Paths of Mediation in Bosnia and Herzegovina
Paths of Mediation in Bosnia and Herzegovina

Sarajevo, 2009
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Margo Thomas
Regional Business Line Leader, Southern Europe
Investment Climate Advisory Services of the World Bank Group

Introductory Word
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For the emerging economies of the Western Balkans, private investment is an important engine for economic growth and the ongoing financial crisis has heightened the competition for private capital. Governments in this region have been working to address the legal and institutional issues that affect the business enabling environment for private investment and according to the World Bank Group’s 2010 Doing Business report, this region is one of the fastest reforming in the world.

However, the region’s performance on contract enforcement and feedback from investors make it clear that much work needs to be done to address issues around contract enforcement and to help minimize the risks associated with private investment. Alternative Dispute Resolution (ADR) is an important mechanism for providing effective and credible alternatives for resolving disputes outside of the court system. IFC has played a leading role in introducing effective and sustainable ADR programs across the region. According to IFC’s monitoring system, more than 90 million (US dollars) have been released for investment through the mediation of commercial disputes in the Western Balkans, of which 30 million (US dollars) in Bosnia and Herzegovina.

This publication serves to document the development and implementation of commercial mediation in BiH while drawing lessons that can guide future development and innovation. Finally, I wish to acknowledge the substantive contributions of the mediation community of practice in BiH, across the region and internationally to this important publication.
Editor’s Remark:
Paths of Mediation in Bosnia and Herzegovina
The publication “Paths of Mediation in Bosnia and Herzegovina” is among first attempts to speak up about mediation at one place and in a certain moment of time enlightening this phenomenon from many perspectives. It was my pleasure and honor to work with all the colleagues involved in this project whereas a real challenge represented editing of themes that could be a part of such a publication and to select authors who were able to respond to their tasks in a multiple fashion. Hereby I would like to thank them all.

Our publication is opened by the Comments on the Law on Mediation Procedure whose author is a distinguished professor from Zagreb, Alan Uzelac. It is a paper which professional community in Bosnia and Herzegovina has been lacking as of the moment the Law was adopted. We have no doubts that this paper will be indispensable in every subsequent analysis of mediation legislation in Bosnia and Herzegovina.

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1 Adnan Novo, attorney at law from Sarajevo holds a Master degree from a Faculty of Law of Sarajevo in the subject “Applicable Legislation for Contractual and Non-Contractual Obligations in the EU Law and Legislation of Bosnia and Herzegovina”. Participated as a mediator in the Pilot Project od Launching Mediation in the Municipal Court of Sarajevo. He is one of eight certified trainers of the Training for Efficient Referral of Cases to Mediation with the Judicial and Prosecutorial Training Centers in Bosnia and Herzegovina. He is also a Chairman of the Committe for Professional Education of Attorneys, Attorney Associates, Attorney Trainees with the Bar Association of the Federation of Bosnia and Herzegovina.
Professor Gašo Knežević from Belgrade outlines the dynamics between concepts of two justices – public and private – emphasizing a thematic dilemma: Whose path are you going, Billy? The major significance belongs to the attempt that consumers of the justice system are provided with as many methods of conflict resolution as possible, which was one of the concluding remarks of this paper.

Steven Austermiller updated for purpose of this publication his paper, very well-known among professionals, – *Mediation in Bosnia and Herzegovina: A Second Application* - published in *Yale Human Rights & Development Law Journal*. This paper, in addition to practical and legal analysis of mediation, emphasizes some of general problems in the judiciary of BiH, but also the future of mediation and strategies of its implementation.

Mehmed Hadžić, Assistant Professor in Labor Law at the Faculty of Law in Sarajevo, outlined in his paper the mediation in labor legislation of Bosnia and Herzegovina. The article is included in this publication with the intention to research the mediation launch and its success rate in specific fields, such as, *inter alia*, the field of labor disputes, and the issue of mediation applicability therein.

The Chairwoman and the Executive Director of the Association of Mediators in Bosnia and Herzegovina Jagoda Ribica and Aleksandar Živanović presented Association’s results and efforts made during past eight years since the idea of launching mediation had emerged in Bosnia and Herzegovina. Particular attention was paid to new challenges that the Association would be facing in future as a proponent and major stakeholder in promoting mediation in Bosnia and Herzegovina.

Branka Skoko and Fatima Mrdović, judges from Banja Luka and Sarajevo, provided, in addition to their personal experiences made in the Pilot Project on Launching Mediation in Courts, an overview of mutual relation between courts and mediation, necessity of further training of judges in this area, and measures for further enhancement of mediation.

And finally, Lada Buševac provides also a brief overview of Directives on Certain Aspects of Mediation in Civil and
Corporate Cases of European Parliament and Council, as well as expectation of companies from Bosnia and Herzegovina concerning the issue of settlement of commercial cases. The paper also includes significant results of surveys of company practice implemented by International Financial Corporation in 2007.

Please note that papers by Gašo Knežević and Steven Austermiller were originally written in English language, while the others were written in respective mother tongues of the authors. We hope that the quality of papers was not lost in translation.

The publication is dedicated to the past, current, and future beneficiaries of mediation, tentative consumers, mediators, legal professional, and to the academic community. In other words, it may be stated that the publication was intended to all those who might seek mediation as a dispute resolution method, i.e. to a very broad circle of consumers. We hope that every and each of them will find the contents of the book useful and that some of the published views will give impetus for further seeking of the right answer which path we are taking.

