

MEDIATION IN MONTENEGRO

Summary

Montenegro is creating a legal environment for the development of alternative dispute resolution methods with the intention of implementing contemporary international standards for dispute resolution.

Mediation has officially existed in Montenegro since 2005. In 2018, Montenegro started with a comprehensive reform of its ADR system aimed at the improvement of the legislative and institutional framework, further promotion of ADR and improvement of the quality of mediation services through continuous training of mediators and qualitative evaluation of their work. The new Law on Alternative Dispute Resolution was adopted in 2020, according to which the Centre for ADR, as a public authority, is the key body executing the largest number of activities aimed at the further development and improvement of ADR in Montenegro.

Keywords

Mediation, Law on Alternative Dispute Resolution, Centre for Alternative Dispute Resolution (ADR), Early Neutral Evaluation

Montenegro is working on creating a legal environment for the development of mediation and other alternative dispute resolution methods with the intention to implement contemporary international standards for dispute resolution as contained in various instruments of the United Nations, the Council of Europe and the European Union that provide for international legal principles for enforcement of justice.

Alternative Dispute Resolution (hereinafter referred to as: ADR) is not a novelty in Montenegro. Contemporary use of these dispute resolution methods is rooted in Montenegrin history, in the form of various alternative processes to court trials. Such alternatives have existed since ancient times, and they have been inextricably intertwined with the birth of our state when St Peter of Cetinje conducted processes of reconciliation between warring tribes. After that, reconciliation extended to almost all spheres of social life. Conciliators, who were persons possessing high moral qualities and deeply respected in their community, were very successful in achieving reconciliation between individuals, and even between families that were fighting, regardless of the relevant field of law of the particular dispute.

The oldest forms of mediation (reconciliation) were recorded in the *settlements of Mirovica*, in the town of Bar where, according to historical data, disputing parties would be reconciled by giving promises to each other beneath an olive tree that was more than 2000 years old. There is also the famous *Reconciliation Hall on the island of Our Lady of Rocks*, which was a sacred place where

disputing parties had reconciled for centuries, and many disputes were solved in an amicable manner. This prevented numerous cases of potential personal vendettas being waged, given that promises and oaths made in this sacred place obliged participants to comply. Such historical heritage has always been an encouragement for the further development of alternative dispute resolution methods in Montenegro and today they contribute to international cooperation consistent with European Union measures focused on the development of the »area of freedom, security and justice«.

Recognizing the necessity to further develop mediation and other forms of ADR, in recent years Montenegro has implemented comprehensive reform activities in this field, with the ultimate goal to ensure efficient access to justice for citizens and legal entities, which is one of the important preconditions for EU accession.

For the further development of ADR, it is particularly important that, in its last four semi-annual reports, the European Commission recognized and commended Montenegro's efforts and outcomes in this field, further encouraging Montenegro to continue with such activities.

With a view to ensuring that citizens can exercise their right of access to justice, the *Strategy for Reform of the Justice System for the period 2019-2022*, adopted by the Government of Montenegro, underlines efficiency of the justice system as one of the key reform principles. It recognizes improvement of ADR as an important part of the reform processes towards strengthening judicial efficiency.

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cy. The action plan for the negotiation of Chapter 23 (*Justice and Fundamental Rights*) also recognizes mediation and other forms of ADR as one of the measures for reducing the backlog of the courts, particularly in civil cases. At the same time, application of ADR is perceived as a significant tool for relieving the burden on the courts and providing parties with a fast and efficient way to protect their rights.

LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

The first piece of legislation that introduced mediation as a possible ADR method in Montenegro was the *Law on Civil Procedure from 2004*. It authorizes the court to refer parties to mediation in cases where the court is of the opinion that the dispute can be successfully resolved in such a procedure. The law requires the court to stay its proceedings for the duration of the mediation procedure.

