rossiiskoi Federatsii v 2010–2012 gg.* FASRF, http://www.arbitr.ru/_upimg/3A03DED0728DA4B9AFB86BF88212379F_2.pdf (Russ.).

²⁵ In a 2011 survey that included judges from both the courts of general jurisdiction and the *arbitrazh* courts, the results were similar, though a bit less one-sided. Less than half (46.5%) considered their workload excessive, while a majority (51.3%) viewed it as normal. Vadim Volkov, Arina Dmitrieva, Mikhail Pozdniakov & Kirill Titaev, *Rossiiskie Sud'i Kak Pprofesional'naiia Gruppy: Sotsiologicheskoe Issledovanie*, INSTITUT PROBLEM PRAVOPRIMENENIIA, EVROPEISKII UNIVERSITET V SANKT-PETERBURGE (2012), http://www.enforce.spb.ru/images/analit_zapiski/Jan_2012_NormsValues.pdf (Russ.). As with my survey, only 2% regarded themselves as under-worked. *Id.* at 46.

when the original complaint was filed.²⁶ Delays are relatively rare, occurring in less than 10% of cases.²⁷ Because their chances for advancement are linked to maintaining a low delay rate, judges have a strong incentive to live up to the statutory deadlines. Almost every *arbitrazh* judge I have ever met has spoken with regret about the conveyor belt quality of the justice she metes out. In an effort to ease the burden on judges, the procedural code was changed in 2012 to require judges to use a summary procedure when handling undisputed debt of up to 300,000 rubles (approximately \$10,000).²⁸ This procedural tool, known as *uproshchennoe proizvodstvo*, allows simple cases to be resolved on the basis of the pleadings, without a hearing, thereby freeing up judges to devote themselves to more complicated cases.²⁹ It was first introduced in 2002, but few judges utilized because it required them to find the case to be undisputed. If they erred, then a reversal was inevitable. Mostly, they took the safer route of holding hearings, even when it amounted to just going through the motions.³⁰ The 2012 amendments removed this discretion—the conditions for use of the accelerated procedure are now more straightforward. The effect has

²⁶ APK RF, art. 152.

²⁷ According to the official statistics published by the Higher *Arbitrazh* Court, between 2009 and 2013, the percent varied from a low of 5.9% in 2009 to a high of 7.8% in 2012. *Tablitsa osnovnykh pokazatelei raboty arbitrazhnykh sudov Rossiiskoi Federatsii v 2009–2013 gg.*, FASRF, http://www.arbitr.ru/_upimg/724306690007BEE7080EE56EAB938A93_1.pdf (Russ.). The notice of the first hearing is sent to the parties by mail. Confirmation of receipt is sent back to the court. APK RF, art. 119. The vagaries of the Russian postal service require that judges allow several weeks for this process, which cuts into the time available to deal with the substance of the case. If the case file does not contain evidence that the parties have received notice of the hearing, then the case must be postponed. *Id.* at art. 158. Not surprisingly, the idea of amending the law to relax these statutory deadlines was popular among the judges surveyed for this study—with 73% expressing support for the idea.

²⁸ APK RF, art. 227. If the case involves an individual entrepreneur, then the amount is decreased to 100,000 rubles. Russia's accelerated procedure shares a number of similarities to Germany's. *Id.* See generally Vol'frang Arenkhefel', *Uproshchennoe proizvodstvo v grazhdanskom prave FRG*, 1 VESTNIK VYSSHEGO ARB. SUDA ROSS. FED. 96 (2014) (Russ.).

²⁹ The survey, which included several questions about *uproshchennoe proizvodstvo*, provides some limited evidence that this reform has had the desired effect. A majority (52%) of respondents reported that it had given them more time to handle complex cases.

³⁰ See Kathryn Hendley, *Accelerated Process in the Russian Arbitrazh Courts*, 52 PROBS. POST-COMMUNISM 21 (2005). For a Russian perspective on the development of *uproshchennoe proizvodstvo*, see Irina Ivanovna Strelkova, *Razvitie institute uproshchennogo proizvodstva v arbitrazhnom protsesse*, 1 ARB. I GRAZH. PROTSESS 33 (2012) (Russ.).

been stunning: the use of *uproshchennoe proizvodstvo* increased from 5% of cases to 37.5% between 2012 and 2013.³¹

Given this obsession with the workload of judges, it is not surprising that mediation was initially trumpeted as a way to decrease their caseload.³² The experience of other countries suggests that the reality is more complicated. Certainly diverting cases to mediation can reduce the burden on judges, but these cases can boomerang back to the judge if the parties prove resistant to mediation. The real advantage of mediation is subtler. Because it allows the parties to probe more deeply into the sources of their disagreement, it can sometimes prevent other claims from ripening. *Arbitrazh* judges often pointed to disputes between business partners / shareholders who have grown disenchanted with one another. Their claims tend to take on an emotional tone that indicates that the court case is a pretext for revisiting personal slights. Absent mediation, the resolution of the case rarely ends the conflict. Rather it is the opening round in a tit-for-tat series of complaints that can eat up a lot of judicial resources. Mediation opens the door to a discussion of the roots of the conflict and a resolution that is more satisfying to both sides because they actively participate in working it out. But these sorts of economies are difficult to quantify.

The small number of cases in which mediation has been used suggests that such debates are premature. The official statistics for the *arbitrazh* courts data document that only a handful of cases have been resolved with the help of mediation over the three years since the new law came into effect. According to these official data, there were four cases in 2011,³³ five cases in 2012,³⁴ and eight

³¹ *Analiticheskaia zapiska k statisticheskomu otchetu o rabote arbitrazhnykh sudov v Rossiiskoi Federatsii v 2013 godu*, FASRF 6, http://arbitr.ru/_upimg/BA56B64409E63370CC611FE1DCC99CB8_an_zap.pdf (Russ.).

³² See generally N.V. Fedorenko, *Mediatsiia: ekonomicheskie i pravovye aspekty*, 5 TRET. SUD 156 (2007) (Russ.); A.S. Krasnopevtsev, *Opyt primeneniia medatsii v mirovykh sudakh Sankt-Peterburga*, 3 TRET. SUD 144 (2011); M.V. Samsonova, *Perspektivy razvitiia al'ternativnykh sposobov razresheniia sporov s uchastiiem grazhdan v Rossiiskoi Federatsii*, 1 TRET. SUD 141 (2008) (Russ.). Several Russian commentators pointed to Western experience to bolster their argument that mediation could reduce the workload of judges. See, e.g., E.I. Nosyreva, *Peregovory kak sredstvo uregulirovaniia kommercheskikh sporov: opyt SShA*, 5 KHOZIASTVO I PRAVO 123 (1999) (Russ.); G.V. Sevast'ianov, *Metody al'ternativnogo razresheniia kommercheskikh sporov*, 6 ROSSIISKAIA IUSTITSIIA 20 (2001) (Russ.).

³³ *Analiticheskaia zapiska k statisticheskomu otchetu o rabote arbitrazhnykh sudov v Rossiiskoi Federatsii v 2011 godu*, FASRF 5, http://www.arbitr.ru/_upimg/BF2D3B8F8961047431972C2285F4F18A_an_zap_2011.pdf (Russ.).

cases in 2013.³⁵ The survey results indicate that these official data have underreported the incidence of mediation. Although 276 of the 297 participating judges reported no use of mediation, the remaining twenty-one judges had resolved sixty-one cases using mediation. Even so, given that the *arbitrazh* courts hear well over a million cases every year, these few cases represent the proverbial drop in the bucket. But perhaps this is not the best point of comparison. It would be interesting to know how often judges recommended mediation to parties and how often parties started down that road. Sadly, this information is not available. The survey of *arbitrazh* judges begins to fill this gap.

