

MONTENEGRO STRENGTHENING COMMERCIAL MEDIATION GUIDANCE ON ONLINE COMMERCIAL MEDIATION PROCEDURES

TOOLS AND TECHNIQUES

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ABBREVIATION AND DEFINITIONS

Mediation provider	Any public or private entity which manages or administers a mediation process conducted by a third-party neutral mediator of whatever denomination or profession, who assists parties to amicably settle their dispute.
ADR Act	Montenegrin Alternative Dispute Resolution Act (Official Gazette of Montenegro No. 77/2020)
ADR Centre	Alternative Dispute Resolution Centre of Montenegro
Video conferencing service provider	Electronic tool used to connect online individuals through a platform (the most commonly used are Zoom, Teams, Skype etc.), usually providing audio and video streaming and other services.
ODR	Online Dispute Resolution

I. INTRODUCTION

When a dispute arises, parties can agree to refer to a professional mediator in order to find common ground and settle for a joint solution to resolve the dispute. Traditionally, mediations are conducted in person and just few of them online, for several reasons: it was the established practice; it was generally assumed that the mediator, to adequately and efficiently play his role, had to physically meet the parties; lack of familiarity and confidence in technology.

However, during these last years, mediation practitioners have increasingly used the videoconferencing platforms to hold the mediation meetings. In particular, a dispute can arise among parties that do not reside in the same area, or the parties might prefer to not meet personally to settle the dispute, reducing the emotional burden that a controversy may cause. For these reasons, in order to reduce costs of mediation avoiding unnecessary movement of people, to reduce the time spent in resolving a dispute through mediation for the parties, since the late 1990s, several mediation providers started offering an online alternative to mediation (the so-called Online Dispute Resolution methods, ODR).

With the advancing of technology and tools used for mediation, online mediation has increasingly become a reality. In particular since, the early 2000s, the use of online mediation – and, in general, of ODR – has increased and became institutionalized, introducing it as a method for dispute resolution for several institutions such as courts and administration authorities.¹ Most recently, the pandemic accelerated the above cultural change. During the emergency situation created by the diffusion of Covid-19, among the unfortunately well-known terrible sanitary, social and economic consequences, there has been a positive effect: everyone has been forced to learn – or to improve his knowledge on – how to use technology to continue to work and to have social relationships from home.

As regards the dispute resolution sector, the “social distancing” imposed by the measures taken against the pandemic made necessary to find an alternative way of holding meetings (in the case of negotiations, mediation etc.) and hearings (before the courts and arbitral tribunal).

¹ Karolina Mania, Online dispute resolution: The future of justice, International Comparative Jurisprudence, Volume 1, Issue 1, 2015

Thus, mediation as well has been strongly influenced by the recent emergency situation.

However, even if during this last year everyone, more or less, has improved his technology's skills, it seems necessary to give mediators practical tips to properly play their role online.

The objective of this document is to guide the mediators in Montenegro on the process of conducting online mediations using a video conferencing service provider and on specific techniques and tools for online mediation to enhance the necessary skills of the mediators to effectively conduct online mediation during and post Covid-19 pandemic, especially when it comes to the disputes in cross-border commercial relations, or when the parties are not from the same towns. Also a knowledge on using the online mediation will be also useful in cases when resolving of a dispute started through traditional, in-person mediation, but due to the specific circumstances it should be continued online from remote.

II. ONLINE MEDIATION

1. Definition of online mediation

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.

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 carefully thinks about the process from the outset and that he or she is familiar with all the relevant equipment and functions.

Even though mediation traditionally used to be (and still is) conducted in person, the above-mentioned need to facilitate access to mediation, trying to render the participation of the parties to the mediation sessions easier, less expensive and more technological, has now made virtual mediation a fully-fledged form of conducting a mediation.

Thus, an online mediation is organized and conducted by the mediation provider and/or the mediator making use of a video conference service provider.

The parties and the mediator shall virtually meet on the chosen platform, using their respective computer and videoconferencing devices and, during the virtual sessions, they shall discuss, explore and assess alternatives, negotiate and find an agreement to their dispute.

2. Online and mixed methods of mediation (online/in-person)

Online mediation can be used as a stand-alone method, or it can be combined with the traditional in-person method as a mixed (hybrid) method.

- Online mediation as a stand-alone method: if a meeting in person is not, for any reason, **wished**, for example, in case of high level of contentiousness or of interest of the parties in saving time and costs, or **possible**, in case that the parties and their counsels cannot physically attend the meeting, as in the case of the Covid-19 pandemic or for any other reason or in case of difficulties to spend time for travel, the mediator and all the participants can “meet” online on the chosen video conferencing platform.
- Mixed methods (online and in-person): nothing prevents to mix the online and in-person methods, so that some of the participants can attend the face-to-face meeting and some of them can participate via telephone or online. Moreover, a mediation session can be conducted via online means and be moved to in-person mediation at a later stage, or vice-versa, according to the current situation and requests from the parties².

The flexibility and informality of mediation allow the mediation provider and/or the mediator, in agreement with the parties, to adapt the mediation process to the different circumstances and needs of the parties.

In principle and to prevent eventual objections and/or challenges by any of the parties, the mediation provider and/or the mediator should always invite the parties to agree in advance how the proceedings will be conducted.

Nevertheless, the mediator will still have, during the proceedings, the possibility to discuss with the parties how to face possible contingencies. Thus, for example, even if the mediator and the parties previously agreed for a mediation process in person, in case of unexpected difficulties to attend the meeting of one of the participants, they may agree that this participant attend the mediation session online or by telephone while the others are meeting in person. Similarly, in case of online mediation, if one of the parties cannot connect on the videoconferencing platform, said party can be authorized to participate by telephone.

² please, see Chapter 5, paragraph 5.5 of this Guidance for further details

3. Advantages, challenges of online mediation and possible solutions

Just as any instrument aiming at settling disputes between parties, online mediation has its advantages and challenges.

However, being aware of positive and challenging aspects of this way of conducting a mediation, parties, lawyers and mediators are able to reduce, as much as possible, the risks possibly involved and to optimise the positive features of online mediation, taking into account the specific circumstances of the case.

