COMMERCIAL MEDIATION: EXPERIENCE FROM MOLDOVA AND SERBIA

"Increasing the use of mediation is an aspiration for EU countries and for the economies where the EBRD invests."

The idea of parties in a dispute coming to a mutually acceptable solution is very appealing, particularly when the solution is quick and affordable. Mediation is believed to offer such a solution and is one of the alternative dispute resolution (ADR) mechanisms.

WHY USE AND PROMOTE MEDIATION?

In some disputes, the use of mediation is accepted more easily, for example, in family or labour cases. This is due to the fact that mediation is, in many respects, about preserving relationships.

In commercial disputes, the main reasons for using mediation are similar: preserving business relationships and saving time and costs. On a different level, parties involved in a mediation do not need to follow a point of law or resolve the dispute according to the law. This means that parties may find a business solution based on their priorities. For instance, shareholders may find it less damaging to find a solution through mediation rather than to take each other to court in order to agree to change the shareholders' agreement. Furthermore, restructuring a debt does not need to be raised in court as it can be resolved between the parties, however they may need the assistance of a mediator to come to an agreement.

The government may be interested in promoting mediation in order to lower the costs of maintaining the state court system, as well as to reduce litigation and to unclog the court system.

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In addition, it is in the public interest to improve the investment climate by offering another dispute resolution tool for investors.

Despite mediation being a soft dispute resolution tool, there is some scepticism and criticism surrounding it. In particular, when mediation is made compulsory in law or practice. The main arguments against mediation concern its misuse as a tool to delay proceedings and add to the expense of litigation. Preservation of the status quo is another culprit, as is quite often the opposition from the legal profession, which jokingly describe "*ADR*" as an "*Alarming Drop in Revenue*".

The response to such criticism is finding a balance: identifying the most suitable cases; limiting the timeframe for mediation to avoid delay; and offering enforceability tools and incentives. For many jurisdictions, finding this balance is a process of trial and error.

INTERNATIONAL SUPPORT FOR MEDIATION

To promote mediation, the European Union issued the EU Directive in 2008,[1] setting an aspirational target of 10 per cent of commercial cases to be resolved through mediation. Similarly, the World Bank Doing Business Report includes the availability of mediation and its practice is one of the main indicators of a good investment climate.[2]

In December 2018, the United Nations General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation". The signing ceremony was in Singapore on 7 August 2019, and involved 46 countries, including China, India, Singapore and the United States of America. The objective of the Convention is to promote widespread international enforceability of settlement agreements, similar to arbitration.[3]

EBRD PROJECTS IN MOLDOVA AND SERBIA

Increasing the use of mediation is an aspiration for EU countries and for the economies where the EBRD invests. The Bank, through its Legal Transition Programme, initiated and implemented a number of projects to assist jurisdictions in their endeavour to establish a functioning mediation framework and practice. The most notable projects are taking place in Moldova and Serbia.

The project in Moldova began in 2013. Its first phase involved supporting the Moldovan government in implementing Moldova's Justice Reform Strategy (2011-2015), which specifically aimed to strengthen the ADR system in Moldova and promote its use in the business community. The project piloted court-annexed mediation in a number of courts and trained mediators, contributed to the drafting of a new Law on mediation, hosted public awareness events. Many of the activities were kindly supported by the United Kingdom's Good Governance Fund. In 2018 the EBRD launched the fourth phase of the project,

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with funds from the United States Agency for International Development (USAID), to attempt a final push to establish viable mediation in Moldova. The project envisages an array of public awareness activities, amendments to the legislative and regulatory framework and institutional capacity-building that are implemented in partnership with the International Development Law Organization (IDLO).

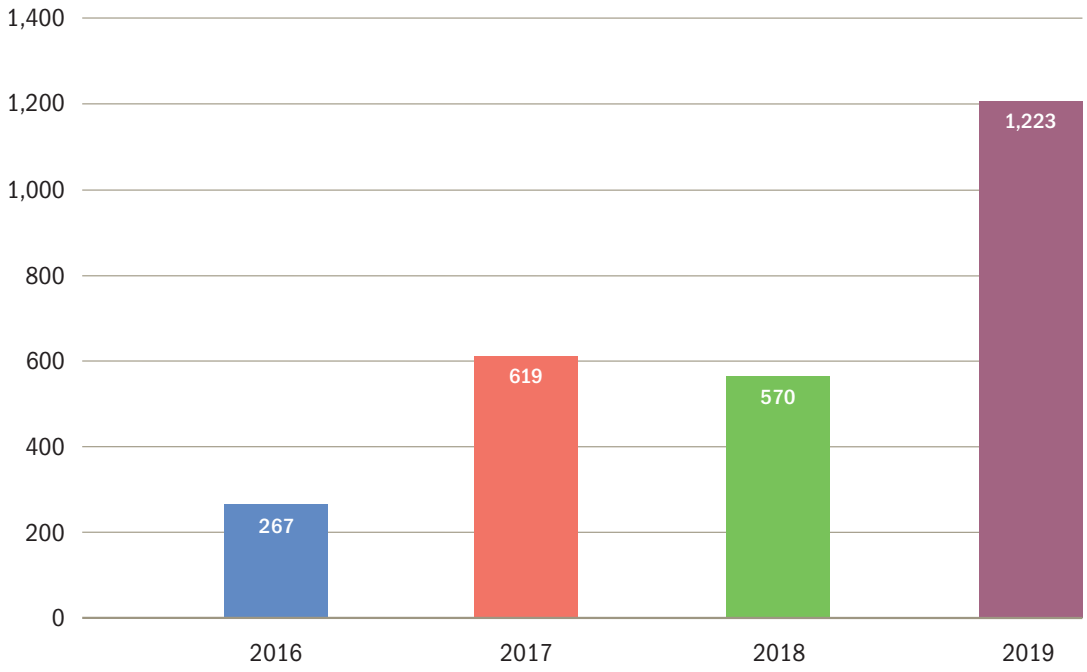
In Serbia, the project was launched in 2016 and was supported by the United Kingdom's Good Governance Fund. It assisted the government and judiciary in raising awareness about commercial mediation and provided training on commercial mediation to judges and mediators. The second phase of the project, funded by the Grand Duchy of Luxembourg, began in 2019 and aimed to carry out a comparative study of the mediation frameworks in other relevant jurisdictions. It also aimed to provide recommendations for revamping Serbia's ADR strategy, with a focus on commercial mediation.