Top officials within the *arbitrazh* courts did not interpret the slow take-up rate for mediation as a death knell. Instead, they debated how to reconfigure the institutional incentives underlying mediation to encourage greater use. Staff members at the Higher *Arbitrazh* Court drafted a set of amendments to the mediation law and the *arbitrazh* procedural code that, among other things, would have allowed retired judges and judicial clerks to serve as mediators.³⁶ This draft law was sent to the legislature in December 2012, but has yet to be enacted. Since that time, the leadership of the *arbitrazh* courts has been preoccupied with internecine political battles due to the Kremlin's decision to merge the Higher *Arbitrazh* Court into the Supreme Court. Given this, the Court's lack of attention to the ups and downs of mediation is understandable. In addition, this initiative to vest greater control over mediation with judges has been opposed by mediation activists who are understandably concerned that this change would severely curtail the role for private mediators.

³⁴ *Analiticheskaia zapiska k statisticheskomu otchetu o rabote arbitrazhnykh sudov v Rossiiskoi Federatsii v 2012 godu*, FASRF 6, http://www.arbitr.ru/_upimg/DFF18C5F128D5D4EF1164A800A18CD1E_1.pdf (Russ.).

³⁵ FASRF, *supra* note 31, at 7.

³⁶ Proekt federal'nogo zakona N 121844-6 "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v sviazi s sovershenstvovaniem primiritel'nykh protsedur," [Draft Federal Law N 121844-6 "On amendments to certain legislative acts of the Russian Federation in connection with the improvement of conciliation procedures"], Aug. 2, 2012 (Russ.), available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=97189>. For a brief legislative history, see A.E. Solokhin, *Evolutsiia zakonoproekta VAS RF o sudebnoi mediatsii*, 1 TRET. SUD 119 (2012) (Russ.). For scholarly assessments of the proposed amendments, see S.K. Zagainova, *Zakliuchenie po zakonoproektu VAS RF*, 1 TRET. SUD 137 (2012) (Russ.). The court proposed these amendments pursuant to its right of legislative initiative. See generally Andrei Avtonomovich Bulykin, *Vysshii Arbitrazhnyi Sud Rossiiskoi Federatsii v roli zakonodatelia*, 2 ARB. I GRAZH. PROTSESS 54 (2013) (Russ.).

IV. THE SURVEY: *ARBITRAZH* JUDGES' ATTITUDES AND BEHAVIOR REGARDING MEDIATION

The remainder of the Article reports on the results of the survey. I begin by exploring what the survey reveals about *arbitrazh* judges' attitudes towards mediation and its place in the Russian legal system. I then turn to judges' behavior and investigate whether they are open to the use of mediation to resolve cases. With respect to both attitudes and behavior, I use statistical analysis to determine what factors tend to be associated with positive attitudes towards, and/or a willingness to encourage the use of, mediation. Of particular interest is the extent to which attitudes drive behavior or vice versa.

A brief description of the sample will help put the results in perspective. The survey included the standard demographic questions. The *arbitrazh* courts do not publish data about the composition of their judicial corps, so it is impossible to know whether the sample mirrors the larger population. Dating back to the Soviet era, the judicial profession has been dominated by women. Though the increase in salaries and prestige has begun to attract men, it is not surprising that women comprised 60% of the sample. Likewise, the dominance of Russians (85%) among the respondents is to be expected. In terms of age, almost half (45%) of respondents were in their thirties, and received their legal education in the tumultuous 1990s.³⁷ Close to half had spent their entire work lives in the courts, having been clerks (*pomoshchniki*) before becoming judges. The age at which the respondents went on the bench ranged from twenty-four to fifty-four, with a mean age of 35.3.³⁸

³⁷ As in other European countries, legal education in Russia is an undergraduate enterprise. Until recently, it was a five-year process. For an overview of Russian legal education during the 1990s, see Jane M. Picker & Sidney Picker, Jr., *Educating Russia's Future Lawyers—Any Role for the United States?* 33 VAND. J. TRANSNAT'L L. 17 (2000). In 2003, Russia joined the Bologna Process with the goal of harmonizing its educational program with the rest of Europe. As a result, the basic legal education course now requires only four years. See generally Anatoly Kapustin, *The Bologna Process: Practical Steps for Russian Law Schools*, 35 INT'L J. LEGAL INFO. 245 (2007), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1099&context=ijli>.

³⁸ *Arbitrazh* judges are appointed by the president upon the recommendation of judicial qualification commissions. Openings are advertised. Candidates must have a law degree and at least five years of experience. Judges are selected on the basis of the results of written exams, interviews with the members of the commissions, and security checks. Despite the seemingly objective criteria (which are analogous to that of many other countries with a civil law legal heritage), subjectivity has crept into the process. The preferences of court chairmen are taken

Looking past these standard categories, the survey provides some insight into how judges think about themselves and about the law. By comparing the results from this survey to those of a more broad-based survey of Russians, we can begin to get a sense of how judges are different from others. For this purpose, I make use of the results from various rounds of the Russian Longitudinal Monitoring Survey-Higher School of Economics (RLMS-HSE). The RLMS-HSE is a nationally-representative household-based panel survey of Russians that uses a stratified cluster sample.³⁹ Both surveys asked respondents to agree or disagree with statement: “[i]f a person considers the law unfair, then he has the right to ‘go around’ it.”⁴⁰ It is a question designed to uncover legal nihilism which, according to common wisdom, is rampant among Russians.⁴¹ The results from the 2012 round of the RLMS-HSE document that almost 20% of Russians would be entirely comfortable ignoring the law under these circumstances. Another 16.6% are unsure what they would do. But a solid majority (59.3%) disagree with this idea, suggesting that Russians’ adherence to legal nihilism has been overblown.⁴² Judges are markedly less receptive to going around the law. Less than 4% agreed with the statement. The same number expressed ambivalence. Well over 80% disagreed. It is hardly surprising that judges would be more law abiding than

seriously, which helps explain why former clerks enjoy more success than other groups. For more on judicial selection, see Alexei Trochev, *Judicial Selection in Russia: Towards Accountability and Centralization*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 375 (Kate Malleon & Peter H. Russell eds., 2006). For a critique of the judicial selection process for its failure to include representatives of non-governmental organizations, see N. Tagankina, *Rol’ predstavitelei obshchestvennosti v povyshenii nezavisimosti ii effektivnosti pravosudiia v Rossiiskoi Federatsii*, in *MOSKOVSKAIA KHEL’SINSKAIA GRUPPA* (2011) (Russ.).

³⁹ For background on the RLMS-HSE, see *THE RUSSIAN LONGITUDINAL MONITORING SURVEY-HIGHER SCHOOL OF ECONOMICS*, <http://www.cpc.unc.edu/projects/rlms-hse> or its Russian-language counterpart, available at <http://www.hse.ru/rlms/> (Russ.). Since 1992, it has been fielded on a regular basis through a collaboration between the Institute of Sociology of the Russian Academy of Sciences, the Higher School of Economics, and the Carolina Population Center at the University of North Carolina.

⁴⁰ Because such a statement is susceptible to multiple translations into Russian, knowing the precise language is useful: “Если человек считает закон несправедливым, то он имеет право ‘обойти’ его.”

