

# Remote ADR for Georgia: Covid-19 & Beyond





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Report by Baria Ahmed



**Baria Ahmed Ltd.**

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# Introduction

This document has been prepared for the United Nations Development Programme (UNDP) in Georgia, in support of the EU-UNDP's "Enhanced Mediation and Arbitration for Fairer and Faster Commercial Dispute Resolution" Project ("the Project"), designed to "enhance the use of and quality of arbitration and mediation through strengthening relevant institutions", in particular leading to an "increase in the use of arbitration and mediation including in-court and out of court mediation".

Funded by the European Union, in partnership with the UNDP, the Project's main stakeholders include the Government of Georgia, in particular the Ministry of Justice and the Judiciary, the various state and non-state Alternative Dispute Resolution (ADR) entities, associations and practitioners, as well as small and medium sized enterprises (SMEs) and the general public as the ultimate beneficiaries and users of ADR.

The purpose of this report is to offer an overview of the use of remote mediation, in particular, and its application in more advanced ADR jurisdictions. Given the relative new status of these processes in the Georgian framework, with both arbitration and mediation laws passed in recent years and limited experience in the provision of services to date, this report is designed to offer the UNDP and key stakeholders knowledge and data on the benefits, opportunities and challenges presented in setting up and delivering remote mediation services for domestic disputes.

The timing of the Terms of Reference (ToR) aligns with the COVID-19 health crisis, which is causing unprecedented disruption to everyday lives and having a significant impact on the global economy. A great variety of civil and

commercial disputes are surfacing as parties find it impracticable or impossible to perform their personal or contractual obligations. In all likelihood, the pandemic will not only result in a surge in litigation but will also considerably slow down the resolution of pending court cases in individual jurisdictions. In fact, many courts around the world have reduced the number of hearings and trials taking place, creating a considerable backlog of cases.

These exceptional delays should encourage parties to consider ADR, and in particular Mediation – a flexible, non-binding dispute resolution process which uses a neutral third party, the mediator, to facilitate negotiations between the parties and help them find a mutually satisfactory solution to the issues between them. The mediator has no authority to impose an outcome on the parties and controls only the process of mediation itself, not its result. The process is typically faster and more cost-effective than binding dispute resolution processes, such as arbitration or litigation.

While usually mediation is a "person-to-person" process and, at least in the past, many experienced mediators have claimed it is not possible to mediate in the truest sense except when in the physical presence of the parties, the current economic environment and practical restrictions have led to significant revision and review on the topic of remote mediation. For most, telephone and virtual mediation are the only options currently available should they wish to continue attempts at settlement.

However, even before COVID-19 changed the way in which most of us now work, there were instances where remote mediation was utilised

or necessary. For example, where parties are located in different jurisdictions; a disability or other situational factor prevents attendance by one or both of the parties, or where the value of the dispute does not justify the cost of an in-person mediation. Remote mediation can also offer quicker recourse where the parties want or need to proceed with a greater sense of urgency. In certain personal cases, such as disputes between former spouses or family members where relationships have broken down or are severely damaged, the parties may choose to avoid the negative emotional impact of an in-person mediation. Instead, by conducting the sessions remotely, the mediator can assist them in focussing on the issues and limiting emotional reactions and exchanges.

Remote mediation can take place on various platforms, either individually or using a variety of them in conjunction, namely:

- **Telephone**
- **Videoconferencing**
- **Automated Software**

In deciding the right format and platform, mediators must consider the level of familiarity and comfort the parties and their attorneys have with the different systems, as well as accessibility, and offer appropriate support and

guidance in the preparatory and set-up stages of the process.

In consideration of the above, where remote mediation may be the only, better or preferred option for the parties, it is useful to consider both the functionality of the different systems, modes of best practice and the challenges presented in the way the mediator and the parties work together.

To which end, in light of the (relatively) recent developments in the field of mediation in Georgia, both with the enactment of the Mediation Law in 2019 and requiring mandatory mediation in certain civil cases, as well as the COVID-19 health crisis, the United Nations Development Programme (UNDP) Georgia has commissioned this paper on the structure, functionality and viability of remote mediation as an alternative to in-person process, both in the current environment and wider applicability in appropriate cases.

Consideration will be given to the various forms of remote mediation, including working examples from other jurisdictions, with some guidance for mediators and stakeholders on how these processes may be established and utilised in the Georgian framework.

# Telephone Mediation

The use of remote mediation via the telephone has been around for as long as mediation itself. While most mediators and parties would agree that there are significant benefits to in-person attendance at mediation, requiring parties involved in highly emotive conflicts, such as certain types of employment or family disputes, to meet in person can sometimes have a detrimental impact on potential progress.

Even pre-COVID-19 and its impact on the way we work and communicate, the use of the telephone played a part in most mediations, with mediators contacting the parties and/or their attorneys during the early set up and preparation stages of the process to ensure that any procedural considerations and questions are answered in advance, as well as agreeing the extent and nature of any documentation to be sent to the mediator and exchanged between the parties.

Indeed, there are occasions where issues can arise before the mediation day and the mediator must engage in a series of private pre-mediation calls or even a joint call with the parties. Where there are multiple parties, mediators often ask to speak to groups of parties (such as all the claimants or all the defendants) in a joint telephone call before the mediation day.

Separately, there are instances where some of the attendees join only by telephone, for example where party lawyers remain at their own offices, available as needed to give advice or draft the settlement agreement, with only the decision makers meeting the mediator face-to-face.

Moreover, where settlement is not achieved on the mediation day, it is usually agreed that

the mediator will continue discussing possible settlement options with the parties on the telephone in the days that follow, both privately and jointly.

Telephonic mediation can offer both time and cost saving, in the avoidance of travel for the parties and their attorneys as well as not needing to arrange and pay for mediation venue facilities. Statistics also show that telephone mediations generally take less time than in person mediations.

On occasion, some parties and their attorneys use in-person mediation to size up their adversary and opposing counsel. Parties who do not want the other side to get a glimpse of them or their witnesses may prefer mediating telephonically, potentially eliminating the possibility of the parties or their counsel offending one another with eye rolling, sighing or other disruptive behaviour, as sometimes occurs during in-person mediations. Relative to this, the telephone mediation process facilitates face-saving, which is frequently crucial to a successful mediation. It is often easier for parties and attorneys to gracefully back away from a “line in the sand”, that they may have previously drawn, if the other side is not staring at them across a conference room table.

# How does Telephone Mediation work?

A telephone mediation works largely in the same manner as a face-to-face process.

As with any mediation, the initial step will be the appointment of the mediator, agreement as to the date and time frame for the mediation and that the mediation will be conducted by telephone. Once appointed, the mediator (or mediation provider in the case of an administered process) will begin case management procedures, including the drafting of a mediation agreement for signature by all, which will include, as standard, terms about the confidential and without prejudice nature of mediation, confirmation as to attendees, authority to negotiate and settle the dispute, agreement of the mediator's fees, terms and conditions of business etc.

In the case of telephone mediation, this document will also reflect that as the mediation will be conducted by telephone and thus will need to be signed by or on behalf of all parties and returned to the mediator (or mediation provider) in advance of the mediation itself, usually electronically. The fully signed version will then be circulated to all parties for their records and reference.