The *Law on Mediation from 2005* is the first national law that regulates mediation in a comprehensive manner. This law, with certain amendments, was in force by 2020 when the new Law on Alternative Dispute Resolution (hereinafter referred to as: LADR) was adopted.²

The LADR is fully aligned with EU law, primarily with the Directive on Mediation 2008/52/EC of the European Parliament and Council³. In the context of Montenegrin accession to the EU, this creates optimum preconditions for meeting the current and future obligations that Montenegro has and will have as a Member State in terms of ensuring high quality and efficient functioning of the

justice system and improvement of access to justice for citizens and legal entities.

The LADR regulates ADR in a comprehensive and integrated manner, clearly and precisely stipulating everything that is necessary for the proper understanding and implementation of all forms of ADR, with an emphasis on mediation as the leading method and early neutral evaluation as a new ADR method.

able document after it is confirmed in the court of jurisdiction, i.e. after a notarial deed is made consistent with the law regulating notarial activity. Thus, for the first time, a settlement concluded with a mediator has been given the capacity of an enforceable instrument, without court proceedings being conducted.

This is a huge step forward for ADR in Montenegro and an extremely moti-

ADR is perceived as a significant tool for relieving the burden on the courts and providing parties with a fast and efficient way to protect their rights.



The provisions of Articles 12 and 24 of the LADR, that are new in this field, are of particular importance for the development and improvement of the use of mediation.

In Article 12, the LADR stipulates that it is the duty of the party that intends to initiate a court proceeding to *apply to the Centre first*, in order to try to resolve the dispute through mediation. Both parties are obliged to attend the first meeting with the mediator in the following disputes: disputes defined in the Law on Civil Procedure such as small value claims, disputes for damages arising from insurance contracts (if one of the parties is an insurance company) and disputes for which a special law stipulates such an obligation (i.e. laws regulating labor relations). If persons who intend to initiate court proceedings fail to first apply to the Centre, the court will reject their claim as inadmissible.

The second important novelty is enshrined in Article 24 of the LADR. It stipulates that a settlement concluded with a mediator leading to a situation where no court proceedings are started (i.e. in a dispute where court proceedings ended in the withdrawal of the claim) shall acquire the capacity of an *enforce-*

vating factor for parties that participate in mediation. After they conclude a settlement with a mediator, they do not have to go to the court any more to conclude a court settlement in order to ensure that the settlement has the capacity of an enforceable document. In addition, this solution strengthens the trust in the work of mediators and in general in ADR, while, on the other side, the control of the concluded settlement by the court in a simple procedure, without participation of the parties, ensures appropriate legal certainty and protection of public order. This solution undoubtedly strikes the right balance between the contemporary needs of citizens and legal entities on one side, and the need to ensure legal certainty and protection of public order on the other.

However, the most important novelty is the first meeting with the mediator, because the fact that it takes place is not taken as the beginning of the mediation. Only after the parties have signed a Mediation Agreement, the mediation is considered to have started. The Mediation Agreement is also a novelty introduced by the LADR. This solution fully respects the principle that the mediation procedure is voluntary.

² Law on Alternative Dispute Resolution (Official Gazette of Montenegro 77/20).

³ See: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&format=EN> (last retrieval on 01.01.2022).

The effects of mediation on preclusive terms and terms for statute of limitation are also precisely defined, as well as the duties of mediators, their recusals, rules for conducting a mediation, the possibility of using evidence in other proceedings, conclusion of a mediation and the binding nature of the settlement.

The LADR also regulates a situation where a settlement is concluded in a dispute which was the cause for court proceedings, stipulating that this kind

Amendments to the Family Law⁵ and the Law on Amendments to the Law on Courts⁶.

The Law on Amendments to the Law on Civil Procedure stipulates the obligation of the court to inform parties of the possibility to resolve their dispute through mediation or using any other ADR methods, i.e. to recommend to the parties to resolve their dispute through mediation according to the LADR. The court can render a decision to refer par-

ovement in the use of mediation, since the number of cases that courts have referred to mediation has increased, as well as the number of proposals for initiating mediation procedures before initiating court proceedings.