⁴¹ At the outset of his successful presidential campaign in 2008, Dmitrii Medvedev famously remarked: “[w]ithout exaggeration, Russia is a country of legal nihilism. . . . [N]o other European country can boast of such a level of disregard for law.” *Polnyi tekst vystypleniia Dmitriia Medvedeva na II Grazhdanskom forume v Moskve 22 ianvaria 2008 goda*, *ROSSIISKAIA GAZETA [Ros. Gaz.]*, Jan. 24, 2008, <http://rg.ru/printable/2008/01/24/tekst.html> (Russ.).

⁴² For a more complete discussion, see Kathryn Hendley, *Who Are the Legal Nihilists in Russia?*, 28 *POST-SOVIET AFF.* 1 (2012).

laymen, though the almost complete unwillingness to tolerate nihilism marks them as distinct from the general population.

Perhaps more surprising is the comparison between the two surveys as to the innate trustworthiness of other people. When the *arbitrazh* judges were asked to agree or disagree with the proposition that “as a rule, it is possible to trust people,” almost half (48.5%) of the surveyed judges agreed. Another 27.6% were on the fence. Only 9.4% disagreed. The remaining respondents chose not to respond. These results are strikingly different from those for the 2012 round of the RLMS-HSE. In that survey, only 15.6% of the sample felt that most people could generally be trusted. A plurality (47%) thought it was best to approach others with caution. More than a third (36.4%) were ambivalent, and the remainder were either undecided or declined to respond. Whether it is appropriate or helpful for judges to be more trusting of others than the general populace is an intriguing question.

As to how judges think about themselves, the results are mixed. In both surveys, respondents were asked to agree or disagree with a series of general propositions.⁴³ For example, they were asked whether they had a good opinion of themselves and whether they were generally satisfied with themselves. Both the general population and the subset of judges emerge as having a good self-image, with more than 70% of each sample answering in the affirmative. But when it came to whether they have control over their lives or whether they are swept along by events, judges distinguished themselves. Almost three-fourths (71%) felt themselves to be the masters of their destiny, as compared to 61% of the ordinary Russians. Maybe this self-confidence is a prerequisite for judges. Their daily existence is a never-ending series of decisions, most of which have a profound impact on the lives of others. If they lacked a sense of control, they might quickly become overwhelmed by the job.

A. *Judges’ Attitudes Towards Mediation*

Turning now to mediation, *arbitrazh* judges were asked a series of questions about their views on different aspects of this new procedural tool. Table 1 summarizes their responses. Most see mediation as a positive addition to the Russian legal system,

⁴³ These questions were last posed as part of the RLMS-HSE in 2002.

though their level of enthusiasm varies. Likewise most are sanguine about the potential for mediation to reduce their workload. Indeed, this optimism may be driving their support for mediation. Only a handful are deeply pessimistic about the value of mediation. On the other hand, there are hints within the data that their support may be shallow. For example, when asked about their familiarity with the draft law that would reshape the way mediation would work in the *arbitrazh* courts, less than 15% said they had paid close attention to this draft law. Most (65%) claimed to have heard something about it, but were not conversant with the details.

The remaining questions reported in Table 1 tap into the viability of mediation in present-day Russia. After all, judges' enthusiasm means little if litigants are resistant. The law on mediation establishes voluntariness as a foundational principle.⁴⁴ Willingness to participate in mediation requires, at a minimum, some awareness of how mediation works and an openness to participating actively in finding a solution to the dispute. In my fieldwork, *arbitrazh* judges repeatedly told me that “parties are not ready” [*storony ne gotovy*] for mediation. The survey data confirms this belief. Almost three-quarters of surveyed judges are convinced that most Russians are unfamiliar with mediation. Given that the word used in Russian for mediation—*mediatsiia*—is an English cognate rather than a word familiar to native Russian speakers, their confusion is understandable. When debating various drafts of the law, scholars debated whether to use a well-known Russian word for using intermediaries (*posrednichestvo*) or this anglicized word (*mediatsiia*).⁴⁵ The final law contains both, but with a clear preference for *mediatsiia*. The purer Russian word carries considerable baggage because it was used during the 1990s to refer to the somewhat sleazy practice of resorting to organized crime figures to resolve problems. No one was keen to attach this negativity to the new institution of mediation.⁴⁶

From the point of view of the surveyed judges, litigants' passivity is a problem. Less than a quarter of these judges believe that litigants are prepared to participate actively in their own cases. This is consistent with what I heard from judges in my fieldwork.

⁴⁴ Law on Mediation, art. 3. The other principles undergirding mediation are confidentiality, cooperation and equality of the parties, and impartiality and independence on the part of the mediator. *Id.*

⁴⁵ E.I. Nosyreva & I.A. Sternin, ‘*Posrednichestvo*’ ili ‘*mediatsiia*’: k voprosu o terminologii, 1 TRET. SUD 9 (2007) (Russ.).

⁴⁶ Kira Latukhina, *Sud dobroi voli: V Rossii vvoditsia al'ternativnaia protsedura uregulirovaniia sporov*, ROS. GAZ., July 8, 2010, <http://www.rg.ru/2010/07/08/mediacia.html> (Russ.).

When I raised the idea of mediation, many judges told me that if the parties felt themselves capable of working out a solution to their problems on their own, they never would have brought the case to the court. For them, it followed that such litigants would be loathe to mediate, preferring to sit on the sidelines while the judge resolved the dispute. The accuracy of this perception cannot be assessed from the survey, but it can be reasonably hypothesized that it acts as a damper on judges' interest in encouraging parties to try mediation.

In an effort to gauge judges' sense of the relative merits of courts and mediation, they were asked to rate various aspects of dispute resolution along a ten-point scale. These included cost, ability to enforce judgments, protection of the rights of weaker parties, speed, confidentiality, and ability to retain business connections. If they had an absolute preference for litigation, then they were instructed to give a score of ten. If they had an absolute preference for mediation, then they were to give a score of zero. Ambivalence was reflected in middling scores. When assessing the means for these questions, three groups emerge.

As to cost, implementing judgments, and protecting weak parties, the mean scores of eight across the board reflected a sense among the surveyed judges that litigation does a better job of achieving these goals. The cost of going to court in Russia is relatively low, though Russians routinely grumble about it.⁴⁷ Filing fees have deliberately been kept low as a way to ensure access irrespective of resources.⁴⁸ They are calculated as a percentage of the amount sought. The cost of counsel is kept down by quickness of the process.⁴⁹ On the other hand, the cost of mediation is largely

⁴⁷ For example, in the 2012 round of the RLMS-HSE, two-thirds of the respondents responded in the affirmative when asked whether the cost of the process acted as a constraint to going to court.

⁴⁸ Top judicial officials have long argued that increasing filing fees would help discourage parties from bringing lawsuits when the outcome is obvious to all. See Dmitrii Koptiubenko, Anastasiia Litvinova & Anna Reznikova, *Glava VAS Anton Ivanov pridumal, kak izbavit' sudei ot chrezmernoi nagruzki*, RBK DAILY, Jan. 17, 2011, <http://www.rbcdaily.ru/politics/562949979552820> (Russ.). Eighty-five percent of the surveyed judges supported increasing filing fees. As I have argued elsewhere, the reasons for not following through on these yearnings is political; judicial officials do not want to be perceived as discouraging litigants from bringing their problems to the courts. See Kathryn Hendley, *Too Much of a Good Thing? Assessing Access to Civil Justice in Russia*, 72 *SLAVIC REV.* 804 (2013).