MEDIATION PROGRESS AND MOTIVES FOR REFORM IN SERBIA AND MOLDOVA

The motives for establishing effective mediation in Moldova and Serbia are slightly different. This is reflected in the level of government involvement in each country. In Serbia, the courts are tremendously overwhelmed. More specifically, the Supreme Court of Cassation in its Annual Report for 2018 indicated that the inflow of cases in all courts in 2018 amounted to a staggering 2,089,237 cases.[4] To put this into perspective, the population of Serbia in the same year was 7,022,000 – that is, one case for every third person in the country. Hence, the government is keen to unburden the courts by actively promoting mediation.

Despite all the government and donor community efforts in Serbia, the uptake of cases was relatively slow. At the same time, 2019 appeared to be more promising, with 1,200 cases of mediations before the end of the year (see Chart 1).

Chart 1: Serbia mediation cases, 2016-19



Source: Ministry of Justice, Serbia.

The reasons for reform in Moldova involve the fact that the courts are incredibly weak and lack independence. Accordingly, mediation is potentially an alternative to courts. However, although the government is supportive of various activities by the project, it is slow to lead any initiatives. The uptake of cases is growing from year to year, although not as fast as expected. In 2017 there were about 277 mediated cases, which grew to 725 in 2019 (see Chart 2).

MEDIATION REFORM JOURNEY IN SERBIA AND MOLDOVA

Both Serbia and Moldova, until recently, were primarily attempting to establish mediation through voluntary routes, relying on market forces to create the supply and demand for mediation services. Unfortunately, in countries where litigation is not expensive, there is less reason to identify alternatives to courts. Hence, the state is burdened with the expense of maintaining busy courts instead.

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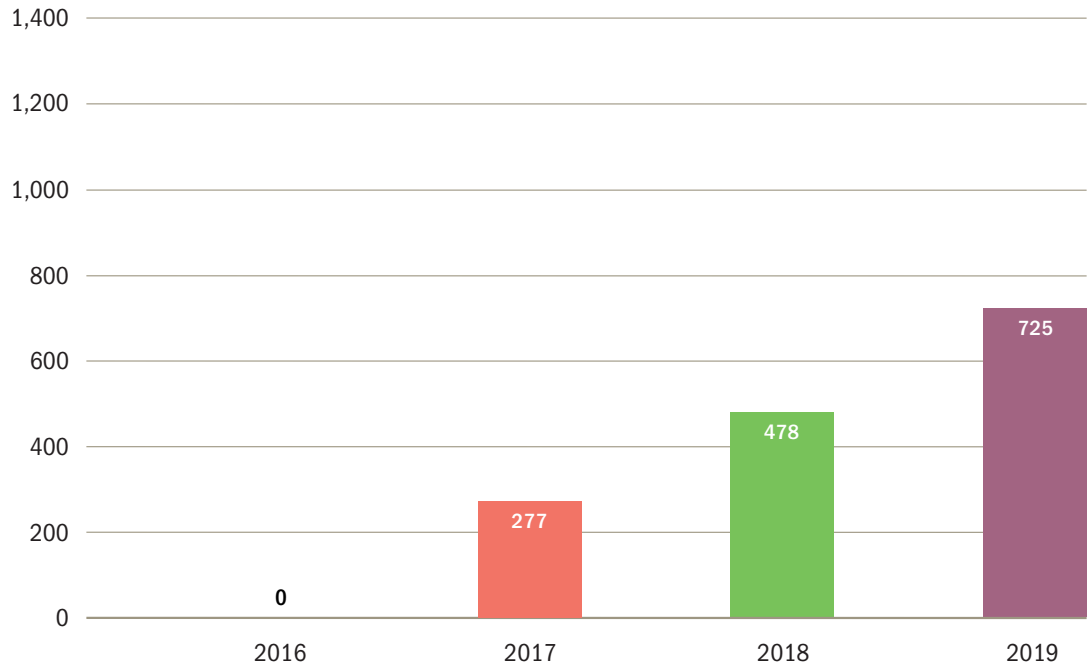
Chart 2: Moldova mediation cases, 2016-19



Source: Mediation Council, (Ministry of Justice), Moldova.