As for Family Law, it is worth noting that, in addition to the LADR, the Law on Civil Procedure is of special importance for mediation in Montenegro. This Law stipulates the possibility to implement a mediation procedure in disputes related to maintenance of personal relations between children and their relatives and other persons that they are particularly close to. In addition to this, the Family Law stipulates that, in all cases of family relations, the court can refer parents to the first meeting with a mediator to try to resolve their dispute, if the court is of the opinion that it is in the best interest of the child. It is also mandatory to refer parties to the first meeting with a mediator for reconciliation or for an attempt to reach an agreement between spouses about exercising parental rights after divorce and agreement about division of joint property. Particularly important is the provision that the court shall not refer parties to the first meeting with a mediator in cases where the mediation would not be purposeful due to suspicion that domestic violence was involved.

Alternative dispute resolution methods are used also in labor law for the resolution of disputes arising from employment or in relation to employment.

Mediation in criminal law is regulated through the Criminal Procedure Code and the Law on Treatment of Juveniles in Criminal Procedures.

The mediation procedure, as one of the ADR methods is also recognized in the Law on Legal Aid. Article 4 of this Law stipulates that the person entitled to legal aid shall be referred to mediation or any other ADR procedure, if appropriate legal requirements are met, which is yet another confirmation of how im-

The oldest forms of mediation (reconciliation) were recorded in the settlements of Mirovica.

of settlement shall be the basis for concluding a court settlement.

As a particular novelty, the LADR introduces a new method of alternative dispute resolution – *Early Neutral Evaluation* of a dispute, which implies a procedure in which a dispute evaluator, based on an agreement between the parties, evaluates factual and legal elements of their dispute. This is a completely new method of ADR which is not characteristic of European civil law jurisdictions, but originates from the USA and from the UK, and it will find its place in the field of alternative resolution of commercial disputes. It has therefore been introduced into the Montenegrin ADR system.

In parallel with the adoption of the LADR, Montenegro adopted a *series of amendments to special laws*. These amendments were necessary to ensure alignment with the LADR and they include the Law on Amendments to the Law on Civil Procedure⁴, the Law on

ties to the first meeting with the mediator in order to attempt resolving their dispute in the mediation procedure.

In certain types of disputes where one party is the state or local self-government, in commercial disputes (except those with international elements), disputes that are not subject to status (company) law, and disputes where the party in bankruptcy procedure is referred to civil procedure, as well as in other cases stipulated in special law, the court is obliged to render a special decision referring parties to the first meeting with a mediator. In such meeting, the parties will be informed about the institute of mediation. They are obliged to attend such ordered first meeting, but they are not obliged to accept mediation in accordance with the principle of voluntariness of mediation. If parties do not accept mediation, the case file is returned to the court for further procedure.

This solution has already produced certain results when it comes to im-

⁴ Law on Amendments to the Law on Civil Procedure (Official Gazette of Montenegro 76/21).

⁵ Law on Amendments to the Family Law (Official Gazette of Montenegro 76/21).

⁶ Law on Amendments to the Law on Courts (Official Gazette of Montenegro 76/21).

portant accessibility and affirmation of ADR is for ensuring access to justice for citizens and legal entities.

Alternative Dispute Resolution Centre

After the LADR came into force, in August 2020 the Centre for Mediation was transformed into the *Alternative Dispute Resolution Centre* (hereinafter referred to as: Centre). The Centre has the capacity of a legal entity. Holding public authorities, the Centre has numerous competences in the field of ADR, which gives it a position as the key provider of the largest number of activities required for the further development and improvement of ADR in Montenegro.

The Centre performs expert and administrative tasks related to mediation, early neutral dispute evaluation and other ADR methods. It informs experts and the general public about the possibilities and the advantages of ADR; it initiates the adoption, i.e. amendments to legislation to ensure their alignment with international standards in the ADR field; it provides opinions on the work of mediators and dispute evaluators in the procedure envisaged for extension and termination of licences for mediators and dispute evaluator, submitting reports thereof to the Ministry in charge of the activities of judiciary and human and minority rights; it conducts trainings for mediators and dispute evaluators, as well as for other persons conducting ADR procedures, etc.