Sarajevo, September 2009
Alan Uzelac

Comments on Law on Mediation Procedure of Bosnia and Herzegovina
Introduction

Bosnia and Herzegovina has joined that circle of countries which by means of a unified law regulated the issue of dispute resolution through mediation. Thereby BiH acknowledged the importance of alternative dispute resolution for appropriate and efficient functioning of national legal protection mechanisms. The Law on Mediation Procedure provides, in a generally acceptable manner with only few deviations, the answer to basic questions that the contemporary mediation legislation is dealing with. Although its provisions mainly focus on so-called court-annexed mediation (mediation in addition to a court procedure and mediation upon a court referral), it also anticipates general issues relevant for conduct of any mediation procedure, including non-administered \textit{(ad hoc)} mediation. The Law on Mediation Procedure is a modern law in its essence; however, there are few omissions in its formulations, which may have resulted as a consequence of its drafting and adoption process. This Law also omitted to set forth several standard topics, such as repercussions of instituting a mediation procedure upon the course of statute of limitation and other limitations; validity of mediation clauses (agreement to a mediation attempt in the event of a dispute arising from any other agreement), and incorporation of mediation rules and regulations in mediation agreements. In this light, the Law on Mediation Procedure creates a solid foundation and leaves room for its further development and expansion in the future. In the text bellow, we intended to provide comments about individual provisions of the Law on Mediation Procedure, bearing in mind the stage of mediation development in BiH and comparative experience of other countries.
LAW ON MEDIATION PROCEDURE

Published in the Official Gazette of BiH No.: 37/2004 of 12 August 2004

Entered in force on 20 August 2004 (see Art. 33 of the Law)

I. General provisions

Article 1

This Law governs the mediation procedure on the territory of Bosnia and Herzegovina.

The mediation tasks shall by a separate law be transferred to the association or associations by the procedure set forth in that Law.

- Mediation Procedure: Chapter III.
- Requirements for dealing with mediation: Chapter VI.
- Association: Art. 5 Para. 1 and 2; Art. 27; Art. 29; Art. 31
- See: Law on Transfer of Mediation Affairs to Association of Mediators (hereinafter referred to as: ZPPMUM, Official Gazette of BiH, No. 52/05).
- Mediation site: Art. 11

Application field of the Law on Mediation Procedure

1. Field of application of the Law on Mediation Procedure (hereinafter referred to as: the LMP) has been determined by the territorial and not causal fashion. The LMP sets out the mediation procedure on the territory of Bosnia and Herzegovina, whereby the sort of disputes and types of mediation procedures are not specified.

2. If read literally, the LMP shall refer only to the mediation procedure. Similar as in regard to the title of this Law, the expression “mediation procedure“ shall be construed broadly, so that it comprises all relevant aspects of mediation, particularly those which are explicit and contained in the Law. Therefore, for example, although in a literal sense the “procedure” should not comprise
issues such as contents, form and effect of the mediation agreement; effect of the mediation procedure to other procedures; conditions for dealing with mediations and similar, all these issues are mentioned in LPM and it with no doubts “regulates” them.

3. Territorial determination of application field may cause some difficulties. Comparing to the arbitration, where the arbitration site, even if not determined in the arbitration agreement, must be determined in the arbitration decision (award), the practice is not usual for mediation. A single norm in the LMP referring to the mediation site is contained in the provision on the contents of mediation agreement, which should also contain mediation site (see: comments about Art. 11). Therefore, a question is raised whether the mediation procedure “on the territory of Bosnia and Herzegovina” shall be considered a mediation, in which (only) a mediation agreement is concluded in BiH; a mediation in which (only) in the contract on mediation BiH is indicated as mediation site; a mediation in which (only) one or more meetings with parties take place in BiH; a mediation in which (only) settlement is concluded in BiH, etc. We believe that this provision shall be construed broadly and permissively, accepting any of the elements of territorial relation. Namely, even only limited personal and institutional application field of the law (to the mediation conducted by mediators registered in BiH supported by association authorized by the Law) creates a sufficient link with the BiH legal order.

4. As the Law specifies neither in its definition nor by a list of cases which may be resolved by mediation (see the comment on Article 2), the field of its application shall be considered broadly to the highest extent in causal terms. Restrictions shall only imply from nature of things, and from the definition of mediation as a path to achieve a resolution of the dispute. With no doubt, causal field of LMP application shall comprise of civil, commercial and labor disputes, as well as other disputes about rights which parties may freely dispose of. Also, other disputes, such as status disputes (disputes arising from the family law domain), and also some disputes from the criminal law domain, may be listed under the application field of this Law, provided any of them is entirely defined by some other regulations, thus they act as lex specialis in that case.

5. The Law on Mediation Procedure, in comparison to many other laws (for example: Law on Conciliation of the Republic of Croatia) comes from the idea about necessity of an institutional and organizational framework for mediation. Insofar, in several articles it comes from the idea that mediation shall be organized under the auspices of mediation organizations (associations), and
that shall be implemented only by registered members of that organization. Although a trend is also present in Europe to license authorized mediators for purpose of quality and control over mediation, provision of Article I Paragraph 2 represents, however, a significant personal reduction of the application scope of the Law to mediations, which are implemented as so-called institutional mediations only, i.e. under auspices of organizations to which implementation of “mediation affairs” was transferred by the Law. For the moment being, this is only one organization – Association of Mediators of Bosnia and Herzegovina (see: Article 4 of the ZPPMUM).

6. Considering the narrowed personal application field of LMP, the question of legal status of the mediation is raised which meets requirements referred to in Art 2, but it is not implemented under auspices and with support of a licensed Association or by a registered mediator. These mediations, although possibly and potentially useful if a settlement is achieved therein, shall not exercise any of benefits anticipated in the LMP, e.g. direct enforcement of the settlement agreement (Art. 25, see comments), court referral to mediation (Art. 4 Paragraph 2), regulated price list of services (Article 30) or accountability of a mediator (Article 27).