3.1. Advantages

Advantages associated with online mediation include:

- If the parties are in different countries, their participation is facilitated, while in the case of in person mediation, the parties may have difficulties to travel to attend the meeting.
- Flexibility, as it makes traditional mediation services more accessible since parties are free to decide from where they want to mediate, as long as they have access to a computer and a secure internet connection, while in the case of in person mediation, the parties might be discouraged or prevented to participate because of the time and costs related to the personal attendance to the mediation meeting.
- The physical distance can be an advantage for the parties in case of high level of contentiousness, thus overcoming the reluctance to meet in person, while in the case of in person mediation, a party can refuse to attend the meeting because he/she does not want to meet the other party.
- As in traditional mediation, online mediation allows for caucusing³ by utilizing virtual meeting rooms so that parties are able to meet separately with the mediator if necessary, while in the case of in person mediation, the mediator can physically split the parties in two different rooms to hear them separately.

³ Individual meetings at which mediator separately speaks with one party and his/her counsel, while the other party is waiting

- Parties, legal counsel and experts can easily participate: when the parties are legal entities (companies, etc.), online mediation facilitates the participation of legal representatives (CEO, managers etc.), managers directly involved in the dispute and their legal counsel because they can remain in their respective offices and devote just an appropriate time to the mediation session, while in the case of in person mediation, it is quite difficult to have several people around the same table in person.
- Documents can be shared on the screen and edited instantaneously, while in the case of in person mediation, documents are physically shared among the participants in the course of the meeting; minutes of meetings and eventual agreement are drafted and hand-signed at the end of the meeting.
- Any participant can decide to take a break, switching off the camera and muting the microphone (so really clearing their heads), in agreement of course with the other participants and the mediator, while in the case of in person mediation, being altogether, the participants may have difficulties in taking advantage of the scheduled breaks, since they are not spending them in their premises but in the premises of the mediation provider.
- In case of a public emergency, online mediation allows the respect of social distancing and fills the gap for solving disputes when access to courts is limited, while in the case of in person mediation, meeting in person might be prohibited.

3.2. Challenges

Challenges associated with online mediation include:

- Risks to confidentiality when using third party applications and the possible presence of unpermitted third parties near the parties' devices, while in the case of in person mediation, the location should be organized in order to safely conduct the mediation, without the presence of third persons.

- Eventual technology malfunctions can affect the regular and fluent conduct of the mediation. At the same time this may be compared with the fact that in the case of in person mediation, there is the risk that one or more of the participants, for any reason, cannot reach the place of the meeting.
- Potential difficulty for the mediator in building rapport with parties: absence of human insight and empathy, which can be overcome in a way that mediator often ask disputants to communicate their thoughts and feelings as clearly as possible. On the other side, in the case of in person mediation, face-to-face communication may facilitate the establishment of a relationship of trust and empathy.
- Limitation – for those who are not used to virtual meetings - to nonverbal communication, namely the ability of reading body language, facial expressions, hand gestures, eye contact and voice tone, while in the case of in person mediation, face-to-face communication may facilitate the reading of nonverbal cues.
- Difficulty for those who are not used to technology, while in the case of in person mediation, there is no such difficulty but there might be other difficulties, for example, for those who are shy and who are not comfortable speaking before other people.
- Participants may be more easily distracted because, for example, of incoming emails, texts, calls, people entering in the party's room, while in the case of in person mediation, parties and their counsel sit together and are normally focused on the dispute and on the possible solutions.

3.3. Possible solutions

In order to reduce and mitigate the effects of the few challenges of online mediation, the mediator can:

- Choose a videoconferencing platform that replicates, as much as possible, the same features and aspects of face to face mediation (*i.e.* confidentiality, joint session, breakout rooms, sharing documents), so that the participants have the impression of being involved in a “traditional” mediation, without having to focus their attention on the technological aspects.

- Draw the parties' and their lawyers' attention to the several advantages of online mediation which counterbalance the few challenging features
- Prepare in advance to familiarise with the chosen videoconferencing platform and raise the parties' and their lawyers' awareness of the technological aspects.
- Induce, before and during the mediation session, the parties and their lawyers to forget that the mediation shall not be conducted in-person and to focus their attention on the possible solution of the dispute.
- Set ground rules for confidentiality and party commitment to participation from a private and quiet space, in order to safeguard the confidential nature and the smooth conduct of the mediation.
- Turn off notifications in computer settings and request that all participants do the same, to reduce the risk of distraction.
- Agree in advance and provide a contingency plan (for example a conference call) to be used in case of technology malfunctions, to reduce the negative impact of eventual bandwidth disruptions.
- Make an effort to create a strong relationship of trust and empathy with the parties, using caucus (breakout rooms) to facilitate feeling and engagement.

4. Specific rules, features and technology requirements for online mediation

The course of the online mediation process depends, of course⁴, on various factors: eventual specific rules provided by the applicable law⁵ and/or by the mediation rules – if any - issued by the mediation provider administering the proceedings; the attitude and training of the mediator.

⁴ As in the traditional mediation process.

⁵ The law applicable to the mediation proceedings will be different, depending upon various factors. In case of domestic mediation, it will be the law of the place where the parties are resident; in case of transnational mediations, there might be several, different applicable laws. For example, article 29 of the ADR Act provides that, in case of case of cross border disputes the mediator has to take into account the provisions of the European Union on mediation in civil and commercial matters. However, the parties can agree , in the mediation agreement, on a specific law, taking into account that the mandatory provisions of the applicable law, if different from that chosen by the parties, shall be in any case applied. Thus, the mediators should be always aware of applicable national statutes or court rules that could be applied to the relevant mediation. In case of domestic online mediation in Montenegro, the provisions of the ADR Act. have to be taken into account by the mediators.

Besides, the online conduct of a mediation inevitably implies and necessitates that its specific features and technology requirements must be taken into account by the mediation provider, the mediator, the parties and their lawyers.

4.1. Privacy, confidentiality and prohibition on recording

Privacy and confidentiality

The fact that the mediator and the participants do not physically meet in the same room but only virtually, on the chosen platform, may raise confidentiality and privacy concerns because the mediation provider and the mediator cannot prevent third parties attending the virtual meeting.