The mediator will agree a timetable with the parties, including when parties will submit their case summaries and supporting preparation documents and whether they will exchange these directly between them (which is normal practice). In most cases, the mediator will arrange to speak with each party and / or their attorney in advance of the day by telephone to check arrangements and ensure any questions

or reservations regarding the process are addressed. As no attendees will be meeting in person, the mediation timetable may be amended from the normal half day or one day process model.

As mediation is a flexible process, tailored by the mediator in light of the specifics of an individual case and the needs of the parties in dispute, there is no fixed procedure for telephone mediation much in the same way as there is no "one-size-fits-all" process for in-person mediations.

The mediator may begin by calling each party separately as an initial step on the day or agreeing to begin in a joint conference call. During the latter, the mediator will review the ground rules for the mediation, followed by the parties and/or the attorneys explaining their respective views of the case and responding to the remarks made by the other side. At the conclusion of the joint conference, the mediator disconnects the conference line and usually conducts separate telephonic caucus sessions with the parties and their counsel for at least the early portion of the mediation. Later in the day, the mediator may wish to set up further conference calls between groups of individuals such as all the decision makers or all the lawyers.

Where usually a mediator might knock on a door with a quick update as to progress in in-person mediations, when operating by telephone this is likely to be replaced by a quick call or short email or direct message to say the other party is considering options, formulating responses, reviewing information etc.

As with any mediation, the process will continue until either a settlement is reached or, unless there is an agreement to extend, the time allocated and agreed by the parties and the mediator for the process has expired. Where a settlement is reached, the party representatives will draft

the requisite settlement agreement, normally utilising a mixture of email and telephone communication, which most mediators will continue to oversee until the agreement itself is finalised and signed remotely.



# UK – Small Claims Mediation Service

An example of an effective telephone mediation service, the Small Claims Mediation Service (SCMS) is a free service provided by the UK civil courts for parties involved in low value disputes. While there is no pre-requisite as to the type of claim that can be referred to mediation under the SCMS, the value of the claim cannot exceed GBP £10,000. Mediations undertaken by the service have included issues around contracts for goods and services, non-payment of professional fees, non-payment of rents, insurance disputes, building disputes, debts and unpaid invoices, negligence claims and boundary disputes.

The SCMS operates on the presumption that it is better for mediation to take place sooner rather than later, for the benefit of all parties. Where a dispute is settled soon after the defence is filed, the parties avoid preparing witness statements, documents and attending the trial itself, saving both the parties and the court service time and expense. While judges cannot force the parties to use the service, under the court rules, they are required to actively manage how claims progress including encouraging parties to use ADR procedures such as mediation.

Once the defence to the claim is filed, the court forwards directions questionnaires to all parties for completion, with a request to confirm whether the parties are interested in utilising the SCMS on the first page. Both parties must agree separately and, upon receipt of such agreement, the court will begin the process to arrange the mediation, contacting the parties to agree dates, times etc. The proceedings in the case are put on hold, including the setting of a date for the

trial, until after the mediation has taken place.

The mediation itself is conducted by telephone, with sessions usually limited to 1 hour. Mediators are court employees and while they utilise the usual mediation skills, given the time constraints, the focus is very much on resolution and reaching settlement, rather than getting into the detail of the dispute and the underlying emotions (as would be normal in higher value or complex cases). All discussions at the mediation are confidential and nothing said can be repeated to the judge at trial, should the parties not reach agreement.

If a settlement is reached, the mediator will help the parties record the terms and notify the court staff. The mediator will not, however, take any steps or be involved in the terms of the settlement if one party fails to comply. Where no settlement is reached, the matter is referred back to the court process and trial.

Whether a settlement is reached or not, the court office will collect anonymised feedback on the mediator and the process, with a high satisfaction rate reported by users. Separately, complaints procedures are available where parties are dissatisfied either with the service or the mediator.

For higher value or complex disputes, the courts offer a fuller mediation process, up until recently via the National Mediation Helpline (NMH), which provided all courts with access to mediators via a number of pre-accredited mediation providers on a time-limited basis with a small fee payable

by the parties (in accordance with the value of the claim or counterclaim). The NMH has now been replaced by the Ministry of Justice with an online list of accredited providers on the Courts website, each of which offers the service upon request directly to the parties.

Between the two services, all parties to court proceedings across England and Wales now have ready access to mediation in the form of a free in-house mediation service for small claims, and – for higher value cases – a low-priced time-limited mediation service via pre-accredited mediation providers.

# Setting up a Telephone Mediation Service

As can be seen above, telephone mediation offers a number of benefits both procedurally and for the parties in terms of cost, time and, potentially, face saving when engaging in negotiations for settlement. While an in-person process is usually best suited for complex, multi-party or high value disputes, telephone mediation may be particularly well-suited for cases which have only one or two issues in dispute and have a relative low value associated to the claim or counterclaim by the parties.

It is certainly worth considering the value of a similar service as part of the court connected/annexed mediation program in Georgia. For such a service to be established, consideration should be given to a number of factors:

- Value limit of cases, if any
- Operated by court service or external administrator?
- Mediators employed by court or appointed ad hoc?
- Both in-person and telephone mediation options?
- Costs, if any, payable by parties?
- Requisite changes to case management procedures and / or court documentation?
- Role of judges?
- Procedures for capturing satisfaction data?
- Complaints mechanism?

Understanding the views of the primary stakeholders, such as the Ministry of Justice,

LEPL “Mediators Association of Georgia”, the Judiciary and High Council of Justice, as well as the beneficiaries of the service in terms of users and attorneys, on the above matters, and their expectations and preferences for the establishment of a court-connected or court-annexed mediation service is necessary to ensure considered and appropriate recommendations.

For ad-hoc mediations where, whether due to the current COVID-19 prohibitions or other reasons, a face-to-face mediation is not possible, in most cases consideration should first be given to whether the mediation can be conducted online via videoconferencing facilities such as Zoom, Skype. However, there may be occasions where such a meeting is also not practicable, say again in lower value cases or where perhaps the parties do not have access to the hardware or software required to run a process online, telephone mediation may be the only viable option.

In such cases, the key is clearly in ensuring that both the mediator, the parties and their attorneys fully briefed and confident about the process. For Georgia, in particular, where mediation is still a relatively new offering with few experienced mediators and fewer still experienced parties, this clarity should be incorporated into the service provision guidelines, either by the mediators themselves or by the court or other mediation provider responsible for the logistics and arrangement for the process.

# Virtual Mediation

Virtual mediation is a form of ADR that uses technology to facilitate the resolution of disputes between parties using a virtual online environment. Where typically parties will meet face-to-face in a mediation, with virtual mediation the participants utilise digital platforms to attend virtual meetings and sessions. This logistical flexibility can cater for any number of people, spread across any number of locations. Most software can be accessed via a range of hardware solutions, such as a desktop, laptop, tablet or even a phone, with the main requirements being a camera, microphone and a reliable internet or mobile data connection.

The use of videoconferencing in mediation can allow for the delivery of a personalised, individual and “as close to traditional as possible” mediation, albeit at a distance. Parties can now easily and cheaply communicate with the mediator and each other in real time, while also benefitting from the visual and vocal cues that video conveys. Of course, mediators may also continue to use email, text messaging, automated systems, the telephone or other forms of technology to converse and coordinate during the mediation process.