⁴⁹ Even so, in the 2012 round of the RLMS-HSE, almost 80% identified the cost of obtaining counsel as an impediment to bringing a lawsuit.

unknown.⁵⁰ In my conversations with litigants in the corridors of the *arbitrazh* courts, many asked why they would pay twice—once for the court’s services and again for mediators’ services. The judges’ belief that a court judgment would be easier to enforce than the results of mediation is puzzling and may reveal a lack of understanding of how mediation works. If the parties reach an accord through mediation, it is memorialized in a mediation agreement, which is brought to the court.⁵¹ Assuming the judge endorses it, it can then be enforced like any other court judgment. The judges’ preference for courts suggests that they believe that the parties will be left on their own to enforce their agreement.⁵²

The surveyed judges were more ambivalent about speed and confidentiality, as the mean scores of six for these variables indicate. As to confidentiality, the only surprise is that judges did not see greater advantage to mediation given that parties agree not to share what happens during mediation with others (including the judge). Court hearings are, by contrast, open to all and its decisions are public documents.

Perhaps not surprisingly, given the newness of mediation, judges identified only the goal of preserving business relations as being notably easier to achieve through mediation, with a mean score of 3.2. Intuitively, this would seem to make sense. Certainly, it would in an adversarial system. But, despite having embraced adversarialism in its procedural code,⁵³ the strong preference of the *arbitrazh* courts for documentary over testimonial evidence⁵⁴ means that the sort of tough cross-examinations that can sour friendships rarely occur. In my prior research, I found that Russian business partners who had butted heads in court often continued to work with one another.⁵⁵

⁵⁰ See generally S.V. Lazarev, *Chto sderzhivaet razvitie primiritel'nykh protsedur?*, 6 TRET. SUD 113 (2010); A.E. Solokhin, *Mediatsiia: byt' ili ne byt'?*, 22 IURIDICHESKAIA GAZ. 13 (2011) (Russ.), available at <http://www.yur-gazeta.ru/article.php?n=228>.

⁵¹ Lisitsyn & Furtak, *supra* note 9, at 86–89.

⁵² Similar fears were expressed by a name partner in a major Moscow law firm when asked whether he would advise his clients to opt for mediation. He said that he doubted his clients would be willing to forego the enforcement power of the court. *Opros iurfirm po itogam praktiki za 2010 god*, 12 ZAKON 30, 44 (2010) (Russ.).

⁵³ See APK RF, art. 9.

⁵⁴ See *id.* at arts. 75–76.

⁵⁵ Hendley, *Business Litigation in the Transition*, *supra* note 7, at 316. My research focused on non-payments cases, not on disputes over the control of firms, from which formerly close relationships rarely survive. All too often, the specter of criminal liability is raised as a way to pressure a former partner into giving in. See Thomas Firestone, *Armed Injustice: Abuse of the*

Though these descriptive statistics help us assess *arbitrazh* judges' attitudes, they provide little insight into what is motivating them. I created a dependent variable that isolated the 19% of respondents who were openly skeptical about mediation (see Table 1). Using STATA, I ran a series of logistic regressions that tested what factors tended to be associated with this attitude. The results are set forth in Table 2 in the form of odds ratios.⁵⁶ Though they do not allow me to create an airtight predictive model, they represent a step forward in our understanding of judicial thinking on mediation.

I began by looking at the extent to which basic demographic characteristics of the surveyed judges explain their behavior. These included gender, age, ethnicity, marital status, and religiosity.⁵⁷ Given that all judges are required to have a law degree, the sample had no variation in educational background. But the sort of law school can vary widely. I included a variable that captured the 19.5% of respondents who had received their legal education through a part-time program. Such programs are generally considered less prestigious and, those who graduate from them are, arguably, less competent. Finally, I looked at the jobs held by judges immediately prior to going on the bench, using the 20% of respondents who had worked as in-house counsel for purposes of comparison.

Model 1 of Table 2 reveals that these demographic variables have remarkably little explanatory power. When they are taken on their own, gender emerged as statistically significant. The odds ratio of 0.545 indicates that women are more likely to be supportive of mediation. But the weak predictive power of gender is revealed as its significance dissipates once other possible explanatory variables are added to the mix. The unimportance of age or experiential factors is surprising. Respondents were asked when they

Law and Complex Crime in Post-Soviet Russia, 38 DENV. J. INT'L L. & POL'Y 555 (2009). For a fascinating memoir of such a case, see Ol'ga Romanova, BUTYRKA (2011) (Russ.).

⁵⁶ Odds ratios that are statistically significant (indicated by the asterisks) and are greater than 1.00 indicate a greater likelihood that the relevant explanatory variable predicts the dependent variable. If the odds ratio is less than 1.00 and statistically significant, it indicates that those lacking the characteristic reflected in the explanatory variable tend to predict the dependent variable. For example, the statistically significant odds ratio of 0.545 for gender in Model 1 of Table 2 reveals that women are 45% more likely to favor mediation as compared to their male colleagues.

⁵⁷ A quarter of respondents described themselves as believers (*veruiushchie*). About another quarter (24.2%) saw themselves as on the fence, but said that they leaned towards being believers. A small minority reported being non-believers (4.4%) or atheists (2%). A plurality of respondents (44.5%) were uncomfortable with the question and did not respond.

graduated from law school and when they became judges, which allowed me to calculate years in the legal field and on the bench. Though not included in Table 2, I experimented with various permutations of these variables, none of which were statistically significant.⁵⁸ This suggests that experience on its own does not push judges in one direction or another as to mediation. Other factors are more important. I included the basic age variable in the regression presented in Table 2 as a control.

I reasoned that judges who had recommended mediation to litigants might be more favorably disposed (or vice versa) towards it, but the data do not support this hypothesis. I created a variable that included those who had never suggested mediation. As Model 2 of Table 2 shows, it is not statistically significant, telling us that it has no predictive power.

Given the emphasis placed on efficient caseload management, I suspected that less successful judges might be reluctant to experiment with mediation. The two key criteria for evaluating judges are delays and reversals.⁵⁹ The survey asked judges to estimate the percentage of their cases in which they violated the statutory deadline, as well as the percentage of their cases that were overturned on appeal. Notwithstanding its merits, mediation inevitably lessens judges' control over the forward momentum of a case. Once passed off, the mediators and the parties share responsibility; judges are left out of the loop. It stands to reason that judges who struggle with managing their docket might shy away from mediation. To test this proposition, I created a variable that included judges who were on the high end of the spectrum for delays, having violated the deadline for resolving disputes in more than 8% of their cases (10.4% of the sample). I then did the same for reversals, creating a variable to capture judges whose decisions were overturned in more than 5% of their cases (11.1% of the sample).

⁵⁸ Cross-tabulations of the dependent variable and the variable measuring years on the bench broken down into five-year intervals reveals a non-linear relationship. Judges with one to ten years of experience and those with more than twenty-five years of experience hover around the norm for the entire group surveyed, whereas judges with ten to fifteen years experience emerge as less likely to see a role for mediation and those with twenty to twenty-five years of experience are quite bullish on mediation.

⁵⁹ Reversals are regarded as judicial mistakes and, consequently, as a stain on the record of the judge whose decision has been reversed. See generally Peter H. Solomon, Jr., *The Bureaucratization of Criminal Justice Under Stalin*, in REFORMING JUSTICE IN RUSSIA, 1864–1996, POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER 228, 243 (Peter H. Solomon, Jr. ed., 1997); E.V. Kazgerieva, *Prichiny voznikoveniia sudebnykh oshibok*, 7 MIROVOI SUD'IA 19 (2006) (Russ.); I.L. Petrukhin, *Prichiny sudebnykh oshibok*, 5 SOVETSKOE GOSUDARSTVO I PRAVO 100 (1970) (Russ.).