Even if nobody but the mediator, the parties and the other authorized participants (parties' counsel, experts etc.) should be present in the same rooms used by each of the attendees when connected, it is quite impossible for the mediator and the mediation provider to prevent the presence of people different from those who are entitled to attend the meeting. Therefore, parties should agree in written (in the Mediation Agreement) that no one except entitled persons should attend the mediation sessions, and they should be reminded at this at the beginning of each session.

Prohibition on recording



In order to protect privacy and confidentiality nobody, including the mediator, the parties and their lawyers, can record the mediation session, in full or in part. In order to ensure confidentiality of the process, in the case of unauthorized recording, this audio or video of the meeting must be destroyed and not given to third parties. The mediator must explain this to the parties from the outset and, if possible, to include this into its internal mediation rules.

Note that many platforms now voice an automatic warning to all participants if the conversation is being recorded. This may help prevent unauthorised recordings

Applicable law

Confidentiality of communications during mediation depends on the law, as applicable in any particular jurisdiction. Thus, if the parties and the mediator have already agreed on the law applicable to the mediation process, this issue shall be regulated by said law⁶.

Otherwise, this issue could be also faced and solved by the rules – if any - of the mediation provider chosen by the parties to administer the mediation.

In the absence of said mediation rules, the mediator and the parties should face and regulate these issues in the mediation agreement⁷, to be signed by the parties at the first meeting with the mediator and to be respected by all the participants during the mediation, providing, among other things, privacy and confidentiality undertakings:

- The mediation sessions shall be closed to all persons other than the parties, their legal representatives, and other persons invited by the mediator with the consent of the parties.
- The participation must be in a place without the presence of people who are not participants in the mediation process.
- All information and documents disclosed by the other parties during the mediation process must be kept confidential.
- No recording of the meeting is permitted at any time.

In order to be sure, an express confirmation of the above undertakings is recommended to be included in the minutes signed at the end of the meeting.

⁶ The Montenegrin ADR Act, at article 21, in relation in general to mediation (without any specific provision regarding those that are conducted online) provides several limits to use, before a court or an arbitral tribunal, of statements made and evidence submitted in the course of the mediation.

⁷ Article 12 of the Montenegrin ADR Act provides that, during the first meeting, the mediator and the parties may conclude a mediation agreement and article 14 sets specific provisions of the mediation agreement, providing that, among other things: it must be made in written form; it has to include, names and addresses of the parties, description of the dispute, name of the mediator and rules for his/her appointment, time limit for the conclusion of the mediation proceedings and a statement that the parties will try to solve the dispute before the mediator. The same article also provides that the mediation agreement can also provide rules for the conduct of the mediation, in accordance with the general principles provided by the same ADR Act.

Additional actions to ensure confidentiality

Moreover, to keep the mediation session confidential, the mediator should send to the parties only the link for the meeting and/or a password/passcode, so that only the invited parties can attend the virtual session on the videoconferencing platform.

Another tool for the mediator consists of the “waiting room” function of the platform. In fact, when the parties click on the link and connect to the platform, they are placed in a separate virtual room, waiting for the mediator (as host) to enable them to attend the meeting. Using this function, the mediator shall have the power to admit (those who are authorised to attend the meeting) or not (those who are not authorised) those who are in the waiting room.

4.2. Technical requirements

Online mediation inevitably implies the use of technological equipment and internet connection.

4.2.1. Equipment

In principle, anyone can participate in an online mediation making use of any device enabling him to attend a videoconference (smart phone, tablet, laptop etc).

However, in order to adequately and actively attend the session and to efficiently interact with others, it is preferable if all the participants use a desktop or a laptop computer, with microphone and camera.

4.2.2. Internet connection

Moreover, the mediator and the other participants/parties must have a stable, secure and high-speed internet connection, for more efficient workflow, better use of online tools and more effective sending and receiving of documents. An unstable and slow internet connection can easily affect the regular development of the mediation and render the smooth carrying out of the negotiation between the parties more difficult despite the help of the mediator.

4.2.3. Electronic documents transmission

During the session it might be necessary to exchange documents among the parties and the mediator. Even though, by choosing an adequate platform, it will be possible to share documents on the screen, the need to send and receive documents shall inevitably arise (*i.e.* the minutes of the meeting, the eventual agreement).

Therefore, in order to share documents, the mediator and the parties should agree in advance to use one or more of the following solution:

- A. Sharing documents on the screen function of the videoconferencing platform.
- B. Email.
- C. File sharing platform (as Dropbox, Google Drive, OneDrive etc.).

Reliability and security are essential for an effective online mediation.

4.2.4. Videoconferencing Platform

Another essential tool for an effective online mediation is a secure and proper videoconferencing platform. There are several different platforms available: Zoom, Webex, GoToMeeting, Teams, Skype and others. The mediators should always use the professional version of the platform.⁸

Therefore, the mediation provider and/or the mediator should choose, in agreement with the parties, a platform having at least the following features:

- The mediator, as host of the videoconference, shall have the power to decide whether and when to admit the participants, mute them, share documents, create, open and close breakout rooms.

⁸ The professional version allows the use of several more tools and instrument than the free one and is usually more secure.

- Waiting room, where the participants shall wait until the mediator admit them to the joint session.
- Shared conference room where the participants and the mediator, all together, shall communicate and negotiate.
- Breakout rooms, allowing the mediator to split the meeting in several separate sessions for caucus, where each party shall have the possibility to discuss, in strict confidentiality, the relevant aspect of the subject matter of the mediation without the other parties, with or without the mediator.
- Chat system to send messages to all or just to some of the participants.

It is essential that the platform allows the mediator and the participants to replicate, as far as possible, a face-to-face mediation.

4.2.5. Signature

At the end of the mediation session, it will be necessary to sign the pertinent minute and, in case of success, the agreement.

Therefore, the mediator should discuss in advance with the parties how these documents – once they have been agreed and finalised - shall be signed. They will have the possibility to choose among the following options:

- A. Electronic or digital signature of the final text of the agreement, which are often used interchangeably but they are different. Electronic signature is an electronic sound, symbol or process that is attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. Digital signature is a digital code generated and authenticated by public key encryption which is attached to an electronically transmitted document to verify its contents and the sender's identity⁹.