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**Article 2**

*For the purpose of this Law, the mediation shall be a procedure in which a third neutral party (mediator) assists parties in an effort to achieve a mutually acceptable resolution of a dispute.*

*A Mediator may not impose the solution to the dispute on the parties.*

- Mediator: Art. 3 Para. 2
- Settlement Agreement: Art. 24
- Principle of free will: Art. 6

**Definition of mediation**

7. The Law defines the mediation in a contemporary standard and acceptable fashion. Definition included in Article 2 points out four elements:
   a.) Mediation as a legally regulated procedure;
   b.) Mediation as a procedure which is implemented by a neutral third party;
c.) Mediation as a procedure whose purpose is to achieve a consensual (amicable) dispute settlement;
d.) Mediation as a procedure in which a person implementing it has no competence of making a binding decision.

8. Comparing to other classical adjudicative procedures (court procedure, arbitration), mediation is less formal and less regulated method of dispute resolution. Therefore, it is sometimes difficult to differentiate between some informal friendly efforts of a third person to assist to the contesting parties and the mediation as a legally regulated and defined procedure. Although LMP is neither extensive nor it contains many procedural rules, nevertheless it determines several clear elements which differentiate the mediation as a legal procedure from other practices: duty of execute a written mediation agreement; a rule of disqualification of mediator; a rule on suspension of procedure and enforcement of settlement agreement, etc.

9. The formulation of Article 2 contains some of wording awkwardness which requires an adequate interpretation. Reference to the “third neutral party (mediator)” resembles a definition of a mediator, although this definition is provided in the next article (Article 3 Paragraph 2). Also, it stipulates efforts for reaching a “mutually acceptable dispute resolution”, although the purpose of mediation does not stop at searching for and finding a solution, but it also includes the implementation of a found “acceptable” solution— in achieving of a legally binding settlement. Eventually, the provision that the mediator “cannot impose a solution to the parties“ has rather a narrative than strictly legal meaning. Its essence is not in the issue that the mediator cannot offer convincing solutions which would be imposed by its plausibility to the parties (which is not true, see the comment on Article 23), nor in that that the arbitrator cannot use unethical methods for achieving settlement (“imposition” as mental or physical force). This norm shall be construed as absence of authority of mediator to make a decision based on his/her assessment of legal status of the parties involved in the dispute, which would be legally binding.

10. The LMP makes no difference between facilitation and evaluation methods of dispute resolution, therefore the broad notion of mediation shall include all forms of alternative dispute resolutions which meet the given definition, regardless how they would be called otherwise (mediation, conciliation, early neutral evaluation, mini-trial, DRB, etc.). Exactly for this concept, its procedural provisions (which are mostly created by a measure of “classical” facilitation mediation) should be considered either excessively scarce (as they
do not anticipate rules for some methods of alternative dispute resolution) or excessively detailed (as they contain too detailed rules for institutional facilitation mediation).

### Article 3

The mediation procedure shall be conducted by an individual mediator, unless the parties agree to have more than one mediator conducting the procedure.

A mediator shall be a third neutral person mediating in dispute resolution between the parties pursuant to the mediation principles.

- Mediation principles: Chapter II.
- Principle of equal treatment: Art. 8
- Principle of neutrality and impartiality: Art. 9

**Number of mediators, definition of mediator**

11. Comparing to arbitration or court procedure (at least on higher instances) where a principle of a joint decision-making prevails, in relation to mediation the principle of individual acting prevails. An individual mediator can successfully mediate in number of disputes, thus it shall be a standard solution in absence of other preferences of the parties or applicable mediation rules. However, the parties may reach an agreement about having more mediators instead of one to conduct the mediation. It has to be emphasized that “more mediators” may stand for both, even or odd number of mediators. Comparing to arbitration (and court adjudication), where an even number can block a decision-making, there is no such danger with the mediation. Therefore, the most frequent case of joint mediation is the one which is conducted by two mediators (so-called: co-mediation). In that event, mediators from various professional backgrounds are usually combined (e.g. a lawyer and a psychologist), or mediators of different experience (which helps to training of mediators and to creation of unified standards and techniques of procedures).

12. Number of mediators or manners of their determination can be also defined pursuant to the rules on mediation. Acceptance of the parties to application of certain institutional rules on mediation also implies their agreement on number of mediators referred to in those rules, unless they explicitly agree on specific deviations from the latter.
13. Article 3 Paragraph 2 sets out the definition of a mediator. This partially overlaps with the implied definition referred to in Article 2 Paragraph 1. If we take both articles together, we will come to the conclusion that for the role of a mediator the following is important:

a) it is about a third neutral person, i.e. a person which is not a party himself/herself in the dispute, nor a party’s representative;
b) the essence of the mediator’s act lays in his/her effort to resolve a dispute between the parties in an amicable fashion by means of mediation, i.e. by concluding a settlement;
c) a mediator has no authority to resolve a dispute by a legally binding decision, but the procedure shall be conducted based on principles of free will, confidentiality, neutrality and impartiality, and equal treatment of the parties (see. Comments on Article 6. to 9 of the LMP).

14. The specified definition implies that some practices of dispute resolutions shall not be considered mediation by the Law. For example, efforts of litigation judge to bring the parties’ views closer in order to conclude a (court) settlement shall not be considered mediation. This is also not the conduct of mediatory negotiations, whereby as mediators between the parties appear their representatives (attorneys), or other persons, whose task is primarily to protect rights and interests of a party in dispute.
Article 4

The parties in dispute may agree, either before or after institution of the court procedure until the conclusion of the main hearing, to resolve the dispute in the mediation procedure.