Evidently, with most of the large international ADR providers reporting the same, party feedback on the use of these techniques, particularly mediation by videoconferencing, has been largely positive leading to an acceptance that it can be just as effective as traditional face-to-face mediation processes. Offering a low stress framework, which allows for trust to be fostered, emotions to be appropriately and positively managed, and potentially reduces power differences in certain types of cases, online mediation can offer a buffer and allow

for rational and productive discussions and reduce any scheduling difficulties. In addition, participants who are younger or normally operate in IT reliant fields are likely to find virtual mediation to be particularly appealing.

While it has taken a pandemic to awaken people to the significant advantages of virtual mediation, the reality for many is that it is far easier to schedule mediations and find date agreement when travelling is no longer an issue. But above all there is significant time and cost savings in avoiding the need to travel at all. Nearly all commercial mediations require participants to travel within their own jurisdiction and, in many cases, from overseas.

On the question of whether virtual mediation speeds up the process, experience indicates that it tends to take much the same time as the in-person process. The novelty of meeting online, particularly in the current climate, is said to produce a healthy atmosphere of collaboration, which could be expected to speed up the negotiations, however the convenience of mediating from one’s own home without the need to travel home at the end of the day can equally slow the process down. On balance, mediators report little difference between virtual and face-to-face timescales.

For certain types of cases, another relative advantage is seen where interpreters are required. The process via video is more seamless than face-to-face, with simultaneous interpretation (with the interpreter on mute) reducing the need for the speaker and listeners to wait.

Other key advantages, beyond those already listed for telephone mediation such as cost and

ease of access, of virtual mediation are the ability to see faces and read body language, allowing the mediator to gather important information and understanding about the parties' feelings and needs, and to facilitate discussions around what matters most to them in any settlement.

However, as expected, there is some reduction in the mediator's ability to read these non-verbal cues. Sometimes a participant will have poor lighting or camera angle, and this can make it difficult to interpret their expression in circumstances where what is being said only forms part of what they are communicating. When more than one person is sharing a camera in the same room, they are inevitably further from the camera and more difficult to see and interpret.

Other challenges include the need for better preparation by all participants. Attorneys need to ensure that clients are fully briefed on the issues ahead of the mediation session and that the procedure of mediation and the range of settlement is carefully explained and

understood. It is likely that the mediator will be involved at an earlier stage to hold a practice session with the parties beforehand and ensure any technological issues are ironed out. The parties should be prepared to use this time to engage with the mediator so everyone can hit the ground running on the mediation day. In addition, bundles, which are likely to be electronic, need to be well organised so that they can be referred to effectively and efficiently.

Finally, because of the reliance on technology, there is always the risk of glitches to the systems operating as required. Where most of the online platforms are incredibly stable, there will occasionally be a participant with an unstable internet connection or someone who has failed to connect their device to the mains and the battery runs out. As a backup, attendees can always revert to telephone, email or text, if only temporarily.

# How does Virtual Mediation Work?

The virtual mediation process works much in the same way as face-to-face or telephone mediation, with the mediator using a mixture of joint and private sessions throughout, including variances allowing for meetings between the primary decision makers or experts or legal representatives.

The level of attention to detail in the preparatory stages for a virtual mediation, however, is crucial. The mediator, or mediation service provider in administered cases, should ensure that parties and their attorneys are able to transition to the online format in a positive way. The technology should be managed by the mediator, and the preferred software should be relatively straightforward for participants to familiarise themselves with in advance of the day.

Following the appointment of the mediator and agreement as to date/time frame for the mediation, the mediator (or mediation service provider) will engage in case management procedures. These are similar again to in-person or telephone mediations and include the drafting of a mediation agreement, incorporating standard terms relating to confidentiality, without prejudice, authority to negotiate and settle the dispute, agreement of the mediator's fees, terms and conditions etc., and reflecting that the mediation itself will take place virtually via online video conferencing facilities. The document will usually be signed and circulated to all in advance of the mediation itself.

A timetable for the submission and exchange of preparation materials, including party case

summaries and supporting documents, will be agreed and the mediator will contact each party and/or their attorneys in advance of the day, either by telephone or videoconference to check arrangements and ensure any questions or reservations regarding the process are addressed. It is becoming more and more normal for virtual mediations to take place over two half days, rather than one long day, subject of course to acceptance and agreement by all parties and attendees.

Separately to the pre-mediation procedural calls, there is real value in engaging in a practice session before the mediation to make sure all attendees are comfortable with the chosen platform. The mediator can guide the parties and their attorneys in practising moving in and out of private breakout rooms, look at how the security works and experience other functions useful in mediation, such as how documents can be shared or the use of any whiteboard or other useful tools. This is also an opportunity for the mediator to demonstrate that at the mediation itself, the party teams will be able to focus on the dispute, while the mediator (or the mediation service provider) will manage all technological aspects of running the various meetings and sessions.

At the start of the mediation itself, parties and counsel are usually invited to a joint session where the mediator will deliver a brief introduction followed by party opening statements. Subject to the parties' agreement to continue in this joint meeting, continuing these collective discussions at this early stage of the day in so far as identifying

agenda items and issues for the day can have a positive overall impact. Following this, the mediator then places the parties and counsel in their respective virtual breakout rooms for confidential discussions between themselves and/or the mediator, moving in and out of the joint and breakout rooms as needed.

In private, the mediator works in each party room to discover their interests, needs and drivers for settlement, passing information, and later offers, between them with direct permission to do so and maintaining all other matters discussed as confidential.

Depending on progress, it may be useful for the attorneys to meet, for example, to discuss particular points of law, or the principal decisions makers to do so to discuss the practicalities of settlement terms, and the mediator will set up separate virtual rooms for these conversations. If a settlement is reached, as with in-person mediations, it is normal for one or the other of the party counsel to prepare a first draft of the settlement agreement. Often, the mediator will

have requested that an outline agreement is prepared in advance, usually by the claimant team, which can then be added to on the day with the specific terms agreed by the parties. Once a draft is completed, this is shared with the other party for their review, comments and proposed amendments. It may be necessary for the legal representatives from each party to meet and finalise the settlement agreement and, again, the mediator can set up a separate virtual room for such a meeting.

If no settlement is reached during the mediation itself, mediators will often request to follow up with the parties after a few days, usually asking them to leave their last offers on the table, to see if the negotiations can continue with many cases settling soon after.

# Virtual Meeting Platforms

There are many video conference providers out there. Deciding which online platform to use for highly sensitive discussions is fraught with difficulties and judgment calls. Many mediations (and court hearings) are being conducted using the online video platform Zoom. However, selection will depend on a number of factors, such as the ease with which less experienced participants can navigate the systems, hardware requirements and any restrictive security protocols (often in place in large corporations and firms).