⁹ Electronic signature and conditions for its use in Montenegro are defined by the Law on Electronic identification and electronic signature (Official Gazette of Montenegro No. 31/2017 and 72/2019) must be connected to the contract, letter, or document in question and for digital signatures it is necessary to have a digital certificate from an issuing certificate authority to link the signer and the signature.

- B. Exchange by email between the lawyers of the final text, in pdf version; hand-written signature, by each party, of this final text; further exchange by email between the lawyers of the scanned agreement signed by each party; then sending the hard copies of the originals signed.

The mediator should, if possible, draw the parties' attention to the opportunity of choosing the first option (electronic or digital signature), since it is more secure and faster.

5. Online mediation: start, organisation and step-by-step process in Montenegro

Mediation is a voluntary process. Therefore, in general, mediation is initiated on the basis of a previous agreement between the parties to try to solve their disputes through mediation. However, it is also possible to start a mediation in absence of a pre-existing agreement, as below specified.



Mediation clause in the contract

The parties can include in a contract a specific clause¹⁰, agreeing that they will try to solve before a mediator all disputes eventually arising out of or in connection with said contract. If the parties are sure and agree in advance that, in case of future disputes, the mediation will have to be conducted online, they can of course specify that in the mediation clause. Otherwise, even if the clause only makes reference to mediation, without any further specification, once the dispute arises they can still agree on the online procedure.

Proposal for mediation

The other option is that, if two parties to a contract are in conflict and the contract does not contain any provision making reference to mediation and the relationship between the parties becomes difficult, it would be difficult, for the party interested in finding a solution to negotiate a mediation agreement with the other party. In this case, a party can try to file a proposal for mediation to the ADR Centre, which should submit it to the other party, and the other party, once it receives said proposal, shall be free to accept or not.

¹⁰ The so-called mediation clause. Article 11 of the Montenegrin ADR Act expressly regulates the mediation clause.

Parties referred to mediation by the court

There is a third option, when the court refer the parties to try to solve their dispute through mediation or other alternative dispute resolution method. According to the Montenegrin Law on Civil Procedure¹¹, the court shall, during the preparatory hearing, or in the first hearing for the main trial inform the parties of the possibility to resolve their dispute in mediation procedure. Also, if during the proceedings the court is of the opinion that the dispute could be successfully resolved in mediation, the court can refer the parties to the first meeting with the mediator at any time until the final completion of the proceedings to try to resolve their dispute in the mediation procedure. When the court refers the parties to the first meeting with the mediator, the parties are obliged to attend the first meeting with mediator in person

5.1. Start: request for online mediation

As set out above, to start an online mediation the party interested in initiating such a proceeding must file a request,¹² specifying that the mediation shall be conducted online. The request can be, in general, submitted by hand, post, by email or, when possible, directly on the website by fulfilling specific template for that purpose.¹³

In case there is a pre-existing mediation clause, the request for mediation shall be drafted and filed according to the relevant provisions of said clause; in the absence, of a pre-existing agreement, the interested party shall be free¹⁴ to draft and file the request according to its preferences.

¹¹ Article 329 of the Law on Civil Procedure (Official Gazette of the Republic of Montenegro 22/04, 28/05 and 76/06, Official Gazette of Montenegro 48/15, 51/17, 75/17, 62/18, 34/19 and 76/20)

¹² It must be noted that, the Montenegrin ADR Act provides, at article 16, that the mediation shall be considered commenced when the mediator and the parties have signed a mediation agreement or when the mediator appointed in the mediation agreement or by the ADR Centre accepts his/her appointment. This provisions generally concern mediation, without any specific mention of online mediation.

¹³ The method utilized to submit the request can vary according to the rules or practice of the mediation provider. . In Montenegro the ADR Centre did not issue mediation rule but applies an established practice, compliant with the ADR Act, according to which the request can be submitted by hand, by post, or by email.

¹⁴ Taking into account eventual statute of limitations provided by the relevant applicable law. At this regard, the Montenegrin ADR Act provides, at article 13, that, if the parties are mandatorily referred to mediation, they should apply to the ADR Centre within 8 days from the receipt of the decision on referral. In absence, the ADR Centre shall invite the parties to attend the first mediation meeting. Besides, it is worth noting that article 17 provides for the effects of mediation on limitation and prescription periods.

In Montenegro, this request should be submitted to the ADR Centre. In this case, after the filing of the request, the process shall follow the provision of the ADR Act and the practice of the ADR Centre.¹⁵

Thus, content and form of the request for mediation depend on different circumstances:

- The existence or not of a previous agreement between the parties to try to solve their disputes through mediation.
- The applicable law: the applicable law might provide specific provisions on the mediation request.
- The provisions of the mediation rules adopted by the chosen mediation provider or, as in Montenegro, the practice of the ADR Centre, compliant with the ADR Act:
- The party and/or its lawyer, taking into account the eventuality of the above mentioned rules and/or practice, may decide how to draft the request.

As detailed in Annex 1, providing an example of a Form of Request for Online Mediation, the request for online mediation should usually contain:

- Name and contact information of all parties to the dispute and their counsel, if any.
- Brief statement of the nature of the dispute.
- Indication of the amount in dispute.
- Way/ method (online, in person or hybrid/mixed).

The party submitting the request may attach any documents that they consider may be helpful for a better understanding of the case.

The party receiving said request is free¹⁶ to accept or not to participate.

In the case of acceptance, the parties shall sign the Mediation Agreement, the proceedings can be started and, in order to conduct a mediation in an efficient way, the mediator and the parties, before and during the meeting, shall have to carry out several activities as outlined below.

¹⁵ In Montenegro, the only mediation provider is the Centre for Alternative Dispute resolution, and mediation is defined by the ADR Act. The only secondary legislation related to the mediation is the Decree on the amount of remuneration and reimbursement of expenses for dispute evaluators and mediators, adopted by the Government of Montenegro, which defines the amount and ways for payment these costs, and the Rules on the manner of determining mediators from the list of mediators, and Rulebook on training curricula for mediators adopted by the ADR Centre.

¹⁶ Unless any applicable mediation rules or law provide differently. In this case, the mediation rules and/or law could also provide a specific time limit to accept or not. In Montenegro there are no specific provisions regarding the timeline for parties to accept or reject.