If before institution of the court procedure the parties have not attempted to resolve the dispute in the mediation procedure, the trial judge in the procedure, if he/she deems it appropriate, may at the preparatory hearing propose to the parties to attempt to resolve their dispute in the mediation procedure.

- Instigating a mediation procedure: Art. 10
- Contract on Mediation: Art. 11
- Requirement to notify the court on mediation agreement: Art. 13
- Court acting in the event the parties have subsequently agreed on mediation: Art. 14

Agreement of mediation, court referral to mediation

15. The first step in the mediation procedure is to reach an agreement between the parties to start with mediation at all. Mediation as an alternative fashion of dispute resolution is the most efficient when replacing a court or another procedure. However, it can only assist to resolve those cases which are already before the court or other authorities. Therefore, Article 4 sets forth that the parties can also agree prior to instigating a court procedure (which will be unnecessary in case the mediation ends successfully), and after the charges have already been filed with the court. In the event the parties reach the agreement on mediation after the instigating a court procedure, see the comments on procedures about Articles 13 and 14.

16. Article 4 Paragraph 1 sets out that the parties can agree on mediation in the course of the court procedure until completion of main hearing. The reason which most probably led the legislator to this limitation lays in the fact that after the completion of the main hearing, the court is obliged to make a decision, whose validity is related to the moment of main hearing. After the conclusion of the main hearing, the parties do not have opportunity to reach agreement in the mediation attempt. It seems however that this limitation
should not be interpreted in a way that the parties outside the court could not agree on mediation, even after the completion of the main hearing, also after pronouncing the invalid (not final) court decision. In that case, the parties can, for example, agree in a mediation procedure on whether a party or both parties should withdraw their appeals; also, complying with the court decision, they can reach an agreement of payment terms (e.g. in installments) or give up on part of adjudicated benefits and replace it by a faster voluntary fulfillment of their obligations, or withdraw legal remedies, etc. In the same fashion, the mediation is also possible after the valid completion of a dispute by a court decision. Its possible success in that event does not affect the efficiency and legal validity of final judgment, but the fashions of its enforcement and further regulation of relations between the parties. These agreements on mediation should also be included in the definition of entered agreements prior to instigating a court procedure, because they decrease probability or prevent further litigation procedures between the same parties.

17. Article 4 Paragraph 2 also authorizes the trial judge to propose mediation to the parties, if he consider that appropriate. A judge's recommendation is not binding for the parties, but it acts convincing, supported by the authority of the court. Even the acceptance of the judge's proposal is not binding, because each party can withdraw in any moment from the mediation procedure.

18. The judge should make a proposal about mediation attempt if parties prior instigating a court procedure did not try to resolve the dispute in the mediation procedure, i.e. at the preparation hearing. Both conditions witness on certain lack of trust of the legislator in mediation and concern that the mediation shall be misused for the delay of the procedure, i.e. as a way for judges to avoid doing their job. Namely, a proposal (recommendation) of the court is not a formal and binding act, and according to Paragraph 1, the parties may anyway agree on mediation after the preparation hearing, and may repeat it for many times, up to the final dispute resolution. Therefore, we believe that limitation of recommendations to cases with no previous mediation attempts and to preparation hearing should be construed only as a guideline to the court when it should consider a possibility to recommend mediation to the parties, and whether its recommendation is useful (in case the mediation attempt already failed, as a rule, this will not be the case, although in specific circumstances may be concluded otherwise).

19. Article 4 speaks about reaching an agreement on a mediation attempt, which can be interpreted as every agreement based on will consent, regardless
of the form. However, for an informal agreement on mediation attempt to become formal instigation of mediation, it is necessary to enter into a Mediation contract (see the comment on Article 11). Therefore, it is desirable that the verbal agreement of the parties is verified in writing as soon as it is practical, along with specifying all elements which make binding contents of a mediation contract.

20. Article 4 speaks about an agreement prior or after instigating a court procedure, however it does not specify whether it is a matter of an agreement entered prior or after occurrence of the dispute. To that end, there is a certain legal gap in the LMP, since it – focused on the annexed court mediation – does not regulate a legal effect, form, and other details related to the so-called mediation clauses (see Introduction).

Article 5

Parties shall jointly select a mediator from the list of mediators established by the Association.

If the parties cannot agree about the choice of mediator, then the mediator shall be appointed by the Association.

The written agreement enactment referred to in paragraph 1 or the enactment of the Association of Mediators referred to in paragraph 2 of this Article shall be submitted and inserted into the case file with the proceeding court, if the mediation procedure has been instituted during or after institution of the court procedure.

- Association: Art. 1, Para. 2; Art. 27; Art. 29; Art. 31
- Background of mediators: Art. 31
- Instigating a mediation procedure: Art. 10
- Mediation Contract: Art. 11

Selection and appointment of mediators

21. Mediation is based on the principle of free will and autonomy of parties, which also includes the right to a mutual agreement about the person or persons who will conduct the mediation. This right is illusive in practice to a
certain extent, because parties in dispute only exceptionally have knowledge about qualities and skills of mediators. On the same ground, the Article of LMP on selection of a mediator anticipates on one side the autonomy of the parties, nevertheless it limits the choice to the list of mediators determined by the Association of Mediators on the other side. This rule should ensure compliance with legal requirements for dealing with mediation, and thereby also competence and quality of procedural acting (see: comments about Article 31).

