



ONLINE MEDIATION: AN EFFECTIVE SOLUTION FOR DISPUTE RESOLUTION FOR SMALL AND MEDIUM-SIZED ENTERPRISES DURING THE COVID-19 PANDEMIC



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INTRODUCTION

Mediation is one of the most common and effective alternative dispute resolution (ADR) mechanisms for resolving commercial disputes. This mechanism is especially useful for small and medium-sized enterprises (SMEs) who need an alternative method for resolving disputes faster and more cost effectively than is possible in the courts. This has become especially relevant during the recent Covid-19 pandemic which has led to disruptions to the normal functioning of business activity and the judicial system. This has resulted in an increase in the number of commercial disputes and delays in court. Due to the impossibility of conducting mediation in the traditional way during the pandemic, mediation is increasingly shifting online. In the economies where the EBRD invests, mediators were often not ready to move to online mediation due to a lack of relevant skills and knowledge of resolving disputes online. The EBRD, through its Covid-19 response projects, is focused on promoting online mediation to help businesses resolve commercial disputes quickly and efficiently during and beyond the pandemic.

WHAT IS MEDIATION AND WHY IS IT USED?

Mediation is regarded as one of the ADR mechanisms and is considered to be non-adversarial. It is a confidential process by which a neutral third party, the mediator, assists the



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parties in reaching a negotiated settlement. The mediation settlement is not binding until the parties sign an agreement which then becomes enforceable. Mediation can be a quick and cost-effective solution with most mediations only lasting one to two days.

Mediation has proved to be an effective tool in resolving commercial disputes. It preserves business relationships between parties and ensures a higher level of voluntary enforcement of the mediation agreement. This leads to greater predictability for commercial partners in addition to an increased number of transactions. The mechanism is especially useful for SMEs, who need an alternative method to resolve their disputes more urgently and cost effectively than what is possible in the courts.

MEDIATION IN LIGHT OF THE COVID-19 PANDEMIC

The importance of ADR mechanisms, including mediation, has become ever more pronounced in 2020 because of the global Covid-19 pandemic.

First, this unprecedented situation has put tremendous pressure on the national economies and had a major impact on economic activity around the world. According to the OECD's latest estimations, many economies will fall into recession.¹ SMEs have been particularly vulnerable to the Covid-19 crisis which has severely disrupted businesses across the EBRD regions. As stated in the EBRD Covid-19 Solidarity Package: Full Mobilisation Paper: "SMEs are likely to feel the brunt of an economic downturn and will be a focus of EBRD intervention."²

Second, due to the introduction of strict restrictive measures during the pandemic, the normal functioning of all state bodies, including the judicial system, was suspended, which in turn led to a delay in the resolution of commercial disputes in the courts.

Third, an additional effect of the Covid-19 pandemic is the significant impact on the business community which threatens commercial relationships and can often lead to disputes.

Examples include: the impossibility of fulfilling contracts for the supply of goods, lack of income to pay rent for retail and industrial premises due to the forced suspension of business activity, and so on. It is expected that this situation will generate a higher number of commercial disputes that will need to be resolved more urgently and cost-effectively. However, the pandemic has brought dramatic new challenges to parties seeking to resolve their disputes in national courts.

Businesses benefit if they can address their disputes with a commercial, efficient and future-oriented focus. This helps overcome a number of the challenges presented by the pandemic, not least the expected backlog in the courts. With accelerated mediation, businesses can concentrate their resources on resolving other challenges, rather than conducting prolonged and expensive legal proceedings.

Traditionally, mediation is conducted in person. However, due to the emergency caused by the spread of Covid-19, traditional mediation is increasingly being shifted to online mediation.

Mediators should be taught to adjust to the new ways of doing their business remotely – as many mediators in the economies in which the EBRD invests where mediation is very new may struggle with new ways of communicating with clients and resolving disputes online.

"Due to the emergency caused by the spread of Covid-19, traditional mediation is increasingly being shifted to online mediation."



¹ <http://www.oecd.org/coronavirus/en/> (last accessed 16 December 2020).

² <https://www.ebrd.com/what-we-do/coronavirus-solidarity> (last accessed 16 December 2020).



ONLINE MEDIATION AS A RESPONSE TO COVID-19

Online mediation is a dispute resolution process that uses online video conferencing platforms to allow parties and a neutral mediator to “meet” remotely for sessions. In online mediation, the entire process is conducted remotely using a digital platform (a video conferencing service provider such as Zoom, Skype, Teams, and so on). Unlike a traditional mediation, the parties and the mediator will not meet face-to-face and all interactions are digital.