In addition to the above listed tasks, the Centre offers expert and general activities related to ADR in other fields, as stipulated in special law. The Centre can also organize the process of extra-judicial resolution of consumer disputes, under the conditions defined in the law concerning consumer protection. The Centre also conducts other ADR procedures in line with special laws. The Centre is

financed from the budget of Montenegro, while supervision of its work is carried out by the Ministry of Justice.

Mediators and Dispute Evaluators

Mediators and Dispute Evaluators can perform their tasks only if they are granted licences for work. Such licences are granted only to persons who meet the

nant model of professional conduct for mediators, is in line with international standards in this field, primarily with the European Code of Conduct for Mediators⁷ from 2004. This brings Montenegro into the group of developed countries that want to affirm this method of dispute resolution respecting the highest international standards of ethics for mediators. Adhering to the principles and standards provided for in this Code, which is their duty, the mediators will

Both parties are obliged to attend the first meeting with the mediator.



requirements stipulated in the LADR. They are granted for a period of five years and can be extended for the same period. Mediators and Dispute Evaluators who are granted licences for work are registered in the Register of Mediators, i.e. the register of dispute evaluators kept by the Ministry. There are 140 mediators registered in the Register of Mediators, and 8 evaluators registered in the Register of Dispute Evaluators. The Register

ensure that equal quality standards are respected in all mediation procedures and will contribute to the strengthening of citizens' trust in mediation.

The need to develop mechanisms for assessing the quality of mediation is in line with relevant international instruments, but it is also recognized in the national strategic documents and legislation, as well as in the internal institutional structures of the national media-

Settlement concluded with a mediator has been given the capacity of an enforceable instrument.



of Mediators in Criminal Matters contains 37 mediators who have licences for working in criminal matters. It is particularly important that there are mediators in all Montenegrin towns, which makes mediation accessible to all potential users in all municipalities. Given the new LADR provisions, the conditions are met so that citizens and legal entities can have access to justice.

The Code of Ethics for Mediators, as a common system of values and a domi-

tion system. The Centre has been recognized as the key institution responsible for coordination of mediation services in Montenegro, including monitoring and evaluation of mediators' performance.

Guided by relevant standards in the field of mediation, with a view to mon-

⁷ See: [https://www.bmev.de/fileadmin/_migrated/content_uploads/code_of_conduct_en_o2.pdf](https://www.bmев.de/fileadmin/_migrated/content_uploads/code_of_conduct_en_o2.pdf) (last retrieval on 01.01.2022).

itoring and evaluating mediators' performance, and with the support of the Council of Europe, Montenegro developed the »Methodology and Procedure for Evaluation of Mediators' Performance«.

justice, ultimately ensuring thus legal certainty for its citizens.

With a view to ensuring that citizens can exercise their right to access to justice, the Strategy for the Reform of Judiciary 2019-2022 defines the efficiency

implementation of the curricula for mediation school; surveys about awareness, experience and attitudes of Montenegrin citizens related to mediation; activities required for development of methodology for monitoring and evaluating work of mediators and its implementation with a view to improving mediation services in Montenegro, etc.

Prior to adoption of the LADR, mediation was mostly used in family matters, and later it started being more intensively used in other types of disputes in civil law, primarily in the field of insurance disputes, labor disputes, small value claims, as well as in the disputes where one of the parties is Montenegro or local self-government. Today, mediation is used in almost all spheres of social life, with a trend of expansion to other disputes that are not strictly under the jurisdiction of courts or other bodies.

In the period ahead Montenegro is expected to adopt a new strategic document: »Programme for Development of Alternative Dispute Resolution 2022-2024« that will provide guidelines for the more efficient use of alternative dispute resolution methods – mediation and early neutral evaluation of disputes. It will also define tasks and responsibilities of all relevant entities responsible for achieving the defined goals. Strategically it will be possible to implement all activities important for further development of mediation and other alternative dispute resolution methods, through alignment of current legislative framework with relevant international standards, improvement of practice in the use of alternative dispute resolution methods, strengthening capacities of the Centre for Alternative Dispute Resolution, as well as strengthening of expert capacities of mediators and awareness of citizens about mediation and other alternative dispute resolution methods.