While not being a comprehensive list, the following are widely used videoconferencing platforms which may be suitable for mediation, subject of course to some familiarisation by the mediator and the parties in advance:

- **Zoom** – [www.zoom.us](http://www.zoom.us)
- **Webex Meetings** - <https://www.webex.com/video-conferencing>
- **Microsoft Teams** - <https://www.microsoft.com/en-gb/microsoft-365/microsoft-teams/group-chat-software>
- **GoToMeeting** - <https://www.gotomeeting.com/en-gb>
- **Bluejeans** - <https://www.bluejeans.com/products/meetings>
- **Modron Spaces** - <https://www.modron.com/spaces/>
- **Legaler** - <https://legaler.com>
- **Skype for Business** - <https://www.skype.com/en/business/> (soon to be fully replaced by Microsoft Teams)
- **Google Meet** (previously Google Hangouts) - <https://apps.google.com/meet/>
- **Jitsi** - <https://jitsi.org>

The basic versions of most of the above services are offered free, or at least free for a trial period. However, these free and trial subscriptions are often restricted to limited capabilities, i.e. number of participants, length of meetings, capacity to share documents etc., and can come loaded with advertisements and other distractions. The recommendation is for mediators and mediation providers to undertake some review of the services on a trial basis before committing to the platform which suits them best. Usually, only the meeting administrator (usually the mediator) requires a “professional”, paid for service account, with the parties and attendees being invited to the event with easy access web links and passwords. And, as with any mediation, it is important to focus the participants on the dynamics of the virtual mediation during the preparation phase of the process.



# Zoom.us

Some online platforms allow for the recreation of the mediation setting in a virtual environment, with virtual breakout rooms and plenary sessions. Offering these features, the mediation community internationally has largely flocked to Zoom as the videoconferencing platform of choice. Each party is allocated their own breakout room, their sanctuary, where the only person able to enter their space is the mediator and only by “knocking” first, much like in a face-to-face process. The mediator can create a range of further rooms to allow additional meetings, perhaps lawyer to lawyer, expert to expert and, of course, principal to principal. And there is a space where everyone present can meet in a virtual plenary session.

Virtual mediations are not without their challenges. Mediators and mediation service providers, attorneys and clients all need to become friendly and interested in the technology, if they are not already. Confidentiality and security need to be carefully considered when conducting a dispute online with multiple participants in different places, possibly different time zones and with multiple non-parties in the participants’ households. These practical issues need to be ironed out by those organising the mediation, in addition to their respective preparation for the day itself. Particularly with those with little or no experience with virtual mediation, there will clearly be a lot more frontloading, at least in the early days, as they familiarise themselves with the functionality, features, navigation and limitations of the software.

With Zoom, in particular, questions have recently been raised around security standards. At the technical level, Zoom have been quick to respond to concerns by making a number of changes to

their security. At the user level, the mediator, as host, has significant controls over the security settings and the admission and ejection of attendees. Each individual mediator and their clients will need to make their own investigations and analysis of the most appropriate platform for them to use, depending on their individual circumstances.

Key is that the participants be willing to learn and adapt, and are patient with the technology and each other. As with any mediation, there is no ‘one size fits all’ approach to virtual mediations. However, the following are some general helpful tips to consider in the organisation and set up of an online process.

## Essential requirements include:

- A strong, secure and private internet connection
- A laptop / desktop computer / tablet with a microphone and camera
- A “Pro” Zoom account – typically the mediation is hosted by the mediator and/or the mediation provider and the attendees do not can register and join the mediation for free.
- Software download – most videoconferencing providers, including zoom, require users to download software to their computer or tablet in advance of the meeting
- Attendees being accustomed to the platform and technology in advance
- If the hardware used by the mediator or other attendees is issued by an employer,

checks should be made with the system administrator about its use and any required support

Mediation organisers should be proactive and helpful with IT support for all participants so that they gain confidence in the system. As stated above, it is recommended to arrange an appointment for a run through of the technology with all attendees at least a week in advance of the mediation. Similarly, options for “Plan B” should be agreed, in the event the technology should fail, e.g. a dial in conference call.

For everyone involved, it is recommended to ensure that they have a professional backdrop behind them which is neat and depersonalised, certainly of any client files or confidential information. Zoom does allow for participants to create a customised backdrop which prevents family members from inadvertently appearing in the background, for example. Additionally, participants should ensure they are framed appropriately, have good lighting and are seated at a suitable distance from the camera.

**It may also prove useful for participants to have:**

- A headset with a microphone
- A large screen or a double monitor
- A stylus to mark-up documents, particularly if working with a tablet
- An external Bluetooth keyboard, particularly if working with a tablet
- An adjustable laptop / tablet stand

To ensure confidentiality is managed appropriately, prior consent should be obtained from all for any recording of the session or agreement finalised in writing beforehand that recording is not permitted. The mediator should set the ground rules for the mediation to protect and preserve the confidentiality of the process and the documents, including amendments to the mediation agreement to ensure, for example, that screenshots or photographs of what is happening on screen are not permitted.

In terms of attendees, it is worth considering who is most necessary to be present and to

keep overall attendees to a minimum, asking each party to nominate who will act as the lead – ideally the principal client decision maker.

All attendees must commit to being available for the duration of the mediation and confirm whether they will be joining the mediation on separate devices or together. If separately, which is most likely in the current circumstances, the teams themselves need to agree how they will communicate off-line especially during any open sessions – e.g. WhatsApp, iMessage etc.

**Parties and their attorneys must separately prepare themselves for participation in the process, including:**

- planning who will say what and when in the opening joint session;
- considering the need of any expert or other witnesses and their involvement in either part or all of the mediation process;
- discussing the location and environment of each participant and the impact of any international time zones on the timings;
- notifying the mediator in advance of the attendees and their respective roles in the negotiations and discussions to take place at the mediation; and
- making arrangements to ensure the mediator’s fees are paid (usually split equally between the parties) and how additional hours will be covered should the mediation run beyond the allocated time

As stated above, there should be clear agreement in advance as to how a settlement agreement will be prepared and executed – for example, via an electronic signature platform.

A process flow plan, prepared by the mediator, to demonstrate the logistics, privacy, how the day will work and conclude may prove useful given the unfamiliar nature of the virtual mediation framework.

Similarly, mediators and parties may consider the use of an online data transfer for the mediation bundle and documents, to avoid having to prepare and send hard copy materials. Such cloud-based services can be designed to give different access to different participants both for uploading and downloading documents.

Zoom offers the host, usually the mediator, the ability to password protect the meeting,

to lock the meeting once all participants are present, and to create virtual break out rooms for caucuses with various parties, protecting the confidentiality and privacy of the process and the discussions taking place within it in a manner which closely replicates the face-to-face framework.

# Setting up and Running a Zoom Mediation

For mediators, the process of using video-conferencing software and mediating virtually should, in time, come to feel natural. Navigating and familiarising themselves with the settings for the software to practice and consider how these may be utilised to run and protect the mediation process is a worthwhile exercise.

The mediator or mediation provider should provide a unique meeting ID for each mediation. This should be sent to all participants in advance at the time the session is scheduled. Each mediation should commence with the use of the “waiting room” feature, which ensures that only participants invited to the process are granted access. The mediator should be ready to troubleshoot any technical issues and, as the host, must control the entry of the participants to the proceedings as well as the setting up and facilitation of breakout rooms.