ADVANTAGES OF ONLINE MEDIATION

- It makes traditional mediation services more accessible.
- Parties can mediate from anywhere, so long as the parties have access to a computer and a secure and reliable internet connection.
- Scheduling can be more convenient, saving time and cost: parties need only consider the scheduled mediation time (no travel/logistics issues).
- The physical distance can be an advantage for the parties in cases of high level of

contentiousness: when parties are physically in the same room, their old patterns and dynamics may emerge more readily, which can negatively affect communication and negotiation.

- Similar to traditional mediation, online mediation allows for caucusing by utilising virtual meeting or breakout rooms so parties are able to meet separately with the mediator if needed.
- Parties, legal counsel and experts can participate easily: when the parties are legal entities (companies and so on), online mediation facilitates the participation of legal representatives, managers directly involved in the dispute and their legal counsel because they can remain in their respective offices and devote limited time to the mediation session.
- Documents can be shared and edited instantaneously.
- Respect of social distancing rules owing to Covid-19.
- Mediation fills the gap for solving disputes when access to courts is limited.

DISADVANTAGES OF ONLINE MEDIATION

- Risks to confidentiality when using third-party applications and the possibility of third-party presence near the parties' devices.
- Difficulty for the mediator in building rapport with parties: absence of human insight and empathy.
- The ability to read body language, hand gestures, eye contact and so on are all likely to be reduced over video conferencing.
- Difficulties for those who are not used to technology.

ONLINE MEDIATION PRE-COVID-19

Online mediation existed before the Covid-19 pandemic but it was not used intensively as a traditional in-person method. For example, in Italy, the Italian General Law on Mediation (legislative decree n. 28/2010) provides that mediation can also be conducted online. Based on the law, Italian mediation centres adopted the rules on online mediation. The Mediation Rules adopted by the Special Agency of the Chamber of Commerce of Rome for Arbitration and Conciliation, include an appendix on rules for online mediation. Its official website says that: "This system (*online mediation*) is very quick and easy to use but it is advisable to use it when it is not possible to meet personally because mediation, to work at its best, requires the physical meeting of the parties..."³ Due to the Covid-19 pandemic, however, the use of online mediation has gained in popularity.

ONLINE MEDIATION DURING COVID-19

Since the onset of the pandemic, a number of mediation centres, where mediation has been successfully used for a long time, have promptly introduced online mediation and trained their mediators in new skills.

For example, the Singapore International Mediation Centre (SIMS) Mediation Rules provides an online mediation service. The parties requesting mediation should indicate the mode of mediation: in-person or online mediation (full or hybrid).⁴ SIMS has also designed a Covid-19 Protocol which provides a swift and inexpensive route to resolve commercial disputes online during the Covid-19 period. This protocol applies whether a dispute was to a material extent caused by the pandemic or legislation relating to the pandemic.⁵

In the United Kingdom, in response to Covid-19, while the normal procedure is disrupted, the Centre for Effective Dispute Resolution (CEDR) offers online and telephone mediations to resolve disputes and help businesses find a sustainable way forward. CEDR has designed the Mediator's Guide to Online Mediation and the Model Mediation Agreement for Online and Telephone Mediation.⁶ The mediators and businesses can find the CEDR's guidance to conducting online mediations and can book online mediation on its mediation webpage.⁷

"Since the onset of the pandemic, a number of mediation centres have promptly introduced online mediation and trained their mediators in new skills."



³ https://www.arbitracamera.it/pagina32_mediazione-secondo-modalit-telematiche.html (last accessed 16 December 2020).

⁴ SIMC Mediation Rules EN <https://simc.com.sg/mediation-rules/> (last accessed 16 December 2020).

⁵ <https://simc.com.sg/simc-covid-19-protocol/> (last accessed 16 December 2020).

⁶ <https://www.cedr.com/wp-content/uploads/2020/03/Mediator-Guide-to-Online-Mediation-1.pdf> (last accessed 16 December 2020).

⁷ <https://www.cedr.com/commercial/telephone-and-online-mediations/> (last accessed 16 December 2020).



TECHNICAL REQUIREMENTS FOR ONLINE MEDIATION

Online mediations can provide a more cost-effective and environmentally friendly mechanism for dispute resolution. In order to create an environment which is conducive to settlement it is important that the mediator thinks carefully about the process from the outset and that he or she is familiar with all the relevant equipment and functions.⁸

There are certain requirements that are essential to any online mediation:

- strong, reliable internet connection with up-to-date security software
- computer/laptop with a microphone and high-quality camera
- secure video conference service provider, such as Zoom, Webex, GoToMeeting, Teams, Skype or others, which has the following functions:
 - waiting room which allows the holding of all participants on their own separate lines until the mediator opens the call

- multiple room (a “conference room” for all parties)
- breakout rooms for the individual parties which allow each party to have their own separate virtual room where they may discuss matters with the mediator or among themselves confidentially.