Another common feature in both countries is an attempt to introduce judicial mediation in addition to private mediation. This is when the judges act as mediators. In Moldova this initiative went the furthest: the civil procedure code was amended and judicial mediation became mandatory for many categories of civil cases. Judges strongly opposed this initiative as it is perceived to add to the judges' workloads. Accordingly, there is a strong demand from the judiciary that this type of mediation be abolished.

In Serbia and Moldova there were initiatives to introduce court-annexed mediation. In Moldova, with assistance from the EBRD, a number of courts in the country piloted court-annexed mediation, offering space for private mediators to carry out mediations and redirecting parties to attempt mediation. The pilot revealed that the courts were not prepared and could not be relied on to continue this initiative, due to a lack of resources and increased administrative demand. Therefore, the idea was abandoned and now a completely out-of-court service is considered.

In Serbia, many courts set up information desks, where parties are able to find out more about mediation and court staff encourage parties to attempt mediation before litigation. This initiative continues, however, opinions about the use and impact of information desks is split. It works very well in some courts (for example, in Nis) and not so well in others.

"ITALIAN MODEL" AND ITS POTENTIAL USE IN VARIOUS JURISDICTIONS

More recently, Italy has appeared to be successful in using mediation to resolve disputes and many countries are considering adopting its model for promoting mediation, the so-called Italian model. The main feature of the Italian model is that in a number of categories of disputes, including most banking and finance-related disputes, parties must attend a meeting with the mediator (the "first meeting"). During the meeting the mediator explains the mediation process and benefits for this particular case, based on which parties may decide to mediate the case, but it is not mandatory to go through with the mediation.

The Italian model has shown excellent results. Despite mediation not being mandatory, the number of cases where parties agreed to mediate and concluded a mediation agreement increased dramatically after the introduction of this model. The data for 2018 show that there were 258,786 new cases of commercial mediation registered, which is in line with the data from 2017 (263,263 cases). A settlement agreement was reached in 44.8 per cent of cases (all data is in line with previous surveys).[5]

Currently, both Moldova and Serbia are considering the Italian model for domestic commercial disputes. The Ministry of Justice created a multi-stakeholder ADR working group in June 2019. However, the progress of the reform

Table 1: Comparing commercial mediation in Serbia and Moldova

	Serbia	Moldova
Mediation laws	2005, various amendments	2008, 2015
Commercial mediation (private)	Voluntary	Voluntary
Commercial mediation (judicial)	Under consideration	Mandatory (for certain types of cases)
Court-annexed mediation	Some courts have information desks, most successful in Nis	Attempted in 2014-15, failed
Reform	Planned for 2020, considering the Italian model	Started in 2019-20, considering the Italian model
Singapore Convention on Mediation	Signed on 7 August 2019, not yet ratified	Not signed

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stalled after the legal community opposed the proposal of mandatory first meeting. The government hopes to push for reform in 2020, after the parliament elections in April. As mentioned above, the EBRD is helping the Serbian Ministry of Justice and Commercial Courts decide on the course of action for commercial disputes.

In Moldova, due to frequent changes in governments and consequently the composition of the Ministry of Justice, the pace of reform is slow. However, the draft Strategy for Justice Sector Reform for 2019-20 includes an entire section on alternative dispute resolution, focusing on the promotion of mediation. The EBRD, with the help of funding from USAID, is undertaking an extensive reform programme to help the Ministry implement this part of the Justice Sector reform.

CONCLUSION

The road to establishing a new dispute resolution mechanism is long. The approach that works in one jurisdiction is not always suitable for another. As a result, jurisdictions must experiment with different rules until they identify the right mechanism and rules and build the necessary capacity. The outlook for 2020 is very promising for both Serbia and Moldova, with regard to advancing mediation.

1. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
2. So far, the advance of mediation in Europe is slow. A study in 2016 revealed that since the issuance of the Mediation Directive, mediation was used in less than 1 per cent of civil and commercial cases in EU parties. The study comprises the views of up to 816 experts from all over Europe, showing that "this disappointing performance results from weak pro-mediation policies, whether legislative or promotional, in almost all of the 28 Member States". See The Implementation of the EU Mediation Directive (November 2016), http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf (last accessed 9 January 2020).
3. Singapore Convention on Mediation (December 2019), see https://www.singaporeconvention.org/ (last accessed 9 January 2020) and https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (last accessed 9 January 2020).
4. "Annual Report on the Work of the Courts in the Republic of Serbia for 2018" (Belgrade, 2019), see https://www.vk.sud.rs/sites/default/files/attachments/Annual%20Report%20on%20the%20Work%20Of%20Courts%202018_1.pdf.
5. See https://www.lexology.com/library/detail.aspx?g=d0faf894-e442-46f9-9fee-dfb1f78ddd4a (last accessed 9 January 2020).