5.2. Organization of the process and preliminary activities

Once the party requested to participate in the mediation accepts, the ADR Centre shall appoint the mediator unless the parties select the mediator by themselves¹⁷.

The appointed mediator shall, first of all, assess whether he/she is in a position to accept or not the task. To do so, the mediator should consider his/her:

- Impartiality.
- Neutrality.
- Independence.
- Professional experience and capacity to manage the requested mediation.

The practice of the ADR Centre is that it shall deal with all the preliminary activities (sending the request for mediation to the invited party, receive the acceptance of said party, appointing the mediator, fixing the first meeting etc.).

However, in some other Countries¹⁸ where there is an established mediation practice, the mediator may, prior to the mediation session and when possible:

- Contact – by telephone, email or videoconferencing platform, as the mediator shall deem appropriate - the parties and their counsel to introduce himself and start to establish a fruitful and trustful relationship.
- Explain the purposes of the mediation to the parties and how it will be conducted.
- Set up, in agreement with the parties and their counsel, the mediation session.
- Plan, with the parties and their counsel, the duration of the meeting and possible breaks.
- Choose the videoconferencing platform.
- Become familiar with the platform.
- Explore the parties' confidence with technology and with the chosen platform.
- Ask the parties and their counsel whether they want to do a test run on the chosen platform.

¹⁷ If the parties jointly nominate a mediator the Centre should, subject to exceptions, confirm the indicated mediator.

¹⁸ As in the United States, United Kingdom, Switzerland, Italy etc.

- Provide for a technology failure protocol.
- Send the parties the link to connect to the platform on the scheduled day and time.
- Ask the parties and their counsel to inform him, at least two days before the online mediation meeting, about names, positions and qualifications of the participants and to send him their documents.
- Prepare a draft minute of the meeting.

5.3. Set ground rules

In Montenegro¹⁹, during the first meeting (which can be held in person or online), the mediator should set the rules, as referenced in Annex 2 of this document, providing a Sample of Mediation Agreement, with the parties and their counsel, that shall be followed during the meeting, aiming at making it fair, correct, effective and fruitful, in the interest of the parties.

In any case, a reference to the agreed ground rules and a confirmation of the corresponding commitments can be also included, by the mediator, in the minutes of meeting drafted and signed at the end of the mediation session.

Therefore, the ground rules contained in the Mediation Agreement should at least include the following provisions and indications:

- Indication of the chosen platform and mode of document transmission and signing.
- Acknowledgement of the parties of the necessity to dispose of a secure and high speed internet connection, adequate computer, microphone and video camera.
- Agreement on turning off email and message notifications.
- How to manage interruptions, as, for example, providing that in this case the participant having difficulties should immediately contact – by telephone or email - the mediator to assess and adopt possible solutions.
- Agreed technology failure protocol as, for example, immediately agreeing whether to postpone the meeting or to hold it by telephone (conference call), indicating in advance the telephone numbers of all the participants.
- Short explanation of the manner of connection to the platform and technical conduction of the session.

¹⁹ In some other Countries this agreement can be reached by the mediator also before the first meeting.

- Short explanation of the way of conduction of the session (joint session, breakout rooms, etc.).
- Basic rules of communication during joint and separate sessions.
- Privacy and confidentiality undertakings.
- No recording undertakings.

By setting the above rules in written form, signed by the parties, the latter will have a clear explanation of all the aspects and rules of the mediation and the mediator will reduce the risk of unexpected and undesirable problems or inappropriate behaviour.²⁰

5.4. Online mediation session

Even though the mediation session can be conducted in different ways, mainly depending on the training, experience, nature and preferences of the mediator, a standard mediation session can be summarized as follows:

- The mediator will connect to the platform at least fifteen minutes before the scheduled time.
- Before connecting, the mediator should carefully organize his/her background, lighting and screen framing.
- Before admitting the parties to the session, the mediator will wait for the presence of all participants to the mediation to be in the platform's waiting room.
- Once all participants have been admitted, the mediator will open the joint session:
 - Short presentation and explanation, by the mediator on mediation and on how the session will be conducted.
 - The mediator will request the parties to state whether they accept the mediation and to sign the Mediation Agreement which contains the ground rules on online mediation.
 - The mediator will ask each party to summarize its position (opening remarks).
 - The mediator will sum up each party's position.

²⁰ Please, see Annex 2 of the Guidance for a sample of Online Mediation Agreement.

- The mediator, when appropriate, will split the parties in breakout rooms and start the caucus with each of them. In this confidential session:
 - The mediator will ask each party to freely express its position, try to explore the real interest needs of each party, induce each party to put itself in the other party's shoes and see the dispute on the other party's perspective, induce each party to consider different settlement options.
 - The mediator will sum up and ask each party what it authorises him to report to the other party.
- Joint session:
 - The mediator will summarize²¹ what emerged during the separate sessions.
 - The mediator will invite the parties to explore and discuss all the options of the resolution of the dispute which emerged during the private sessions.
 - In case of an agreement, the mediator will invite the parties to clearly set the terms and draft the agreement.
 - At the end, the minutes of the meeting and the agreement, if any, shall be shared on the screen and expressly agreed to by the participants.
- Final stage: the documents agreed shall be sent to the parties and signed, following the procedure and modalities agreed at the first meeting with the mediator.

5.5. Mix of Methods: from in-person mediation to online mediation and vice-versa

One of the main advantages of using online mediation is the possibility to conduct the mediation even though the parties are not present in the same place, but connecting remotely. Situations of crisis, such as the COVID-19 pandemic and the related restrictions imposed by governments worldwide, create the need to avoid personal contact.

²¹ To the extent that he has been so authorized by each party, given the particular confidentiality that characterizes private caucus.

For this reason, when for instance a mediation is initiated through in-person means, and during the different phases of conducting the mediation, sudden restrictions are imposed, it is certainly possible to propose to the parties to turn to online mediation to finalise the process. Once decided to move to online mediation, parties will follow the rules of online mediation as described above in the Guidance and presented by the mediator at the first online session. In this case, it would be appropriate that the mediator invites the parties to sign an agreement where they agree to shift to online mediation or, at least, the mediator should state in the minutes of the meeting, to be signed by the parties, that they so agreed.