22. Limitation of choice to the list of mediators can also cause some difficulties. Namely, list of mediators according to the LMP does not necessarily conform with the group of all persons who comply with all the requirements referred to in Article 31, i.e. can be narrower in comparison to mediators registered in the List of Mediators; LMP does not also contain the explicit rule to include only persons who comply with the respective requirements, although it should imply from the spirit of the Law and other legal norms. These dangers should not be augmented, as the mediation is a flexible procedure which most frequently leads to solutions which are voluntarily respected, yet an issue of settlement status may arise in certain cases, which was achieved after the mediation which was conducted by a mediator who is not on the list (or did not comply with requirements referred to in Art. 31). See: Rulebook of Association of Mediators on Mediators List, “Official Gazette” of BiH No.: 21/06.

23. LMP differs between two documents relevant for implementation of mediation: Agreement on Mediator/Mediators, and Contract on Mediation. It is not explicitly indicated which of these two documents should be executed first, however as the Contract on Mediation should be signed both by parties and the mediator (compare to Art. 11) it implies that the Agreement on Mediator should be signed first (or executed simultaneously with the Mediation Contract). Thereby, the purpose of separating the Mediation Contract from the Agreement on Mediator is questioned, because it will be logical to expect the parties to agree on mediation procedure first, and to select their mediator in the aftermath. We believe it should not be insisted on rephrasing of these two documents, and that the Mediation Contract, if containing all elements of the agreement on the mediator, can serve as an Agreement on the mediator, which is the subject of this Article.

24. Pursuant to Paragraph 2, in absence of an agreement achieved by the parties, the mediator shall be appointed by the Association of Mediators. The Law does not include closer provisions what this appointment should consist of.
We should assume that the appointment should be also formulated in writing (the argument referred to in Paragraph 3), but also that it would be limited to the list of mediators, i.e. persons who comply with requirements under Art 31. There is also no provision on time limitations for parties to reach an agreement, before the appointment is done by the Association. Also, regulation of the appointment procedure is left to the internal rules of the Association (see comments about Art. 1 Para. 2). Some of these rules are contained by the Rulebook on referral to mediation (“BiH Official Gazette” No: 21/06).

25. Although the wording of the Law in regard to selection of the mediator is relatively scarce and incomplete, it must be noted that it was drafted primarily bearing in mind, so-called court-annexed mediation, i.e. mediation which is implemented after instigation of the litigation, whereas the court refers to the option of utilization of already existing infrastructure (Mediation Office, creditors for mediation, Association of Mediators, etc.) which will assist to ignorant parties in deciding about mediation, enter into all necessary agreements and agree on schedule of meetings.

26. The provision of Paragraph 3 on filing the documents on mediator appointment in the file folder also relies on the court-annexed mediation – which is possible only in case the procedure is already ongoing. The purpose of this obligation is not clear, its title holder (a party/parties or the Association) or consequences of a tentative failure to comply with.
II. Principles of the Mediation Procedure

Article 6

The parties in dispute shall institute the mediation process and participate in reaching of a mutually acceptable agreement on a voluntary basis.

- Instigation of the mediation proceeding: Art. 10.
- Free suspension of a mediation procedure: Art. 19 Para. 1
- Willingness about choice and time of mediation: Art. 12
- Settlement Agreement: Art. 24

Principle of willingness (autonomy of parties’ will)

27. Principle of willingness (absence of external force and autonomy of will) shall be a foundation of every mediation, although in specific circumstances for some disputes (e.g. marital divorces) a binding principle may be anticipated to the lesser or higher extent to give a chance to mediation. In the LMP, as a general source of mediation law, there is however no elements of formal force of mediation (informally, parties can feel obliged to follow the court proposal referred to in Art 4. Para 2, (see Comments, but it leaves the legal definition of binding principle)

28. Article 6 mentions willingness in respect to instigating the mediation procedure and in respect to achievement of mutually acceptable agreement. What the legislator intended to express by these formulations is that there is no binding principle either in terms of participation in mediation procedure (an attempt to resolve the dispute by mediation), or in terms of accepting the proposed solution (conclusion of settlement). Insofar, the principle of willingness refers to all other events in mediation and around it: choice and number mediators and persons; venue of mediation, selection of applicable mediation rules, suspension (completion) of mediation without concluding a settlement agreement, contents and conditions of settlement, etc.

29. Limits of the will autonomy in regulation and implementation of a mediation procedure are determined only by need to comply with other mediation principles, primarily with the principle of equal treatment of parties, about which there should not be any exceptions. As far as confidentiality and independence of a mediator is concerned, the agreement can make exceptions to a certain extent to that regard (see: comment on Articles. 7, 9. and 29).
Article 7

The mediation procedure is of a confidential nature. The testimonies of the parties made in the mediation procedure may not without approval of the parties be used as evidence in any other procedure.

The mediator shall keep secret of the information provided to him/her during the separate meetings with each of the parties, and shall not discuss them with the other parties, unless agreed upon otherwise.

- Confidentiality in relation to third parties: Art. 16, Para. 2
- Separate meetings with parties: Art. 21
- Obligation to submit documents: Art. 17

Confidentiality principle

30. Unlike a court procedure, mediation is not conducted in public. Confidentiality of the mediation procedure is one of the major prerequisites for securing free and undisturbed communications in which proposals shall be exchanged openly and discussed about real causes and possible directions of dispute resolutions.