As with use of mediation, this hypothesis did not pan out (see Model 2 of Table 2). Neither of these variables is statistically significant, which tells us that attitudes towards mediation are not driven by the internal metrics of success for judges.

A corollary of the hypothesis that workplace issues ought to influence judges' attitudes towards mediation is that the number of cases judges handle ought to color their views. Judges were asked to estimate the number of cases they handle each month. These estimates ranged from 0 to 165.⁶⁰ I created a variable that isolated judges who reported handling more than sixty cases per month, which was the top quartile. Model 2 of Table 2 shows that the odds of these high-performing judges seeing the value of mediation was 66% higher than for their less productive colleagues. This may be a measure of desperation. Judges who are drowning under a sea of paper may be ready to try anything to ease their burden.

Bolstering this argument is the strong predictive role of judges' belief that mediation can lead to a reduction in their workload. I created a variable that isolates the 23.5% of judges who strongly believe this (see Table 1). The regression analysis reveals this variable to be highly significant; the odds of being open to mediation are almost 30% greater for these judges. When we flip the argument, we see that the same logic holds. Judges who are convinced that ordinary Russians have little use for mediation (see Table 1) are over three times more likely to be skeptical of its value (see Model 2 of Table 2). The analysis suggests they may also be somewhat curmudgeonly. Judges who harbor serious doubts as to whether people are basically trustworthy are almost three times more to question the usefulness of mediation.

Much like the parties who appear before them, *arbitrazh* judges faced a steep learning curve when the law on mediation was passed. If mediation is to gain traction in Russia, then increased exposure will have to give rise to support. The survey provides some support for this optimistic scenario. I created a variable that captured familiarity by isolating the 21% of judges who are familiar with a mediation center and are personally acquainted with a mediator.⁶¹ The variable is statistically significant, and runs in the

⁶⁰ Respondents on the low end of the scale tended to be preoccupied with managerial tasks at their courts.

⁶¹ The survey stipulated that it must be a "qualified" mediator. The statute on mediation draws a distinction between professional and non-professional mediators. Law on Mediation, arts. 15–16. The survey's language signaled judges that they were being asked about professional mediators, who had completed a state-authorized training course.

predicted direction. This subgroup of judges is more likely to be supportive of mediation, though the effect is slighter than for either of the attitudinal measures discussed above. The odds of being supportive of mediation for judges who know a mediator are 7% greater than for those who do not (see Model 2 of Table 2).

Participation in a training program on mediation might cause judges to think differently. Training can, of course, take a variety of forms. When new laws are enacted, judges typically discuss them with each other and share insights. The survey reveals that *arbitrazh* judges are no exception. Three-fourths of the respondent-judges reported having discussed mediation with their colleagues. Participation in formal training programs was less common, though well over half (60%) had attended some sort of lecture on mediation. Fewer (about 30%) had learned about mediation as part of a continuing legal education program, and even fewer (17%) had taken part in a seminar devoted to mediation. Attendance at CLE programs was divided fairly evenly among the courts, suggesting that mediation was just one of many themes covered at such programs. On the other hand, more than half of all the judges who attended seminars on mediation were from Ekaterinburg. This confirms what I learned during my fieldwork in Ekaterinburg, namely that the chairman of the *arbitrazh* court sees great value in mediation and has sponsored multiple training seminars for her judges. No doubt she hopes to shape attitudes and behavior. As to the former, the analysis reveals that spending time learning about mediation, whether at CLE programs or in a seminar turns out to be a poor predictor of attitudes (see Model 2 of Table 2). But such efforts have a more important payoff, as the behavioral analysis below reveals. They emerge as strong predictors of which judges are likely to recommend mediation to litigants.

B. *Judges' Behavior Regarding Mediation*

Russian law does not mandate the use of mediation. *Arbitrazh* judges who see some value to this process can encourage parties to try it. A positive attitude towards mediation might logically seem to be a necessary precondition for a judge to push litigants to use it. But the data reveal the fallacy of this assumption and highlight other more important factors. The voluntariness that is at the essence of mediation makes unpacking the reasons for its use or

non-use difficult. If either or both of the parties insist on having their dispute resolved by the court, then judges' efforts to convince them to try mediation can fall on deaf ears. According to the survey results, almost 80% of judges who had urged the use of mediation indicated that the parties did not follow up on their advice.⁶² Judges may have selfish reasons to downplay mediation. Opening the door to mediation inevitably diminishes judges' ability to ensure that the case proceeds in a timely fashion. Some judges may admire mediation in principle, but be unwilling to risk the informal censure that comes when cases are not resolved within the statutory deadlines.

The survey offers several possible indicators of use. The most obvious is whether judges had presided over a case that was resolved through the use of mediation. Of the 297 *arbitrazh* judges who participated in the survey, 276 (93%) had no cases that were resolved with the help of mediation. Among the twenty-one judges who reported the use of mediation in their courts, most had only a few cases. Eighteen had five or fewer cases. One judge reported six cases, and two judges reported eight cases. Given litigants' unfamiliarity with mediation, taking the data on the use of mediation to resolve cases as the sole measure of judicial behavior would be overly stringent. Another behavioral indicator of judges' openness to mediation is their participation in training programs on mediation. As I noted above, more than half of the surveyed judges reported having received some sort of training. But such behavior is too far removed from the actual use of mediation.

The best indicator offered by the survey is respondents' answer to whether or not they have recommended the use of mediation to litigants. Doing so is entirely within the control of the judge. It is not entirely ideal because there is no metric for evaluating whether the suggestion to try mediation was genuine or merely part of a rote listing of available rights.⁶³ But it helps iden-

⁶² Another 17% of judges said that litigants followed up from time to time. Only a handful of judges (3%) reported that litigants followed up more frequently.

⁶³ As part of the survey, judges were asked how often they informed litigants of their right to opt for mediation. About a third claimed that they did so at every hearing. Another third said they did so only at the first hearing. The final third said they did not bother with this. By contrast, judges were much more likely to inform parties of their right to present evidence supporting their claim or their right to question one another during the hearing. In research conducted by the Levada Center, almost two thirds (62%) of those who had been to court confirmed that the presiding judge had informed them of their rights, but almost 30% said that this had been done in a formalistic manner. Lev Gudkov, Boris Dubin & Natalia Zorkaia, *Rossiiskaia sudebnaia sistema v mneniia obshchestva*, 4 *VESTNIK OBSHCHESTVENNOGO MNENIIA* 7, 41 (2010) (Russ.).

tify judges who are not open to mediation. Among the surveyed judges, 62% claimed to have recommended mediation, while 38% said they had not. What happens after the hearing is beyond the control of judges. As I noted above, judges' suggestions to use mediation mostly fell flat. The question of why litigants shun mediation is not knowable from the survey. In a separate line of research, I organized a series of focus groups in Moscow, Novosibirsk, and Voronezh to inquire into the attitudes of ordinary Russians regarding mediation. A full discussion of the findings is beyond the scope of this article, but what shone through all the groups was the complete dearth of knowledge of mediation among the focus group participants. Along similar lines, a 2010 survey of Moscow trial lawyers (*advokaty*) reveals that most were unfamiliar with mediation.⁶⁴

In the logistic regression analysis set forth in Table 3, whether a judge has recommended mediation acts as the dependent variable. The analysis seeks to identify factors that predict when judges will decline to recommend mediation. The set of explanatory variables is basically the same as for the study of judges' attitudes (see Table 2). As with that analysis, most of the demographic variables have little predictive power (see Model 1 of Table 3).⁶⁵ There are two notable exceptions: having gone through a divorce and having graduated from a part-time law school program. The logic of the former is easier to understand than the latter. The odds of having recommended mediation are almost 50% greater for judges who have been divorced than for those who have not. Avoiding the courts when getting divorced in Russia is almost impossible.⁶⁶ Justice-of-the-peace courts handle simple divorces in which the spouses have agreed on the division of property and child custody (if relevant), whereas district courts handle more contentious divorces.⁶⁷ Regardless of which option a respondent-judge used, the

⁶⁴ Only 25% claimed that mediation was "well known" to them. Of the remainder, 53% had heard something about it, and 22% knew nothing of it. A.M. PONASIUK, *MEDIATSIYA I ADVOKAT: NOVOE NAPRAVLENIE ADVOKATSKOI PRAKTIKI* 257–58 (2012) (Russ.).