- sharing documents online
- utilisation, if possible, of electronic signing services.

In addition to the normal rules of mediation, there are online-specific issues which need to be considered, as the mediator will not have full visibility and control of the environment where the mediation is taking place. This includes:

- confidentiality
- privacy (ensuring that the parties agree that only individuals listed on the participant form may attend or be present in the rooms where each party member is joining)



⁸ <https://www.cedr.com/wp-content/uploads/2020/03/Mediator-Guide-to-Online-Mediation-1.pdf> (last accessed 16 December 2020).

- recording (agreeing in writing that recording is not permitted)
- planned or possible interruptions
- active management of communication
- explanation of how the mediation will run
- use of phones/checking emails (agree ahead of time if participants should have email and messenger functions closed and off during the mediation)
- having a Plan B, if there is a technical issue that arises.⁹

EBRD SUPPORT OF ONLINE MEDIATION

The EBRD has been continuously supporting the promotion of commercial mediation in a number of economies where the EBRD invests, including the Kyrgyz Republic, Moldova, Serbia and Tajikistan, and as a means of improving the investment climate.

As a response to the Covid-19 crisis, in order to support SMEs to resolve their disputes more efficiently through mediation during and post the Covid-19 pandemic period, the EBRD launched a technical cooperation project in Montenegro in September 2020. In the Kyrgyz Republic and the Republic of Tajikistan similar projects have been approved in October/November 2020 and will be launched at the beginning of 2021.

The situation in these countries varies in terms of the level of development of commercial mediation, but none of these countries currently has online mediation.



⁹ <https://www.cedr.com/wp-content/uploads/2020/03/Mediator-Guide-to-Online-Mediation-1.pdf> (last accessed 16 December 2020).



For instance, in the Kyrgyz Republic, the Law on Mediation was adopted in 2017, and with the support of the EBRD a self-regulated organisation for mediators entitled Republican Community of Mediators of the Kyrgyz Republic was established. There are currently two mediation centres in the country with a pool of mediators trained with EBRD support. Although Kyrgyz legislation has introduced the right of judges to refer disputing parties to the first informative mediation session and judges have received training on mediation, the number of cases of mediation is still small.

In Tajikistan, the Law on Mediation has not yet been adopted. The EBRD, through its project on commercial mediation launched in 2017, contributed to the promotion of commercial mediation and drafting the law on mediation. To promote mediation in the country, the Chamber of Commerce and Industry in the Republic of Tajikistan (CCI) established the Commercial Mediation Centre (CMC) as its structural subdivision which became operational in 2020. The EBRD project helped to develop the package of statutory documents for the CMC and organised the training of mediators. All certified mediators have been registered in the CCI mediators' registry and are ready to start practising mediation. The EBRD, during the next phase of the project, will provide support with adoption of the law on mediation in the country and, on its adoption, will assist with promoting and facilitating the use of commercial mediation, including online mediation to SMEs.

In Montenegro, the new Law on Alternative Dispute Resolution was adopted by the parliament on 16 July 2020 and came into effect on 6 August 2020.¹⁰ The law simplifies the procedure for enforceability of mediation settlements and provides for an obligatory referral of parties to a first meeting with a mediator in some types of disputes, including commercial ones. While the recent improvements of the legal and institutional framework establish an important milestone towards increasing the use of commercial mediation, the overall use of mediation in the country remains low. There is still a high number of commercial cases causing an

overload in the courts, especially because of Covid-19, which remains of concern. In 2020 the Mediation Centre, recently renamed as the Centre of Alternative Dispute Resolution of Montenegro, received 3,535 cases (2,885 cases were referred by the courts) of which 2,085 cases were settled (other cases are still pending). Of these 46 were commercial disputes from which 27 were settled and 19 are in progress.¹¹

To achieve the aforementioned objectives, these Covid-19 response projects will assist in providing guidance on how to conduct mediations online and organising capacity-building training for online mediators. In cooperation with EBRD Advice for Small Businesses, it is planned to promote the use of commercial mediation, including online mediation, among SMEs.

CONCLUSION

Online mediation is predicted to become the “new normal”. Its simplicity ensures it is an attractive option for anyone involved in commercial disputes. The Legal Transition Programme at the EBRD will continue to support the promotion of online commercial mediation in our regions to help SMEs resolve their disputes more effectively during and post Covid-19. In addition, the EBRD aims to enhance the necessary skills of the mediators and ensure the use of mediation, including online mediation, becomes normal business practice.



¹⁰ <https://me.propisi.net/zakon-o-alternativnom-rjesavanju-sporova/> (last accessed 16 December 2020).

¹¹ Provided by the Centre of Alternative Dispute Resolution of Montenegro as of 7 December 2020.