On a similar note, when the parties have started conducting the mediation through online means and, for reasons related to one of the parties or both, they prefer to meet personally and to finalise the mediation face to face, the mediator can propose to the parties to agree moving to in-person mediation for future sessions. This is in particular relevant when the parties approach to the end of the negotiations and are close to reaching the settlement. Even though it is not compulsory, as described above in the procedure on online mediation, the mediator can propose the parties to meet in person to conclude the settlement and sign it in person.

5.6. Settlement concluded in the online mediation

Once the parties achieve settlement and signed settlement agreement, the mediator shall deliver the settlement to the ADR Centre that will promptly submit it to the court with jurisdiction for confirmation. Settlement concluded before a mediator in the online mediation in a dispute where no court proceedings have been started, shall become an enforceable enactment after being confirmed in the court with jurisdiction, i.e. after a notarial deed is composed in line with the law regulating activities of notaries. The confirmation of settlement shall be done by a single judge of the court with jurisdiction by affixing a certificate on the settlement. The settlement may be refuted only by a claim, in line with the law regulating civil procedure.

III. TIPS FOR A SUCCESSFUL ONLINE MEDIATION

As shown above, in-person and online mediation have slight differences, advantages and challenges and a good online mediator has the duty to do his/her best to mitigate and reduce the latter. The parties and their lawyers should also adapt their approach and behaviour, taking into account specific features of online mediation.

Being aware of both the 'pros' and the 'cons' allows the parties in dispute to maximise the benefits and optimise their potential for resolution.

1. The mediator

A professional and experienced mediator, in order to properly and efficiently conduct an online mediation, should:

- Invest his/her time to thoroughly understand how the videoconferencing platform operates, becoming as familiar as possible with them and with possible technical or technological setbacks and how to deal with them.
- Optimise and check his/her equipment (desktop or laptop computer with microphone and camera, high speed internet connection), background, lighting, clothing.
- Make sure that the parties and their counsels are or become familiar with the chosen platform, being available to help them with indications and suggestions on how to connect and manage the platform, how to arrange their devices, environment and lighting and on the importance of having a high-speed internet connection.
- Offer the possibility to hold a test before the mediation session
- Quickly understand and work on assuring a proper space for all the parties to speak and, in particular, reassuring those who might be intimidated by the technological aspects of the mediation.

- Organise timing of session and plan breaks.
- Consider the possibility to contact the parties before the meeting to begin to better understand the disputed facts.
- Be sure that all parties and counsels have, on the scheduled day, created time for and are fully prepared to participate in the videoconference.
- Agree with the parties a plan B (telephone or other) and exchange telephone contact numbers.
- Identify, from the beginning, all the participants and make sure that everyone has understood who the others are and their functions (parties, key decision maker, counsel, etc.).
- Set the ground rules early in the mediation.
- Use the “chat” (to send messages to an individual user or to the entire group) when necessary and or appropriate.
- Use and resort to active listening, questions, brainstorming, collaboration and empathy.
- Be particularly focused on reading and interpreting participants’ nonverbal messages (to do so, the mediator should adapt the video layout – gallery view, active speaker view etc. – to his/her necessity, taking into account that, as in face-to-face mediation, it is very important to carefully look at the speaker and, at the same time, be able to observe the other participants too).
- During the private session²², it could be useful to keep the parties engaged by giving them tasks (as, try to put themselves in the other party’s shoes, explore their respective real interests and needs, assess the best and the worst alternative to a negotiated agreement etc.)

²² A private session (or caucus) is a private meeting – in the context of the mediation meeting - between the mediator and just one of the parties and its lawyers that is held without the other party. In some mediations there are no caucuses at all, while in others the mediator may meet separately with each party once or multiple times, depending on the situation. It is always up to the parties and the mediator to decide if they want to use private meetings.

2. The parties

A party really interested in trying to reach a solution of the dispute in the context of an online mediation, should:

- Have a working and adequate equipment (desktop or laptop computer with microphone and camera) and high-speed internet connection.
- Be or become familiar with the chosen platform.
- Ask the mediator to hold a test before the mediation session should there be a lack of familiarity with the chosen technology
- Ask clarifications to the mediator, in case of doubt on any aspect of the online mediation.
- Ask his/her lawyer to meet before the mediation session to adequately discuss and agree to the strategy to be used.
- Use the “chat” (to send messages to an individual user or to the entire group) when necessary and or appropriate but only in relation to organisational matter.
- Mute the microphone when others are speaking.
- Carefully respect the agreed ground rules.
- Ask for a break if necessary.
- Be open.
- Have a cooperative - and not adversarial - approach.

3. The lawyers

A lawyer, in order to adequately and professionally assist his/her client in an online mediation, should:

- Have a working and adequate equipment (desktop or laptop computer with microphone and camera) and high-speed internet connection.
- Be or become familiar with the chosen platform.
- Consider the opportunity to have an online test, with the mediator and the client, before the mediation session.

- Clearly explain to his/her client the features of mediation and the particularity of those that are conducted online, emphasizing that he will be – together with the other party - the decision-maker.
- Bear in mind that, during the mediation session, he will be in a different location from the client and that, therefore, he/she might have to put more focus on adequately preparing the client taking into account the particularity of online meetings.
- Clarify to his/her client that, in mediation, the lawyer will not have the same adversarial approach he/she would have before a court.
- Carefully prepare the mediation, together with his/her client, understand his/her real interests and needs and plan an adequate strategy.
- Remind his/her client that he/she can have an open approach, given that mediation is protected by confidentiality and privacy.
- Invite the client to also attempt to understand the other side's case.
- Ask the mediator to identify all the participants and their roles.
- Cooperate with the mediator, in the interest of the client.
- Have a draft settlement agreement and/or be available to draft it in the course of the mediation session.

IV. CONCLUSION

Technology is having an increasingly significant impact on everyday life. Many aspects of our life have changed and become facilitated – with a few exceptions – by electronic devices, computers and internet. Nowadays, everyone is more used to technology than before.