Once all participants have joined the session, the mediator should lock the meeting to prevent anyone else from joining and disable the recording function. Similarly, rather than allowing anyone to do so, the mediator should control the screen sharing function, potentially utilising this to draft and agree an agenda with the parties following their opening statements in the joint session.

As the parties move into caucus, the mediator will send each team to their separate breakout rooms and should only enter by asking

permission first through the chat function. This mimics the knock on the door in face-to-face meetings. The parties are also able to request the mediator’s attention while in the breakout room by utilising the “ask for help” button.

Beyond this, the mediation will run in much the same way as an in-person process, with the mediator moving between the breakout rooms, working with the parties to identify their respective needs, interests and settlement options, sharing information and passing offers as these emerge later in the process.

In the event of a settlement, the mediator will work with the parties and their attorneys to ensure that the terms can be drafted into an agreement, ideally to be signed by virtual means on the day.

Concluding well is as important in virtual mediation as in face-to-face mediations, so the mediator should see if the attendees are willing to get back together in a joint session to thank everyone for their participation. Parties may be more forthcoming where a settlement has been reached, but this meeting can still be utilised as an opportunity to highlight the value of the process and the progress made by the parties even in the absence of an agreement, as there will undoubtedly have been some, and of course to agree next steps to continue the discussions and negotiations if at all possible.

# The Future of Virtual Mediation

The question as to whether virtual mediation will continue to be used in the post Covid-19 world is a topical one. Most mediators and mediation service providers who have utilised these facilities over the last few months agree that it will, particularly in light of an expected retreat from globalisation as the world economy seeks to restabilise.

Having spent so much time working from home, there will, no doubt, be questions as to the need to travel as much as we have done in the past, whether by plane, train or car, spending time that could be used more productively elsewhere and reducing our overall carbon footprints. And there will be a greater familiarity with technology, in particular, video conferencing where whole families, not just professional people, having been using it as a lifeline during lockdown.

The ease and speed of setting up a virtual mediation may also make it the choice for those who, pre-litigation, need help with having a difficult conversation. The current crisis has caused many such cases where there is often no need for a full day session, but the use of a neutral third party skilled in facilitating negotiation and discussion may be just the thing for those who realise that, in these unprecedented times, embarking on litigation to enforce contractual rights is not the best way forward. The skills of a mediator can help parties find compromise, or a solution which works for both of them and, in many cases where this is important, help to preserve the relationships, both personal and commercial, so that all involved can move forwards, quickly and easily.

# Considerations for Mediators

## TELEPHONE / VIRTUAL MEDIATION VS IN-PERSON MEDIATION

The primary variance of the telephone mediation process is in the lack of face-to-face contact with the parties and their representatives. Mediators are skilled practitioners of interpersonal and communication skills, both verbal and non-verbal, and trained to pick up on nuances, not only in what is being said but also by the cues presented in the participants' use of body language. While what is being said, the tone and weight given to statements, may still be observed in a similar manner in a telephone mediation, clearly the mediator will not be able to detect any non-verbal signals. While the impact of this may be limited in lower value or less complicated cases, it is likely that telephone mediation may prove less fruitful in larger, multi-faceted disputes.

By contrast, virtual mediation by videoconferencing does not limit the mediator observing these signals in the same way, subject of course to the parties being close enough to the camera to be seen clearly, in a well-lit environment etc. This may become more difficult where the party team, for example, are all in the same location such as a conference room at the attorneys' offices.

## LOGISTICS AND ARRANGEMENTS

While the parties and the mediator will not need to make arrangements for travel, accommodation or venue and service facilities for the mediation, there are other considerations to ensure that the process is well planned and delivered. In particular, the date and timings for the mediation should be clearly agreed by all participants, with a commitment to be available for the entirety of the allocated timeframe. For telephone mediations, a list of primary and secondary telephone numbers should be shared, and the mediator should ideally have access to conference calling facilities for any joint sessions (or where the party and their attorneys are in different locations). Even for virtual mediations, having this information and setting up similar facilities can be useful in the event that the videoconference is interrupted because of technical issues for one or all participants.

## MEDIATION AGREEMENT

The standard provisions within the mediation agreement relating to confidentiality, authority, the non-binding nature of the discussions and the mediator's immunity, to name a few, must of course still be included, subject to any party agreed amendments. The document will, however, need to highlight that the mediation will be conducted by telephone/videoconference and stipulate any agreement as to how settlements will be recorded and finalised, if reached.

## PREPARATION

Except in the lowest value and simplest of cases, most mediators will engage in some preparation in advance of the mediation, familiarising themselves with the facts and issues in dispute. Such preparation usually takes place in isolation of the parties, albeit relying on their submissions by way of case summaries and key documents. For telephone or virtual mediations, there is no variance as such, although it is likely that the documentation will be limited for shorter allocated mediation timeframes.

## PRE-MEDIATION CONTACT

As has been stated above, most pre-mediation contact between the mediator and the parties, even for in-person mediations, is usually conducted by telephone. For telephone mediations, the mediator should be prepared to explain how the process will run and ensure the parties and their representatives are clear about how and to what extent they will be required to participate. In particular, the set-up of the early joint session by way of a conference call where each party will usually make an opening statement should be clarified and agreed.

For virtual mediations to be conducted by videoconference, as well as the usual pre-mediation logistical calls, it is highly recommended that the mediator arrange a practice session with the parties and attorneys in advance of the day to ensure their familiarity with the system and manage any technical limitations or issues.

## JOINT MEETINGS

Most civil and commercial mediations begin with a joint session at the start of the process, unless there are good reasons for such a meeting to not take place. In a telephone mediation, as provided above, this session will have to be conducted by way of a conference call, potentially with even parties and their attorneys in separate locations. Accordingly, the mediator should encourage a

test run before the day, ensuring that all systems are operating as required. There may be later joint sessions, or variances of meetings with just the legal representatives or the decision makers, and again being comfortable with the use and functionality of a conference call system is important, particularly for the mediator.

For mediation by videoconference, depending on the agreed platform, the mediator may be able to set up separate virtual meeting rooms for joint and private sessions in advance, allocating attendees into their respective rooms and allowing them to join the joint session by invitation.

## CAUCUSES

Private meetings between the mediator and the parties will usually take place in the privacy of the party's room, or virtual room, with all discussions entirely confidential unless and until a party agrees to pass information or offers to the other side. A private telephone call with a party and their attorneys operates in a similar way to a private party room. The mediator should still ensure they remind and reassure the parties of the confidentiality of these discussions to allow for an open conversation around their respective needs and interests.

## SETTLEMENT

Usually any settlement reached at a mediation is drafted into an agreement and signed on the day by the parties. Clearly this is difficult to achieve in a telephone mediation set up. As part of the mediator's preparation and pre-mediation contact with the parties, the discussion around how settlements will be recorded and signed should already have taken place. Usually, one party's attorneys, often the claimants', will have a draft prepared that can be amended to reflect the specifics agreed at the mediation. This can easily be sent to the other party via email for review and finalisation, and then signed. While this can be achieved on the day, sometimes parties do agree to finalise and sign the next day. There are also a number of easily

accessible electronic signature services now available should the parties be amenable to their use. Discussing these options in advance of the day clearly assists in keeping momentum and progress going during the latter stages of the mediation itself.