⁶⁵ Once again, I explored the relevance of age and experience but, as with the attitudinal analysis, these variables had no predictive power.

⁶⁶ Childless couples with no dispute over their property can obtain a divorce from the office that registers marriages. *SEMEINYI KODEKS ROSSIISKOI FEDERATSII [SK RF]* [Family Code] art. 19 (Russ.), available at <http://www.consultant.ru/popular/family/>.

⁶⁷ *Federal'nyi Zakon RF o mirovykh sud'iakh v Rossiiskoi Federatsii* [Federal Law of the Russian Federation on Justices of the Peace in the Russian Federation], art. 3, SZ RF 1998, No. 51, Item 6270 (Russ.), available at http://www.consultant.ru/document/cons_doc_LAW_142948/. For background on these courts, see Kathryn Hendley, *Assessing the Role of Justice-of-the-Peace Courts in the Russian Judicial System*, 27 *REV. CENT. & EAST EUR. L.* 373 (2012).

mere fact of getting divorced means that they have seen the courts from the perspective of a litigant. Moreover, they have suffered the emotional pain associated with having a deeply personal life decision managed in a routine, often officious, manner. They may have wished to have the option to work through the issues associated with their divorce in the more inviting environment offered by mediation. As a result, they may be more open to encouraging the use of mediation by those who appear before them. The significance of having been divorced dissipates, however, when a variable that captures the incidence of settlements in the respondent-judges' docket is included (See Models 2 and 5 of Table 3).

The link between part-time law school programs and receptivity to mediation is more opaque. This subset of judges is two times more likely to eschew mediation than their colleagues who received their education in full-time programs. Those who participate in part-time programs are usually working full-time while going to school, often in a law-related job. They have been taught how to handle disputes by busy lawyers, who typically have little time for experimenting with anything new, like mediation.⁶⁸ They may have taken these conservative ideas with them to the bench.

Much as for the analysis of judges' attitudes, indicators of judicial performance (delays, reversals) turn out to have no effect on their willingness to recommend mediation (see Model 2 of Table 3). Although the earlier analysis indicates judges with the heaviest workloads are more favorably disposed toward mediation, this variable has no predictive value when it comes to their behavior.⁶⁹ These results are somewhat surprising. It seemed reasonable to posit that openness to mediation would be correlated with workload; that judges would see mediation as a way out, but the data tell a different story.

The only workplace-related variable that emerges as relevant is a measure of cases settled (see Model 3 of Table 3).⁷⁰ Judges were asked what percentage of cases were resolved by settlement

⁶⁸ In my conversations with *arbitrazh* judges, many told me that Russian lawyers are generally hostile to mediation, fearing that it will deprive them of work. In reality, however, parties are welcome to bring their representatives to mediation. The lack of knowledge of mediation may be fueling lawyers' fears.

⁶⁹ This variable is not included in Table 3. It is highly correlated with the variable that captures whether there is a local mediation center, and was dropped. Copies of the results of regressions that include it are available from the author.

⁷⁰ I also explored whether this variable was relevant to judges' attitudes about mediation. It was not and, therefore, I left it out of Table 3.

agreements (*mirovye soglasheniia*) between the parties.⁷¹ The responses ranged from 0% to 30%, with a mean of 4.2%. Though those accustomed to the strong informal norm in favor of settling cases in the US⁷² might regard this as bizarrely low, it is above average for Russian *arbitrazh* courts. According to their official data, only 2.5% of 2013 cases were resolved via settlement.⁷³ As with mediation, judges cannot force parties to negotiate with one another. But they can encourage it by postponing the case if the parties express a willingness to negotiate⁷⁴ or by working with the parties to find a compromise.⁷⁵ Alternatively, they can signal their distaste by limiting their receptivity to cases in which the parties arrive with signed settlement agreements.⁷⁶ The survey does not

⁷¹ When a case settles, the disputants bring a settlement agreement to the court. The judge then affirms (*utverzhenie*) it, giving it the same authority as a judicial decision. Judges' discretion to reject settlement agreements is narrowly constrained. They must reject agreements that contradict the law, but cannot reject them because they disagree with the terms. APK RF, arts. 138–42. For an overview of the history of settlement in Russia, see N.N. Zippunnikova & Iu.N. Zippunnikova, *Ideia primireniia v istoriia rossiiskogo grazhdanskogo protsesssa (zakonodatel'noe zakreplenie i doktrinal'noe obosnovanie)*, 9 ARB. I GRAZH. PROTSESS 10 (2011) (Russ.). There is considerable regional variation in terms of settlement rates. The Sverdlovsk region *arbitrazh* court is an outlier, with an average settlement rate of 19%. Lazarev, *supra* note 51, at 119.

⁷² For an overview of US attitudes and practices regarding settlement, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). For a critique of Galanter, see John Lande, *Shifting the Focus From the Myth of "The Vanishing Trial" To Complex Conflict Management Systems, Or I Learned Almost Everything I Need To Know About Conflict Resolution From Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191 (2005).

⁷³ *Spravka ob utverzhenii mirovykh soglashenii arbitrazhnymi sudami Rossiiskoi Federatsii v 2010–2013 gg.* FASRF, http://www.arbitr.ru/_upimg/2B321D1900F0766CB1E517D03B6FF8A2_9.pdf (Russ.). These data show that the settlement rate has been as high as 3.3% in 2009, and as low as 2.4% in 2012. *Id.*

⁷⁴ *Arbitrazh* judges have discretion as to whether to postpone a case though, as a rule, any such delay does not act to extend the deadline for resolving the case. APK RF, art. 158.

⁷⁵ When observing cases, I noticed that some judges were more aggressive than others in encouraging settlements. These judges would often ask questions that would strongly signal their likely decision in the case as an incentive for the parties to solve the problem on their own. As part of the survey, respondent-judges were asked to recall their most recent ten settlement agreements and were asked what percentage resulted from their participation. Over 70% reported this sort of activism. Of this group, most (53%) had done so in only a few of the ten cases under review, though 12% claimed to have had a hand in all of the settlement agreements.