The Centre has established active and successful cooperation with international partners:

The approach of a first meeting strengthens the trust in the work of mediators and in general in ADR.

This document perceives the evaluation of mediators' performance as a mechanism for quality assurance, which primarily works as a professional support to mediators. It proposes a comprehensive approach to evaluation which ensures a combined use of different evaluation methods, like self-evaluation, evaluation by users of services, mentorship, supervision and interview.

of the justice system as one of the key reform principles.

Respecting the need to further develop mediation and other ADR forms, Montenegro has undertaken numerous strategic, legislative, institutional and other activities. Thus, in December 2018, the Government of Montenegro adopted a strategic document »Programme for Development of ADR 2019-

Mediators and Dispute Evaluators who are granted licences for work are registered in the Register of Mediators.

DIRECTIONS FOR FURTHER PROMOTION AND USE OF MEDIATION IN MONTENEGRO

Improving the use of mediation and other ADR methods is one of the priorities in the reform of the judiciary, not only because of the European directives in this field and because of pre-accession negotiations, but primarily because Montenegro needs its judiciary to be more efficient. Mediation and other ADR methods are needed so that Montenegro can improve its efficiency and timeliness with regard to the protection of citizens and legal entities, as well as the business environment and access to

2021« with an Action Plan for its implementation. At the same time, in line with the obligations from this Programme, Montenegro established a *Council for Encouragement and Improvement of Use of Alternative Dispute Resolution*.

The Centre undertakes numerous activities important for the development of mediation and other ADR forms, the most important being: promotion of mediation and other ADR methods; training of mediators and dispute evaluators (basic and specialist); training activities for relevant participants in mediation procedure, particularly judges, protector of property-law interests of Montenegro, lawyers, local self-governments, insurance companies, etc.; development and

- ▶ the *Programme Office of the Council of Europe* in Podgorica, within the programme »*Accountability and professionalism of the judicial system in Montenegro*«;
- ▶ the *Horizontal Facility for the Western Balkans and Turkey 2019-2022* that provided support in the development of the Code of Ethics for Mediators and Methodology for Monitoring and Evaluating Mediators' Performance, as well as in organizing advanced trainings for mediators;
- ▶ the *European Bank for Reconstruction and Development (EBRD) and International Development Law Organization (IDLO) Organization* that supported implementation of the project »*Strengthening Commercial Mediation in Montenegro*« which implemented trainings on online mediation and developed Guidelines for Online Mediation in Commercial Matters, as well as trainings for small and medium-size enterprises;
- ▶ the *German Foundation for International Legal Cooperation* which supported presentation of new provisions of the LADR and informed participants about German experience in the implementation of mediation in labor, commercial, family, consumer and other types of disputes; and
- ▶ the *USA Embassy in Montenegro* that provided technical assistance and support in the organization of basic and advanced training for mediators in criminal matters and in the development and printing of promotional material and purchase of computer equipment.

Zusammenfassung

Montenegro schafft den rechtlichen Rahmen für Alternative Dispute Resolution (ADR) mit dem Ziel einer zeitgemäßen Umsetzung internationaler Standards für die Streitbeilegung.

Die Mediation kommt in Montenegro seit 2005 zum Einsatz. Im Jahr 2018 startete Montenegro eine umfassende Reform des ADR-Systems zur Verbesserung des gesetzlichen und institutionellen Rahmens für ADR, zur Förderung alternativer Streitbeilegungsmethoden sowie zur Qualitätssteigerung der Mediationsdienstleister, so durch kontinuierliche Ausbildung und Evaluation von Mediatoren. Das neue Gesetz zur alternativen Streitbeilegung wurde 2020 verabschiedet, wonach das Centre for ADR als öffentliche Organisation die wesentlichen Aktivitäten zur Weiterentwicklung und Verbesserung der ADR in Montenegro zentral steuert.

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