31. Confidentiality in relation to mediation may have more meanings: first, it refers to the exclusion of the public from meetings between a mediator and the parties (see comments on Art. 16). Second, it refers to a waiver on the possibility that statements given between the parties confidentially, for purpose of reaching a settlement, can be used as weapon in a court proceeding against the party, which disclosed them. (see: further elaboration under 32). Third, it refers to the confidentiality of information which was disclosed to the mediator unilaterally, in order to find room for reaching a settlement in negotiations with the other party (see more under 35). Fourth, it refers to all other pieces of information in relation to the procedure of conciliation, including the fact that mediation is conducted at all, as well as the information on the mediation outcome. Out of all these meanings, LMP includes corresponding norms in relation to the first three ones, while it has – due to its concept of affiliation with court-annexed mediation – missed the fourth one, which the parties in mediation, conducted before and out-of-court proceeding, have to reach in a separate agreement.
32. Concerning the exclusion of confidential information disclosed in a mediation procedure as evidence in a court or another proceeding, Article 7 Paragraph. 1 speaks about that statements of parties disclosed in the mediation procedure shall not be utilized in a court procedure. This norm has to some extent a narrow and uncertain wording, thus needs an adequate interpretation. Confidentiality should not refer to only verbally disclosed statements by the parties, but also to proposals of dispute resolution made in writing, regardless whether they are made by the parties or a mediator, as well as to other facts, which the other party and mediator find out in the course of procedure. Exclusion of evidence excludes only documents related to the dispute, and those which are not prepared specially for purposes of conducting a mediation procedure, because it would otherwise prevent parties to freely and openly present and use them for purpose of settlement achievement.

33. LMP does not set out in which way the mentioned exclusion of evidence is implemented in a court procedure. In any case, one should assume that the court shall not present evidences that can be used ex-officio, i.e. it shall dismiss motions of evidences by the parties who proposed presentation of such evidences. Among these motions, particularly those related to the questioning of the mediator, the very party that filed such a motion, or its opponent, as well as party representatives and third parties that were involved in the mediation, shall be dismissed. The court shall not accept the proposal to obtain documents which are part of the confidentiality requirement, and in case these documents were filed, the court shall dismiss, and if necessary, exclude them from the case file.

34. Exclusion of evidence is not absolute, because some protected information may be used as evidence, but only if there is consent by all the parties. Also, one should assume that a party or the mediator may be required to exceptionally witness or present mediation material, if there is a court obligation to witness about some facts (e.g. to prevent immediate danger of committing a crime, or to provide certain data which will enable the implementation or enforcement of the achieved settlement).

35. Paragraph 2 comprises a provision on so-called internal confidentiality. When a mediator utilizes a generally very useful and extended techniques of separate meetings with the parties, a question arises whether he/she may communicate to the other party what he/she found out from one party (besides the facts for which the party exclusively asked for confidential treatment) or vice versa, should he/she keep confidential everything he/she found out, unless
a party has explicitly made a consent to present certain circumstance to the other party.

36. Violation of confidentiality principle is a violation for which a compensation of damage may be required in relation to all parties who are asked to comply with that principle. Moreover, a mediator shall be accountable on disciplinary counts (see comments on Art. 27).

<table>
<thead>
<tr>
<th>Article 8</th>
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<td>The parties in the mediation procedure shall have equal rights.</td>
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- Neutrality and impartiality principle: Art. 9

Principle of equal treatment of parties

37. Article 8 sets out somewhat inadequately formulated general principle, according to which the parties in a mediation procedure should be treated equally, providing to each party the possibility to state all relevant dispute circumstances, to make its own proposals, and to find out about the proposals of the other party, as well as mediator’s proposals for dispute resolution. In the mediation procedure none of the parties shall be disadvantaged, or treated differently from other parties in the mediation. The aforementioned rule is closely connected to the neutrality and impartiality principle, whereby a principle of equal treatment of parties was objectively formulated, without prejudice to circumstances existing with individual mediators, while neutrality and impartiality imply rather subjective characteristics of a person leading the case.

38. As opposed to majority of other rules and principles arising from LMP, Article 8 is of strict (cogent) natures and it cannot be even waived by the parties’ agreement. In case the parties reach an agreement on the procedure, in which one of them will not be treated equally, a mediator should dismiss such an agreement. Should the parties insist on such an agreement, he/she should refuse to participate in that procedure, or to suspend the procedure in case it was already instigated (see comments about Article 19).
Article 9

The mediator shall mediate in a neutral manner, without any prejudice as to the parties and the subject matter of dispute.

- Mediator as a neutral person: Art. 2 Para. 1; Art. 3 Para 2
- Principle of equal treatment: Art. 8
- Duty of a mediator to suspend mediation: Art. 19
- Reasons for disqualification of the mediator, conflict of interest: Art. 28 and 29

Principle of neutrality and impartiality

39. Even the very definition of mediation and mediator comprises a notion of neutrality. A mediator as a “third neutral person“ must strictly comply with duties to treat parties equally (see comment about Art. 8), so that he should not be perceived by the parties as someone who is closer or more inclined to any of the parties in the procedure. If such circumstances exist or arise, a mediator cannot, except in special cases, continue with conducting mediation (see comments about Art. 28 and 29).

40. The principle of neutrality is demonstrated on one side in the manner of conducting the procedure (mediation in a neutral way), and on the other side in a subjective relation of the mediator towards the parties and the dispute in question (without prejudice in relation to the parties and subject matter of the dispute). Both duties are absolute and imply from the previously established principle of equal treatment of the parties. (see: comments about Art. 8 and 29).

41. Neutrality, broadly interpreted, also encompasses objective characteristics of the mediator, i.e. his/her link with the parties or other persons, respectively existence of other circumstances, which may in the eyes of parties give a rise to doubts of his/her independence and impartiality. Some of these circumstances are indicated under the title “conflict of interests“ in Art. 28 (personal, family, or business relations with the respective party, trial judge, authorized person, legal representative, or advisor to one of the parties). These circumstances are, however, not considered absolute by the LMP (see: comments about Art. 29).
III. – Mediation procedure

Article 10

The mediation procedure shall be instituted by a written agreement on mediation signed by the parties in dispute and the mediator.