⁷⁶ Initiating a case by presenting a settlement agreement is not the norm. After all, if the parties had been able to figure out their problems on their own, the petitioner would never have filed the complaint. But it can happen when the filing of a case operates as a wake-up call for the defendant, who immediately acknowledges liability. Alternatively, the defendant may see it as an opportunity to negotiate a reduction in the amount owed. The plaintiff may want the security of a court judgment to help with enforcement, which explains why he goes to the trouble of negotiating a settlement agreement and having it affirmed by the court. When asked how many of their most recent ten settlement agreements fit into this category, about half (46%) said

allow me to discern judicial motivations in connection with *mirovye soglasheniia*. I was able to isolate the group of judges with less than 10% of settled cases (about 17% of the sample). In Model 5, which brings together all of the explanatory variables, the odds of refusing to recommend mediation for these judges was over six times higher than for their colleagues who were more receptive to settling cases. Russian scholars tend to lump settlements and mediation together as alternatives to litigation, and this finding confirms that the two are closely related to one another in practice.⁷⁷ The strong link between not recommending mediation and low levels of settled cases suggests that the desire for control persists among this subset of judges. Control translates into an ability to ensure that cases are resolved in a timely fashion. This sort of risk-averse approach to judging is a carry-over from the Soviet era.⁷⁸

Attitudes regarding mediation likewise do not affect behavior (see Model 3 of Table 3). The regression includes a number of variables that capture different sorts of attitudes, including the dependent variable from the earlier regression (whether the respondent sees a role for mediation in the contemporary Russian legal system) as well as whether the respondent thinks Russians are aware of mediation and whether he thinks mediation will help decrease the burden on judges. None of these are statistically significant. Though it is often assumed that a favorable attitude is a prerequisite to use, this finding belies this common wisdom. Judges may be acting more strategically than intuitively.

On the other hand, judges' self-perceptions play a role. For judges who feel a lack of control over events, the odds of deflecting mediation in favor of hearing cases themselves is almost three times greater than for judges who feel more in control.⁷⁹ This variable can be seen as an indicator of desperation. Perhaps the risk-averse nature of Russian judges makes those who are drowning stick to the tried and true rather than reaching out for a new tool to help them manage their docket.

none. The other half had had such cases. For most (45%), they amounted to less than half of these agreements.

⁷⁷ See Reshetnikova, *supra* note 5, at 84.

⁷⁸ Kathryn Hendley, *Are Russian Judges Still Soviet? An Analysis of the Effort to Introduce Adversarialism to the Russian Arbitrazh Courts*, 23 *POST-SOVIET AFF.* 240 (2007).

⁷⁹ The odds ratio of 3.22 in Model 3, which tests the strength of attitudinal variables, decreases to 2.75 when the demographic control variables and other independent variables are added to the mix in Model 5. The statistical significance likewise decreases but does not disappear.

The set of variables that go to judges' level of familiarity with mediation emerge as powerful predictors of judicial behavior. They were also statistically significant in the analysis of attitudes, but are much stronger as to behavior. The robustness of these variables provides support for the hopes of the proponents of mediation that once judges understand its merits, they will encourage litigants to use it. Simply having a local mediation center seems to incentivize judges to try mediation (though its statistical significance disappears when the variable related to settling cases is introduced, as a comparison of Models 4 and 5 demonstrates). For judges who take it a step further and both know of a mediation center and are personally acquainted with a mediator, the odds of having recommended mediation are more than 60% higher than for their colleagues who have not had this sort of direct exposure to mediation.⁸⁰ Being familiar with these facilities and their staff may ease judges' uncertainties about yielding control over their cases. Along similar lines, judges who have gone through focused training programs (either CLE programs or targeted seminars) emerge as more likely to encourage litigants to opt for mediation. The training opens their eyes as to how mediation works, thereby dispelling some of the myths, and leaves them in a position to project this confidence to those who appear before them.

The strength of these variables measuring familiarity speaks to a different aspect of control. *Arbitrazh* judges who are not acquainted with mediators may be uncertain as to their skill; they may worry that the quality of assistance provided by mediators is uneven. They may fear that mediators will be biased or susceptible to bribery. This may translate into a concern that litigants will blame them if their experience with mediation is not positive. It makes sense that judges who have assuaged such concerns through their personal interactions with mediators are more willing to recommend mediation to litigants. In essence, by encouraging parties to try litigation, judges are vouching for its quality. Along similar lines, *arbitrazh* judges who have had no contact with a mediation center or mediators may hold back from recommending mediation because they simply do not know where to send litigants.

⁸⁰ Although the correlation between having a local mediation center and knowing a mediator is relatively high (0.57), it is not perfect. Over 20% of judges who report being acquainted with a mediator are from regions that do not have mediation centers.

V. CONCLUSIONS

Familiarity with mediation is the only factor that drives both behavior and attitudes, though is a more powerful predictor for the former than for the latter. This validates the initial hypothesis that being acquainted with the people who serve as mediators and with the center where they work makes a difference for judges. No doubt they feel more comfortable pushing litigants out of the comfortable nest of the courtroom into the new world of mediation when they know who will be taking care of them.

The real revelation of the survey is the disconnect between judges' attitudes and behavior. All too often we unquestioningly assume that the two must be intertwined. Logically that would seem to be the case, namely that one could not engage in behavior that she did not believe in. No doubt this assumption holds up in many settings, but my research suggests that it is tenuous when applied to the courts. In an earlier project, I explored the link between trust in the courts and use of the courts in Russia, documenting that trust is not a *sine qua non* for litigating.⁸¹ What drives use is less about trust and more about need. Both individuals and firms turn to the courts when unable to find a solution to their problems. Sometimes they do so grudgingly, with a secret wish that there were some other avenue. The available data suggest that they mostly come away satisfied with their experiences.⁸² Even when they do not prevail, they feel like they have been listened to and treated fairly.⁸³ This, of course, does not include those who are involved in cases with political resonance where the Soviet-era specter of "telephone law" persists.⁸⁴

At first glance, mediation seems similar. After all, the analysis shows that a belief that mediation is a positive addition to the legal system does not necessarily translate into a willingness to encourage litigants to use it. Nor does encouraging its use signify a

⁸¹ Kathryn Hendley, *The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts*, 56 CORNELL INT'L L.J. 517 (2012).

⁸² See generally A.K. GORBUS, M.A. KRASNOV, E.A. MISHINA & G.A. SATAROV, *TRANSFORMATSIYA ROSSIYSKOI SUDEBNOI VLASTI. OPYT KOMPLEKSNOGO ANALIZA* 423-24 (2010) (Russ.); *PREDLOZHENIYA PO POVYSHENIU DOSTUPNOSTI PRAVOSUDIYA DLYA MALOIMUSHCHIKH I SOTSIAL'NO NEZASHCHISHCHENNYKH GRAZHDAN – UCHASTNIKOV GRAZHDANSKOGO PROTSESSA* (L.O. Ivanova ed., 2011) (Russ.); SERGEI KRIUCHKOV, *OTNOSHENIE GRAZHDAN K MIROVYIM SUDAM* (2010) (Russ.).

⁸³ On the importance of procedural justice, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

⁸⁴ See Alena Ledeneva, *Telephone Justice in Russia*, 24 POST-SOVIET AFF. 324 (2008).

positive attitude. The relationship between the two variables measuring attitudes and behavior is consistently not statistically significant. Whether this finding will hold up as mediation becomes less exotic is unclear. At present, *arbitrazh* judges seem reluctant to yield control over their cases to mediators. Even if a judge is intrigued by mediation, she may shy away from promoting it out of fear of losing control over her docket. Given that judges' assessments are keyed to their ability to resolve cases quickly, their yearning for control makes sense. Alternatively, judges who use mediation may do so because they see its utility rather than because they support it. They may believe that diverting cases from their docket will help them achieve the much-desired on-time record. Cases resolved through mediation are much less likely to be appealed, lessening the risk of being reversed.