## **KEEPING THE MEDIATION ALIVE**

Most mediators are also aware that while the majority of mediations lead to settlement on the day, there are occasions where, for a range of reasons, the parties may need a little more time. In such cases, where a settlement has not been reached, mediators will usually offer to continue working with the parties via telephone over the coming days / weeks to ensure the negotiations can continue, sometimes asking them to leave their last offers open for a period of time and checking back in to see whether any further movement can be achieved. In a telephone or

virtual mediation, this post-mediation contact is similarly encouraged and can, more often than not, lead to further negotiations and settlement.

## **FEEDBACK, REFLECTION AND REVIEW**

Mediation, by its very nature, is a solitary profession with most mediators operating alone for many of the cases they mediate. Building a habit of reflection and review is therefore crucial to ensure professional development and consideration both of what went well and how things may have played out differently. Such reflection should be undertaken no matter the form of mediation, and wherever possible, mediators should request feedback from the parties and / or their attorneys either directly or via the mediation provider in administered cases.



# Online Dispute Resolution

There is a distinction between what is described above, i.e. the delivery of ADR via telephone and videoconferencing services, and Online Dispute Resolution (ODR), which has been around for a number of years and relied, at least historically, on text-based communication, such as email, and patented bidding software systems.

The concept of ODR refers to the use of IT and the Internet to help resolve disputes, other than the computerisation of a court system, i.e. conducting court hearings across video links or online tracking of the progress of trials. When a conflict is handled using ODR, a traditional courtroom or hearing room is not employed. Instead, the process of settling a dispute is entirely or largely conducted across the Internet. In other words, dispute resolution services are made available as a type of online service. Many techniques fall under the umbrella of ODR. Sometimes human beings remain heavily involved, as when ODR systems provide facilities for judges, mediators, or negotiators to handle disputes by communicating electronically with parties and by reviewing documents in digital form. On other occasions, the assessment of a legal problem or the negotiation itself might be enabled by the ODR service without much or any expert intervention.

ODR techniques are already being deployed around the world in resolving a wide range of disagreements – from consumer disputes to problems arising from e-commerce, from quarrels amongst citizens to conflicts between individuals and the state. ODR is not appropriate for all classes of dispute but, on the face of it,

is best placed to help settle high volumes of relatively low value disputes – robustly, but at much less expense and inconvenience than conventional courts.

## ODR can offer:

- **Affordability** – regardless of means
- **Accessibility** – especially for those with physical disabilities
- **Simplicity** – for non-lawyers to self-represent without feeling disadvantaged
- **Appropriateness** – for an increasingly online society
- **Speed** – minimising uncertainty over unresolved problems
- **Consistency** – offering a degree of predictability
- **Trustworthiness** – reliable forums to ensure user confidence
- **Judicial Focus** – on matters requiring their expertise and knowledge
- **Alternatives** – to imposed judicial decisions
- **Proportionality** – in cost of pursuing a claim vs the amount in issue
- **Fairness** – offering opportunity to present case to neutral expert
- **Robustness** – with rules of procedure and applicable laws
- **Finality** – offering resolution so that parties can get on with their lives.

There are a number of completely automated and semi-automated ODR systems available, particularly for consumers, with computer prompted information gathering, decision

making based on participants' inputs, and sometimes no interaction from a third party, such as a mediator, at all. While there are a wide range of E-mediation programs and software in use, including those where all contact between the parties and the mediator happens

by way of messaging systems and emails, those are usually tailored for specific sectors or jurisdictions, and largely only used in more advanced ADR jurisdictions.

# The European Union Online Dispute Resolution (ODR) Platform

One of the largest ODR projects internationally, designed to protect and empower consumers across the Single Market, the European Union (EU) has a comprehensive set of substantive consumer rights in place to inform consumer choice and expectations. Alongside the body of substantive consumer law, EU policymakers have developed a set of legislative and non-legislative tools that aim to make the enforcement of consumer rights in member states more effective, of which consumer ADR is a key component. With Directive 2013/11/EU on alternative dispute resolution for consumer disputes (the “Directive”) and Regulation (EU) No 524/2013 (the “ODR Regulation”), a horizontal framework for consumer ADR and ODR was established.

Settling consumer disputes out of court holds considerable potential for consumers, retailers and the administration of justice in general. Access to easy, fair and cost-effective ADR strengthens consumer trust when buying from retailers, in particular in an online environment. The less formal, and typically conciliatory, nature of ADR procedures allows the parties to maintain their customer relation even after a dispute has arisen. Retailers receive important feedback on the quality of their products and services, potentially gaining an advantage over

their competitors by saving the costs of court proceedings and demonstrating high standards of customer care.

Under the Directive, Member States facilitate consumer access to ADR and ensure that they can turn to quality-certified ADR providers to resolve both domestic and cross-border disputes throughout the Union and in virtually all retail sectors, irrespective of whether the purchase was made online or offline. Compliance is ensured through a specific certification and monitoring mechanism with Member States, although the Directive does not prescribe a specific model for ADR, nor regulate whether participation is voluntary or mandatory, or whether the outcome is binding.

The ODR Regulation builds on this infrastructure and applies specifically to consumer disputes over purchases of products and services online. Under the ODR Regulation, the European Commission established and maintains a European ODR Platform, a multilingual interactive website that allows consumers to submit their consumer-to-business disputes online. It informs parties of the quality-certified ADR provider/s which are deemed competent to handle their dispute and transmits the case onwards. If the parties do not agree an ADR

provider within 30 days of the submission of the complaint, the case is automatically closed on the platform, without prejudice to the consumer's right to pursue the complaint outside the platform.

The Commission launched the ODR platform in January 2016, with it becoming open to the public on 15 February 2016. Since its launch, the platform has attracted more than 8.5 million visitors and 120,000 consumer disputes, both domestic and cross-border. The

Commission reports that most of the disputes are about airlines (13.2%), followed by clothing and footwear (10.9%) and information and communication technology (6.8%). In about 80% of disputes, the case was automatically closed by the platform because the business had not responded to the consumer's notification. However, in 42% of the total cases, the parties reported that a settlement had been reached bilaterally.

# Other ODR Services

## Ebay

[www.ebay.com](http://www.ebay.com)

A remarkable 60 million disagreements amongst traders on eBay are resolved every year using ODR. There are two main processes involved. For disputes over non-payment by buyers or complaints by buyers that items delivered did not match the description, the parties are initially encouraged to resolve the matter themselves by online negotiation. They are assisted in this by clearly structured, practical advice on how to avoid misunderstandings and reach a resolution. Guidance is also given on the standards by which eBay assesses the merit of complaints. If the dispute cannot be resolved by negotiation, then eBay offers a resolution service in which, after the parties enter a discussion area to present their argument, a member of eBay's staff determines a binding outcome under its Money Back Guarantee. This e-adjudication process is fast with strict time limits. The claim must be escalated to eBay within 30 days from the actual or latest estimated delivery date and, to encourage a full opportunity for self-resolution, no earlier than 8 days since the complaint was first raised with the seller.