Mediators, parties, lawyers, and mediation providers cannot ignore this unstoppable process. To be viable, mediation practitioners must change, adapt and evolve.

During 2020, as a result of the pandemic, most mediations were conducted online and the results are positive. Online mediation is set to become the “new normal” for the foreseeable future and is an attractive option for anyone involved in civil disputes. It is true that, in certain cases, face-to-face sessions are necessary and really cannot be replaced. It is equally true that in several cases, online sessions can easily be used as a valid and equivalent alternative.

As described in the present Guidance on Online Mediation Tools and Techniques, online mediation can provide a valuable alternative to in person mediation when this cannot – for any reason - be conducted. Moreover, online mediation can further reduce costs and time allocated into resolving the dispute, while continuing benefiting from the services of professional mediators.

The Guidance represents an introduction and a practical tool for mediators in Montenegro to initiate conducting mediations online. It provides detailed rules, features, technology requirements in order to be able to smoothly conduct an online mediation session. It furthermore describes in details the entire process of online mediation, from the request to the organization, rules and agreement, highlighting the differences between online and in person mediation, providing useful tips for mediators.

It is probably time to change mentalities and start considering online mediation not as a second class alternative but as one of the two main modes of conducting a mediation.

Therefore, before starting a mediation and deciding how it will be conducted (face-to-face or online), the parties and their counsel should knowingly and adequately decide taking into account, at least, the respective advantages, disadvantages and features.

In conclusion, mediation is not a panacea but it has the potential to unlock and resolve even the most intractable disputes in a highly efficient and often mutually satisfactory manner. Therefore, it should certainly not be abandoned only because it might be virtually conducted but should be seriously considered as a valid option for any mediation process.

ANNEX 1: FORM OF REQUEST FOR ONLINE MEDIATION

Please complete this form if you are interested in having your dispute mediated through the Centre for Alternative Dispute Resolution or wish to switch to or add online method to an ongoing mediation.

There are costs associated with mediating through the Centre for Alternative Dispute Resolution. Please visit www.centarzaars.me to learn about the mediation process and anticipated costs. No fees are due until an agreement to mediate with the other parties is confirmed i.e. after signing the Mediation Agreement,

If you have questions after reviewing this information, please contact us at email: centarzaars@centarzaars.me, or phone No. 020 265 349 or 068 872 965 office, and request a package of information that will include an overview of the mediation process, fees and rules.

Please fill out the form completely. Missing information may delay the processing of your request

Initiator of the mediation procedure:

First Name	Middle Name	Last Name
Company name		
Street Address		
City	State	Zip
Telephone	Fax	
Email Address		
Tax Identification Number:		

Other Party:

First Name	Middle Name	Last Name
Company name		
Street Address		
City	State	Zip
Telephone	Fax	
Email Address		

1. I request that my dispute be mediated by the Centre for Alternative Dispute resolution, according to the ADR Act and the ADR Centre Mediation Rules..

2. Check One:

☐ This dispute involves a pending court case.

The case number is: _____

☐ This dispute does not involve a pending arbitration case.

3. Please provide a brief description of the dispute. Include a summary of what occurred, the names, the date(s) on which the dispute occurred, the names and titles of all individuals involved, and the relief requested (e.g., an amount of money damages or a description of other relief you seek).

4. Name and surname of the proposed mediator, if the parties agree on the appointment of a mediator in a particular case (otherwise, the Centre for Alternative Dispute Resolution will appoint a mediator in accordance with the ADR Act and the ADR Centre Rules on the appointment of mediators and assignment of cases referred to mediation)
-

5. I ask that the mediation be held:

- ☐ Online, via _____ platform
- ☐ Mixed method, online and in person

6. Other remarks:
-
-

Please mail or email this completed form:

MAIL: Serdara Jola Piletića bb, Podgorica

E-MAIL: centarzaars@centarzaars.me

ANNEX 2: SAMPLE OF ONLINE MEDIATION AGREEMENT

Please note that the below may be used as a stand-alone agreement to initiate mediation or be formulated and added as an amendment to an existing mediation agreement when switching to or adding online mediation method to an ongoing mediation

ONLINE MEDIATION AGREEMENT

This Agreement is entered into on the

[•] day of

[•] by and between:

Requesting Party
and

Responding Party
(hereinafter also referred to as the “**Parties**”)
and

.....
(hereinafter also referred to as the “**Mediator**”)

WHEREAS, the Parties are involved in a dispute in relation to(*short description of the dispute*)..... (hereinafter also referred to as the “**Dispute**”).
(in case of pre-existing agreement to use mediation to solve such dispute)

WHEREAS, pursuant to article [•] of the(*reference to the contract/agreement containing the mediation clause*)..... (hereinafter also referred to as the “**Mediation Clause**”), the Parties decided to enter into mediation with the intent to resolve the Dispute (hereinafter also referred to as the “**Mediation**”).
(in absence of pre-existing agreement to use mediation to solve such dispute)

WHEREAS, the Parties decided to enter into mediation with the intent to resolve the Dispute (hereinafter also referred to as the “**Mediation**”)

WHEREAS, the Parties want the Mediator, who accepts, to conduct the Mediation and help them to settle the Dispute.

NOW THEREFORE, in consideration of the mutual undertakings and promises herein, the Parties and the Mediator hereby agree as follows:

1 The Dispute

1.1. The Parties state and declare and the Mediator acknowledges that the Dispute relates to(description of the dispute)

1.2. - The Parties state and declare and the Mediator acknowledges that the amount in dispute can be actually assessed in(indication of the value of the dispute, if known at the time of filling this form).....

2 The Mediator

2.1. The parties hereby appoint, who accepts, as mediator for their negotiations aiming at solving the Dispute. The Mediator confirms and the Parties acknowledge that:

- A. He/she is and remain impartial, neutral and independent in relation to the Parties and to the Dispute;
- B. To the best of mediator's knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that he/she should disclose because they might be of such a nature as to call into question his/her independence in the eyes of any of the Parties and no circumstances that could give rise to reasonable doubts as to his/her impartiality;
- C. However, the Mediator may privately – in the course of the separate sessions or in private communications out of Mediation sessions - contact and discuss with each Party and its counsel the procedural aspects of the Mediation and the subject matter of the dispute in order to better understand the facts and the parties positions, without entering into the negotiations, keeping his/her impartiality, independence and neutrality.