- Mediation agreement: Art. 4
- Contents of the mediation agreement: Art. 11
- Agreement on mediator: Art. 5

Instigating a mediation procedure

42. Although mediation stands for an informal and flexible procedure, aiming at amicable dispute resolution, a moment when the mediation is instigated should be determined. It is necessary for various reasons: impact of an instigated mediation procedure to the court procedure (see. Art. 14), filing terms (both in the court procedure and beyond that – e.g. terms for filing an appeal or statute of limitation), rights of mediator to remuneration or compensation, etc.

43. According to the LMP, the mediation procedure shall be instigated by a written agreement. This expression should be construed in the sense that the mediation has commenced in the moment the parties concluded a written agreement, and not in terms of its filing, registration, and similar. A written agreement on mediation is concluded when it is signed by the contested parties and the mediator. Whereby the agreement must have a mandatory contents set out in Art. 11 (see comments).

44. The signature on the mediation agreement has the meaning of the mediator’s acceptance of the mandate to conduct mediation, but also consent to other elements of the mediation agreement contents. We believe that the mediation agreement, when it is signed, can replace the agreement on mediator appointment (see comment about Art. 5).
Article 11

The agreement on mediation shall contain: information on the parties to the agreement, the legal representatives or plenipotentiaries, the subject matter (dispute description), the statement of acceptance as to the mediation principles defined in this Law, the mediation site as well as the provisions on the costs of the procedure, including the mediator’s fee.

- Application field of LMP: Art. 1
- Mediation principles: Section II (Art. 6 to 9)
- Representatives and proxies: Art. 15, Para. 2 and 3; Art. 16 Para. 1
- Compensation and remuneration of costs to the mediator: Art. 30

Contents of the Mediation Agreement

45. Article 11 sets out the mandatory contents of the mediation agreement. The mediation agreement which would not comprise all mandatory elements would not be properly drafted, thus a question arises whether such an agreement, once concluded, should lead to instigating a mediation procedure, and what would be the impact of the mediation settlement, if the mediation was implemented and completed based on a defective agreement.

46. We believe that, considering ambiguities mentioned in the previous paragraph, the legislator had too extensively defined mandatory contents of the mediation agreement. Namely, out of elements mentioned in this article only few are essential and necessary (essentialia negotii). These are the data about identity of parties, dispute description and willingness to resolve the dispute by mediation (among these data, information on mediator’s identity was also included, but it – most probably as an omission – is not among mandatory elements, although that document shall be signed by the mediator). Other elements are not of such nature: representatives and authorize persons can also be determined during the procedure; obligation to accept mediation principles arises from the legal text, and mediation site and costs can be subsequently determined (specific amounts of costs, on contrary, can be possible to determine only at the end of the procedure). Therefore, it appears that provisions about the mandatory contents of a mediation agreement should be interpreted in relation to other elements as recommendations, which in case of their absence would not make a concluded agreement null and void. It would be opposite
to the spirit of the LMP to challenge the settlement effect and final dispute settlements between the parties if there would be an omission by the parties to include any of the elements (e.g. statement on compliance with principles or provisions on costs).

47. This article does not speak about elements which the agreement may contain. From the principles of free will and the parties’ autonomy implies that the agreement may also include other elements, e.g. closer provisions on relevant procedural regulations (e.g. acceptance of a specific mediation rulebook or introduction of one or more additional rules supplementing or modifying operating parts of the Law). These may also be provisions on mediation language, time limitations, additional statements on confidentiality (or on public nature) of certain data related to the mediation procedure, or similar.

48. The mandatory part of the mediation agreement also comprises the provision on mediation site. The relation between this provision and application area of LMP, i.e. principle of territory (s. supra t. 3) is ambiguous. The mediation site should be considered a city or an area in which the mediation is conducted. In addition to that, a broadly defined site, the LMP also recognizes closely defined site, in which mediation takes place (s. comments about Art. 12).

Article 12

After signing of the agreement on mediation, in arrangement with the parties, the mediator shall schedule the time and the closer location - premises of holding the mediation meetings.

Determination of site and time of mediation

49. Mediation shall physically take place as one or more joint or separate meetings between a mediator and the parties. Pursuant Article 12, following instigation of mediation, a mediator and the parties shall jointly decide about the specific site (closely defined site) and time of mediation meetings. This norm is of technical nature and is self-explanatory to its most part.
Article 13

If the court procedure is already in due course, the parties who have agreed to resolve their dispute in the mediation procedure shall be obligated to inform to that effect the judge conducting the court procedure, by submitting him/her a copy of the mediation agreement.

- Mediation agreement, prior and after instigation of a court procedure: Art. 4
- Mediation agreement: Art. 11
- Delay due to mediation attempt: Art. 14
- Notice requirement on mediation outcome: Art. 26

Notice on mediation instigation

50. The parties who have reached an agreement about mediation shall notify the court before which a procedure is conducted about the respective dispute. The purpose of this provision shall be to make possible for the court to temporary adjourn taking any actions during the course of mediation (see: comments about Art. 14).

51. Pursuant Article 13, the parties shall be required to notify about the agreement by submitting a copy of the mediation agreement. This somewhat oddly formulated norm should be construed in a way that parties shall notify the judge about reaching an agreement that the respective dispute shall undergo a mediation procedure (see: comment about Art. 4), and to submit the mediation agreement to the court as soon as the latter is concluded.