Disputes over feedback (reviews by buyers of sellers), which can include reviews that might otherwise lead to court-based defamation claims, are dealt with by an independent company called Net Neutrals. Their service is called Independent Feedback Review (IFR). Using a separate discussion space for each dispute, a trained independent neutral reviews the evidence from both parties, invites fresh argument, and determines whether the feedback meets one of four criteria for removal. The process takes seven days and eBay removes the feedback pending the outcome. Operational only in the Netherlands, a novel crowd-sourcing resolution process for feedback disputes is available for one of eBay's subsidiaries, Marketplaats. After arguments are exchanged, 21 'jurors' are randomly selected from a volunteer panel of experienced users of Marketplaats and shown the details of a dispute. The buyer is given 7 days to respond and the seller then has 2 days to rebut. The jurors, after that, have 10 days to review and they issue a decision as to whether the feedback should be withdrawn. Marketplaats acts in accordance with the majority decision.

## Canadian Civil Resolution Tribunal

[www.civilresolutionbc.ca](http://www.civilresolutionbc.ca)

Launched in 2015 in British Columbia, Canada, the Civil Resolution Tribunal is an online tribunal available as an alternative pathway to the traditional courts for resolving small claims through a more convenient and less costly process. Dealing with claims valued under CAD \$25,000 relating to debts, damages, recovery of personal property and certain types of condominium disputes, the tribunal operates in several stages.

In the first instance, the facility helps users explore possible solutions, with parties using the tribunal's online negotiation platform, which is subject to short timelines and supported by templates for statements and arguments. If a settlement is not reached, a tribunal case manager is appointed to assist the parties to settle their dispute through a mediation process that takes place online or over the telephone. If no settlement is reached through mediation, the parties are then invited to agree to a third and final stage of adjudication. The adjudicator contacts the parties via the online platform, over the phone, or, when necessary, through video-conferencing, and makes a decision that will be final and binding.

## **UK Financial Ombudsman Service**

[www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk)

The UK Financial Ombudsman Service was established by statute in 2000 as the mandatory ADR body in the financial services sector. Its function is to resolve disputes between consumers and UK-based financial businesses quickly and with minimum formality. Its casework process is designed around the principle that a dispute is usually best resolved at the earliest possible stage and that most problems can be resolved without needing a formal determination by an ombudsman.

Businesses covered by the ombudsman have the opportunity to resolve disputes before the service becomes involved, but they must resolve complaints promptly – and always in fewer than eight weeks. Once a complaint is referred to the service, its process is geared towards early and informal resolution. Its case-handlers ('adjudicators') attempt to facilitate an amicable resolution to the dispute between the two parties, usually resulting in adjudicators writing to parties with their view on what the fair and reasonable outcome should be. If both parties agree (which typically happens in around 90% of cases), the dispute is resolved. But either party may disagree and ask for the case to be referred to an ombudsman for final, binding, determination. An ombudsman's determinations can be accepted or rejected by a consumer, but if a consumer accepts the decision then it is binding. While the decisions are not appealable, they are subject to Judicial Review.

## **Resolver**

[www.resolver.co.uk](http://www.resolver.co.uk)

Resolver is a UK-based online facility that helps consumers raise complaints with suppliers and retailers. The operators of the site have populated it with the e-mail contacts of the complaint departments of over 2000 major organizations. Through a form-filling exercise and helped by the provision of standard phrases, a consumer is given online assistance in drafting a complaint. This is then e-mailed directly to the relevant complaint department. The suppliers and retailers are urged to respond to the Resolver e-mail address so that the exchange of messages can be stored on the consumer's case file that is then maintained on the site. The service presently covers energy, telecoms, transport, loan companies, restaurants, high street shops, solicitors, and many more sectors. Resolver provides a platform through which parties can discuss their differences in a structured way. Emoticons are provided to help consumers better express their emotions. The service hold details of the escalation procedures of the 2000 organizations and guides users from first-tier complaints handling up to the highest level. Users are alerted by e-mail to any responses and are prompted to escalate when responses are not received. The service is free of charge, both to consumers and to the organizations to whom they are complaining.

## **Youstice**

[www.youstice.com](http://www.youstice.com)

Youstice is an ODR service for handling large volumes of low value consumer complaints, relating both to goods and services, whether or not the purchases took place online. There are two tools. The first enables negotiation between parties. It provides assistance in framing arguments – parties are invited to describe their position by selecting from a series of phrases, with relevant icons for each. The site also suggests suitable solutions that again can be represented by icons. A form of structured (asynchronous) dialogue can take place within a limited area for free form comment. The objective is to encourage and facilitate the parties to reach an agreed settlement directly between themselves.

Using the second tool, customers can escalate cases and seek an independent review by one of a number of neutrals accredited by Youstice. Customers can file their claims either directly at the retailers' websites or at websites of consumer organizations. Shops are entitled to use the Youstice logo if they reach agreement on Youstice with consumers in at least 80% of cases and they implement at least 98% of the agreements reached or of decisions by third parties. Use of the facilitated negotiation platform is free to consumers, with Youstice earning its income from the retailers who pre-register and who display the Youstice logo in their marketing.

## **Online Schlichter**

[www.online-schlichter.de](http://www.online-schlichter.de)

The Online Schlichter is an online mediation service for Business-to-Consumer e-commerce and direct selling disputes. It has been run by the German-French European Consumer Centre (ECC) in Kehl/Strasbourg since 2009 and has been financed by the Ministry of Justice/ Consumer Protection of six regional governments of Germany. Its aim is to increase access to justice and reduce the number of cases reaching the regular courts. It has also received funding from legal insurance and standard bodies (Trusted Shops and DEVK) and the direct selling association, a membership body (Bundesverband Direktvertrieb).

The service is free for both parties and the mediators/advisors are independent lawyers at the ECC. There is considerable emphasis on analysing the case from the start and providing both parties with legal advice and evaluation of their legal position, thereby correcting any unfounded expectations about their rights. This online advice is partly automated by using textual building blocks and decision trees. This up-front advice and evaluation often helps to achieve early settlement. The mediator makes a non-binding recommendation. In about two-thirds of all cases both parties accept the recommendation and the case is settled accordingly.

## **Cybersettle**

[www.cybersettle.com](http://www.cybersettle.com)

Cybersettle, based in the US, developed software to provide 'blind bidding' services. This is a process designed to speed up negotiation when all that is in dispute is how much is owed. In broad terms, the claimant and defendant each submit the highest and lowest settlement figures that would be acceptable to them. These amounts are not disclosed but if the two ranges overlap, a settlement can

be achieved, the final figure usually being a split down the middle.

It is claimed that Cybersettle has handled over 200,000 claims of combined value in excess of USD \$1.6 billion, and that the City of New York used the system to speed their settlement process for a backlog of 40,000 personal injury claims. More than 1,200 claims were submitted, and it is claimed that there was a 66% settlement rate within 30 days of submission, savings in litigation costs of \$11.6 million, with an average reduction of settlement time of 85%.

Similar systems include [www.themediationroom.com](http://www.themediationroom.com) in the UK, [www.trytoseettle.com](http://www.trytoseettle.com) in the USA (set up under a license granted by Cybersettle) and the Canadian [www.smartsettle.com](http://www.smartsettle.com). Cybersettle holds worldwide patent, which did lead to some competing systems closing down.