Convincing *arbitrazh* judges to embrace mediation will be a pyrrhic victory if it is not matched by a similar receptivity to mediation among litigants. Whether mediation will take hold in Russia is open to question. In contrast to the United States, where mediation provides a welcome relief from expensive and time-consuming processes, litigation in Russia is quick and inexpensive. The evidence from the survey is mixed. The fact that judges who believe that mediation will reduce their caseload are more likely to see a place for it is troubling. Buttressing this is the finding that the busiest judges are the most receptive to mediation. This claim that mediation will ease the burden on judges is quite flimsy. At least in the short run, the opposite is likely to be true. Cases can only get to mediation through the courts and judges' gatekeeper role is turning out to be more time consuming than originally anticipated. If they want to have cases diverted to mediation, then they have to spend time in their hearings explaining how mediation works. They run the risk of such advice falling on deaf ears or having the case boomerang back to them if the parties are unable find a mutually acceptable solution through mediation. While the choice to promote mediation to judges as a time saving measure is entirely understandable given their obsession with maintaining a delay-free record. But it is a slender reed on which to rest the argument.

Looking past the nuts and bolts of mediation, these first few years of experience with court-based alternative dispute resolution shows the perils of designing legal reforms without incorporating some mechanism to encourage their use by litigants. One choice might have been to follow the Chinese model and require parties to mediate as a prerequisite to filing a claim with the court, but

such heavy-handed tactics were not politically viable in Russia.⁸⁵ The conditions that have spurred the widespread voluntary use of mediation elsewhere are absent in Russia. In an ironic twist of fate, the success of the *arbitrazh* courts in processing claims quickly and cheaply has proven poisonous to the efforts to encourage parties to try mediation. After all, if the existing supply of dispute-resolution services is satisfactory, why should litigants look for alternatives? Under such circumstances, the likelihood that mediation will take hold in the near future seems quite remote.

TABLE 1: ARBITRAZH JUDGES' ATTITUDES REGARDING MEDIATION

	Completely agree	Somewhat agree	Ambivalent	Somewhat disagree	Strongly disagree	Hard to say
Mediation is a helpful addition to the Russian legal system	31.3%	31.3%	15.2%	15.8%	4%	3.4%
Most Russians are familiar with mediation	2.4%	4.1%	9.9%	44.7%	30%	8.9%
Mediation has the potential to decrease the workload on <i>arbitrazh</i> judges	23.5%	36.4%	16%	16%	5.4%	2.7%
Litigants in Russia are prepared to participate actively in the resolution of their disputes	5.8%	16.4%	23.3%	36.3%	14.7%	3.4%

⁸⁵ For an overview of mediation in China, see Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 H.K. L.J. 715 (2005); He Wei and Zeng Ying King, *Extra-Judicial Mediation System and Practice*, KING & WOOD, (Oct. 31, 2011), <http://www.chinalawinsight.com/2011/10/articles/dispute-resolution/extrajudicial-mediation-system-and-practice-ipart-i-of-iii/>.

TABLE 2: LOGISTIC REGRESSION MODELS – ODDS RATIOS FOR ANTI-MEDIATION ATTITUDES OF *ARBITRAZH* JUDGES

DEPENDENT VARIABLE	EXPLANATORY VARIABLES	(Model 1) Demographic	(Model 2)	
Judges who do not see mediation as a positive addition to the legal system	Male	0.545* (0.182)	0.596 (0.232)	
	Age	0.976 (0.0225)	0.983 (0.0245)	
	Russian ethnicity	1.286 (0.633)	1.096 (0.601)	
	Has Been Divorced	1.407 (0.501)	1.368 (0.552)	
	Religious believer	1.353 (0.448)	1.678 (0.645)	
	Attended part-time law school	1.086 (0.427)	1.038 (0.477)	
	Worked as iuriskonsul't before becoming judge	1.902 (0.820)	1.958 (0.980)	
	Has never recommended mediation to litigants		0.780 (0.305)	
	Familiar with mediation center and with mediator		0.193** (0.131)	
	Participated in formal training program on mediation		0.869 (0.415)	
	Higher rate of violating deadlines for resolving cases (more than 8%)		1.646 (0.939)	
	Higher reversal rates (more than 5%)		1.127 (0.595)	
	Busier (more than 60 decisions per month)		0.329** (0.143)	
	Judges who believe that mediation will decrease workload		0.0719*** (0.0587)	
	Judges who believe Russians are well-informed about mediation		3.485*** (1.336)	
	Judges who do not believe people can be trusted		2.758* (1.563)	
	Judges who feel like they are not in control of their lives		1.205 (0.881)	
	Constant		0.521 (0.535)	0.519 (0.618)
	Observations		249	249

*** p<0.01, ** p<0.05, * p<0.1

TABLE 3: LOGISTIC REGRESSION MODELS – ODDS RATIOS FOR ARBITRAZH JUDGES’ REFUSAL TO RECOMMEND MEDIATION TO LITIGANTS

DEPENDENT VARIABLE	EXPLANATORY VARIABLES	(Model 1) Demographic	(Model 2) Workplace	(Model 3) Attitudes	(Model 4) Familiarity	(Model 5)
Judges who have never recommended mediation to litigants	Male	0.791 (0.222)	0.800 (0.238)	0.771 (0.221)	0.868 (0.255)	0.916 (0.296)
	Age	0.995 (0.0184)	0.992 (0.0195)	0.986 (0.0190)	1.004 (0.0190)	0.994 (0.0208)
	Russian ethnicity	1.055 (0.409)	1.053 (0.428)	1.036 (0.410)	1.017 (0.412)	0.953 (0.416)
	Has Been Divorced	0.549* (0.168)	0.686 (0.219)	0.591* (0.188)	0.523** (0.167)	0.701 (0.245)
	Religious believer	0.871 (0.243)	0.824 (0.240)	0.906 (0.257)	0.853 (0.249)	0.843 (0.264)
	Attended part-time law school	2.467*** (0.803)	2.624*** (0.901)	2.481*** (0.828)	2.199** (0.759)	2.185** (0.810)
	Worked as iuriskonsult't before becoming judge	0.594 (0.233)	0.663 (0.271)	0.595 (0.241)	0.564 (0.231)	0.686 (0.306)
	Region has mediation center				0.600* (0.182)	0.579 (0.196)
	Familiar with mediation center and with mediator				0.401** (0.156)	0.342** (0.147)
	Participated in formal training program on mediation				0.504* (0.185)	0.472* (0.189)
	Higher rate of violating deadlines for resolving cases (more than 8%)		1.513 (0.677)			1.999 (0.965)

DEPENDENT VARIABLE	EXPLANATORY VARIABLES	(Model 1) Demographic	(Model 2) Workplace	(Model 3) Attitudes	(Model 4) Familiarity	(Model 5)
	Higher reversal rates (more than 5%)		0.650 (0.299)			0.538 (0.259)
	Never settles cases		4.529*** (1.678)			6.022*** (2.513)
	Judges who do not see mediation as a positive addition to the legal system			0.992 (0.365)		0.877 (0.347)
	Judges who believe that mediation will decrease workload			0.810 (0.276)		0.592 (0.232)
	Judges who believe Russians are well-informed about mediation			1.263 (0.389)		1.533 (0.532)
	Judges who do not believe people can be trusted			0.589 (0.284)		0.353* (0.193)
	Judges who feel like they are not in control of their lives			3.220** (1.731)		2.751* (1.635)
	Constant	0.955 (0.796)	0.750 (0.676)	1.294 (1.140)	1.345 (1.194)	1.410 (1.390)
	Observations	249	249	249	249	249

*** p<0.01, ** p<0.05, * p<0.1