2.2. The Parties and the Mediator acknowledge and confirm that the Mediator will facilitate the Parties themselves reaching an agreement in a collaborative, consensual and informed manner and that he/she will not have power to decide the Dispute, nor not express any opinion on the subject matter of the same.

3 The Mediation

3.1. The Parties agree to attempt in good faith to settle the Dispute during the Mediation, through active participation of the Mediator, in an online format, from different locations, making use of(indication of the videoconferencing platform)..... (hereinafter also referred to as the “**Platform**”).

3.2. The Parties and the Mediator agree and undertake to act and participate in the Mediation in accordance with the present Agreement.

3.3. The Parties here declare that they voluntarily initiate the Mediation in good faith, with the intention to reach an agreement.

3.4. However, it is agreed that any Party may withdraw from or suspend the Mediation at any time, for any reason and that the Mediator may suspend or terminate the Mediation if he/she feels that there are not the conditions to carry on the Mediation.

4. Confidentiality and Privacy

4.1. All the participants in the Mediation, including the Mediator, the Parties and their counsels agree, acknowledge and undertake:

- A. That all Mediation discussions, negotiations and documents, including all written, oral and digital communications with all the participants and their counsels, any proposal and draft resolutions and any unsigned mediated agreements shall be kept strictly confidential and not disclosed to any third party and shall not be admissible and shall not be produced as evidence or disclosed to any judge or arbitrator in any court proceeding, unless:
 - a. otherwise agreed by the Parties in writing; or
 - b. disclosure is required by law; or
 - c. disclosure is ordered by order of any legitimate court; or
 - d. to implement or to enforce terms of settlement.
- B. No person other than the Mediator, the Parties and their counsels will participate in, observe, assist and be present in the same room where that Mediator's, Party's or counsel's computer is located.

4.2. The Parties and their counsels further agree, acknowledge and undertake to not:

- A. Call the Mediator to testify concerning the Mediation or to provide any materials from the Mediation in any court proceeding between the Parties;
- B. Make any audio or video recording, in full or in part, of any mediation session and ensure that any of such audio or video recording is made by any third parties.

4.3. The Mediator undertakes to keep as strictly confidential and not to disclose to the other Party, without the consent of the disclosing Party, any information privately disclosed by each Party and considered by the latter as confidential.

5. Online Mediation Process

5.1. The Parties and the Mediator agree to mediate from different locations, on the Platform, pursuant to the following terms relating to online Mediation.

5.2. The Parties confirm to have the equipment, devices and high speed internet connection necessary to adequately and efficiently participate to an online videoconference meeting and that they are able to use such technology and to connect and use the online Platform.

5.3. The Online Mediation process will be conducted as follows:

- A. The Mediator and the Parties will agree on the date and time of the Mediation session (hereinafter also referred to as the "**Mediation Session**");

- B. The mediator will send the Parties the link to connect to the Platform for the Mediation Session;
- C. The Parties will communicate to the Mediator, at least two days before the mediation Session, names, positions and functions (job title and role) of those who will attend the Mediation Session (hereinafter also referred to as the “**Participants**”);
- D. The Parties undertake to take – and to cause their counsels take - all reasonable measures to ensure that they will not be interrupted (including, turning off of telephones, messages and email alert) during the entire online Mediation Session;
- E. The Participants will log into the meeting fifteen minutes prior to the scheduled start time;
- F. In case the technology would not work as intended, any Participants having difficulty with the Platform and unable to join or stay in a scheduled meeting will immediately email the Mediator. If the online Mediation Session cannot start or continue the Mediator and the Parties will decide, by telephone, whether to reschedule the Mediation Session or to hold it by phone to the following numbers:
 - The Mediator
 - Requesting Party
 - Counsel of the Requesting Party
 - Responding Party
 - Counsel of the Responding Party
- G. The Mediator, in agreement with the Parties, will be the host of the Platform and shall have the power to admit, mute and unmute the Participants and also to open and close breakout rooms;
- H. The Parties undertake – and will cause their counsels - to allow each participant to finish their comment or statement before responding and keep their microphone muted when other Participants are speaking;
- I. At the end of the Mediation Session the mediator will draft a minute that will be shared on the screen and, after having being agreed by the Parties, it will be signed by them in the following way:(*indicate the agreed form of signature*)..... ;
- J. In case the Parties reach a settlement, the draft of the agreement will be drafted by the mediator in cooperation with the parties and their counsels and, once agreed, it will be signed in the following way:(*indicate the agreed form of signature*).....
.

6. Online Mediation Fees and Costs

- 1.1. The Mediator shall be entitled to a fee which amount is defined by the Government of Montenegro regulation on the amount of the fees and expenses of mediators and early neutral evaluators of disputes
- 1.2. The Mediator shall be reimbursed for all expenses incurred in relation to the Mediation process.

1.3. Unless otherwise agreed by the Parties, each Party agrees to share the Mediator fees and expenses equally and also to bear its own legal and other costs related to the Mediation.

6.4. The Parties shall be jointly and severally liable for the Mediator's fees and expenses.

7. Governing Law and Settlement of Dispute

7.1. This Agreement is governed by, and shall be construed according to, the Law on Alternative Dispute Resolution of Montenegro (Off. Gazette No. 77/2020) with the exclusion of any conflict of law principles, which would apply the laws of another jurisdiction.

7.2. In the event of any dispute arising out of or in connection with the present Agreement, the Parties shall first refer the dispute to mediation. If the dispute has not been settled pursuant to the said mediation within [45] days following the day of signing the Mediation Agreement and not filling the request or within such other period as the parties may agree in the Mediation Agreement, such dispute shall thereafter be finally settled before the respective court.

IN WITNESS WHEREOF the Parties have executed this Agreement as of the date first written above.

REQUESTING PARTY

By:

Name:

Title:

RESPONDING PARTY

By:

Name:

Title:

THE MEDIATOR



This project is implemented in
partnership with IDLO

This project is financed by the Grand-Duchy of
Luxembourg

This project is implemented by the EBRD

This project is implemented in
close cooperation with the ADR
Centre Montenegro