## Modria

[www.modria.com](http://www.modria.com)

Modria is a spin-off from the ODR platforms utilised by eBay and PayPal and provides a cloud-based platform on which businesses and public bodies can customize and build their own ODR services. It supports various ODR methods, including diagnosis, negotiation, mediation, and arbitration, and also offers a configurable case management and workflow system that handles case intake, document generation and management, scheduling, reporting, and status messaging.

By using Modria, therefore, governments need not design and develop their own ODR technology. Modria has ISO 27001 certification for information security and its processes and technology resolve hundreds of thousands of disputes each year, for clients such as the American Arbitration Association (road traffic accident cases), Marketplaats and leading e-commerce and payments companies.

## Traffic Penalty Tribunal

[www.trafficpenaltytribunal.gov.uk](http://www.trafficpenaltytribunal.gov.uk)

The Traffic Penalty Tribunal (TPT) of England and Wales hosts a web-based portal BECK (Best Evidence Cloud Knowledge), for use by appellants, respondent authorities as well as the adjudicators and administrators. The Portal enables appellants to appeal, upload evidence and follow cases and hearings under one evidence screen and account. Likewise, each authority has a dashboard showing current cases, enabling them to submit evidence, comment, and follow progress of hearings and decisions. Appellants create an account and receive all notifications by email. They comment on evidence, request their preferred hearing type and follow progress of the case through to the decision, viewed online. Their dashboard displays the status in each case, prompting actions. Adjudicators can manage their own caseload, send directions to parties, and easily see uploaded evidence, including videos, which is also displayed to all parties. At telephone conference hearings all participants can view the same evidence, guided by the adjudicator.



# Conclusion

Most experienced mediators will have, until recently, claimed themselves as proponents of having a mediation take place in person, with all decision makers physically present. The very nature of the mediation process leads to the view that seeing people in person in order to secure trust and develop rapport, and also to read and evaluate micro-expressions during the process is crucial to its success. Humans, by nature, connect and evaluate one another in various ways, including through eye contact and body language, both of which are visual cues, as opposed to voice inflection, which can of course be detected over the phone or video calls.

In particular, videoconferencing satisfies that “in-person” touch that so many mediators and participants desire, allowing the parties to hear and see each other via webcams and for separate sessions to be created, thereby mimicking the joint and private caucuses. However, no matter which platform is used, mediators must be facile with the program and have the ability to not only use it themselves but also be able to guide the participants who may not be as familiar so that they are equally comfortable. To which end, aside from taking the many training sessions that are popping up, mediators must practice the use of the technology themselves. There is nothing more frustrating to a mediation attendee than technology that impedes rather than enhances the process.

For similar reasons, setting up a time before the actual mediation to virtually or telephonically (depending on the form of remote mediation agreed) “meet” with each side, including clients, is useful in ensuring they are equally comfortable with the technology. Just as mediators would ensure that participants are comfortable in their

conference room and understand where the amenities are located, they need to be sure they know how to use the mute button, or discretely request, set up and/or participate in a private caucus session.

Separately, while it is easy to gauge confidentiality sitting in a private conference space, determining that what is being said is only being heard by the actual participants who are present in that room, with telephone and virtual mediation, there is either no view or a limited view of where the other participants are physically sitting. Moreover, many of the virtual platforms have recording features (which should of course be turned off by everyone). Mediators must review and identify the confidentiality expectations with all participants and stress the importance of maintaining confidentiality of the process, modifying their mediator introduction at the start of the day to cater for the format being used. Parties themselves should be in a private space where they cannot be overheard, with private telephone or internet connections to avoid disruptions to the process. Even with these recommendations in place, contingency planning is important in the event the technology fails.

Mediation, in whatever form it is undertaken, is dependent on the parties having trust and confidence in the mediator and the process. Although far more the norm in the current dynamic, there is still the possibility that some people will not be comfortable with or trust technology. Therefore, in order for the process to work while utilising these remote forms of mediation, it is up to the mediator to ensure the stage is appropriately set and any reservations and problems are swiftly managed.

In terms of utilising these forms of mediation in Georgia, both during lockdown conditions as a result of Covid-19 or for other reasons, whether they be relative to cost or ease of accessibility, the key will be in diagnosing the need and designing the services, with stakeholder ownership and buy-in to the systems. For telephone mediation, which may be suited to low value civil claims, a pilot court-connected or court-annexed program could be a good starting point.

Virtual mediation, by contrast, is being utilised well and effectively in the most complex commercial cases and so may be a great addition to the services offered by ADR providers and associations, subject again to working closely with mediators and professional users, such as attorneys, in ensuring the dynamics of the process, the technological underpinnings and variances in the ways of working are understood and accepted. While the larger ADR providers have all comments, via social media platforms, webinars and articles, on the effectiveness and increased use of virtual mediation in response to the Covid-19 crisis, unfortunately there are no published statistics on case numbers, types, settlement etc. It is anticipated that such data will be made available in due course, however, to profile the process and its longer term viability.

As for ODR, one of the primary roles of a state in a democratic liberal democracy is to provide an affordable and accessible public dispute resolution service with an independent judiciary at its core. The work and services of the ADR community often provide private sector alternatives to the courts, and while these help maintain the health of a legal system and support the rule of law, these depend most heavily on the existence and widespread use of a public court system that applies, clarifies and develops the law through decisions that are authoritative, enforceable, final and can set precedent.

Of course, the decision as to the type and form of ODR will require detailed consideration for Georgia, in particular whether the service should form part of an online court service or be offered separately via professional bodies, such as ADR

providers, for sector specific (such as consumer) or low value disputes. Independent systems have been reviewed above to some degree, and it is worth noting that there are more and more examples internationally of the establishment of "Online Courts".

One of the great potential benefits of well-designed ODR services is that litigants in person have access to dispute resolution services that are intelligible and user-friendly for the non-lawyer. A counter to this is the concern that an easily accessible ODR process may encourage litigiousness, promote a more combative culture, and empower vexatious litigants. However, if online services enable more citizens to understand and enforce their legal entitlements, this should be regarded as increasing access to justice rather than encouraging litigiousness. Nevertheless, to deter both the speculative and vexatious, there should be detailed consideration given to the costs of the service, particularly for higher value claims, for example.

For consumers, particularly in the spirit of the European Union Regulation on ODR, establishing an appropriate ADR service for the management of disputes around the provision of goods and services offers citizens the confidence to shop, facilitating trade and economic growth, with the knowledge that help is at hand should they experience a problem with a purchase.

It is very likely that developments in ODR, particularly in the form of emerging technologies, such as artificial intelligence, big data, affective computing, crowd sourcing, machine learning, what-if analysis and virtual meeting rooms, will no doubt begin to form part of the ODR landscape in the coming months and years. The technical details and precise systems are less important at this stage than the need to recognise that there is no finishing line in the world of IT, with it highly unlikely that supporting technologies will not evolve at all. It is therefore safe to assume that that ODR systems will become steadily more useful and powerful.

Thus, piloting and trialling an ODR system, or indeed a number of distinct ODR options and services, seems a timely step forwards in light of

the country's wider developments in the field of ADR and would keep in line with similar initiatives internationally.