52. The Law does not comprise of sanctions for failing to perform this duty. Naturally, if the parties fail to notify the court, it shall continue taking actions in the procedure. Although there are no direct sanctions, the court could indirectly sanction a party or the parties who fail to make a notice on mediation by a decision about court expenses.
Article 14

If in the course of a civil action, on their own initiative or upon the proposal of the judge, the parties have agreed to attempt to resolve their dispute in the mediation procedure, the court shall postpone the hearing for the period no longer than 30 days.

- Mediation agreement: Art. 4
- Notification requirement about the agreement: Art. 13

Delay due to mediation procedure

53. Article 14 provision speaks about the court proceeding in somewhat casuistic manner in case the parties reach an agreement on mediation implementation. This article implies the hearing delay only. One can assume that authors of this provision imagined a case in which the parties, independently or encouraged by the court, reach an agreement on mediation in course of a hearing (see Art. 4); or, possibly, they agree about an attempt of mediation after a scheduled hearing outside the court, and notify the court thereabout (see Art. 13).

54. We believe that the application of this particular provision should be extended to cases in which the court have not schedule a hearing yet (e.g. parties have reached an agreement immediately after filing a claim), as to other court events such as (e.g. investigation of parties’ motions, making a procedural decision, obtaining of evidences).

55. Time period of 30 day is rather short, thus a question about its possible extension arises. As the procedure management is in hands of the court, we believe that the court and time period of 30 days, if deemed useful, can be extended in consultation with parties, taking account that the procedure is not unnecessarily delayed.
Article 15

If the parties in dispute are natural persons, their attendance at the procedure shall be mandatory.

The interest of the parties in the procedure may be represented by their legal representatives or plenipotentiaries.

The actions in the mediation procedure, including signing of the settlement agreement, as undertaken by the plenipotentiaries, shall have the same legal effect as though undertaken by the parties themselves.

- Mediation Agreement: Art. 4
- Representatives and authorized persons/attorneys: Art. 11; Art. 16, Para. 1

Requirement of physical presence, representation of the parties

56. Unlike the court procedure, in which a final decision as a rule depends on application of legal norms to the legally established statement of facts, in mediation arguments which are not legal but rather of strictly private nature, are infrequently decisive. To make possible for a mediator to find out about the entire background of a dispute and motivation of the parties, for purpose to increase probability to achieve the settlement, it is justified to request from the parties to participate in the mediation procedure in person.

57. Article 15 confines the requirement of participation in person to natural persons. One should consider as useful, although not mandatory by the law, that persons who are directly authorized for representation in the name and on behalf of legal entities (bodies-representatives, i.e. managers, chairs of board of directors and similar) also participate in a procedure. Their participation shall eliminate need for consultation about possible contents and settlement conditions, thus mediators should encourage them to (i) participated in the procedure.

58. Beside the parties, their voluntary representatives (attorneys, legal representatives) can also participate in the procedure. Participation of the attorneys can be useful for counseling of the parties about legal and/or
technical aspects of the dispute, interpretation of options in case no settlement is achieved, and explanation of consequences of the proposed and achieved settlement.

59. Incompetent persons in the procedure are required to be represented by their legal representatives, because they are only authorized persons to conclude a settlement on their behalf.

**Article 16**

In addition to the mediators, the parties, or their representatives, the procedure may also be attended by third parties, provided that the parties give their consent to that effect.

Any third parties attending the mediation procedure shall oblige themselves in writing that they shall adhere to the confidentiality principle of the mediation procedure.

- Confidentiality principle: Art. 7

**Third parties in mediation procedure**

60. Although mediation is not open for the public, if granted consent by the parties, third parties may attend and monitor a mediation procedure. For example, there can be assistants or advisor to the parties or mediator among them, administrative staff assisting in organization of technical affairs, or mediators who by monitoring of mediations led by other persons do their professional training. For presence of all these persons an explicit consent by the parties shall be required.

61. Third parties are not generally bound by the procedure conducted by other parties – that procedure is for them rather *res inter alios acta*. In order to extend the requirement of information confidentiality to them, and to mitigate the evidentiary process and sanctioning of a possible violation of the confidentiality principle, all third parties shall sign a binding statement to keep confidential all data about which they become aware during the mediation procedure. Also, it should be considered that statement disclosed about these facts can be made only if they are exempted by the parties, if they are legally bound to witness about it (see comments about Art. 7).
Article 17

Parties shall in due time submit to the mediator any of the relevant documents related to the subject matter of dispute.

- Suspension of mediation due to ineffectiveness of further procedure conduct: Art. 19 Para. 2

Submission of documents

62. The meaning and scope of the provision of Article 17 which sets out that parties are required to submit all the relevant documentation on time, are not clear. To the best, this obligation shall be taken as recommendation, because parties voluntarily participate in a procedure, and therefore they cannot be forced to take any action in the procedure. If they submit some documents to the mediator, this is only expression of their benevolence to present information to the mediation which can be helpful to his better understanding of the dispute and thereby to contribute to achieving a settlement. A mediator may, however, suspend a mediation procedure if the parties’ resistance to cooperate would lead him/her to conclude that further conduct of mediation will not be effective (see Art. 19, Para. 2).

Article 18

In the beginning of mediation procedure, the mediator shall briefly inform the parties of the mediation goal, of the procedure to be conducted, and of the role of the mediator and the parties in the procedure.

Advice to parties at the beginning of procedure

63. In principle, a provision of Article 18 has a didactic meaning. Normally, a set of skills and techniques to be utilized in the procedure shall be a subject matter of legal regulation. However, the legislator made an exception to the rule here, probably taking account of low level of mediation knowledge of the parties, and lack of experience of most mediators.
Article 19

The mediation procedure shall be terminated by either party at any time in the course of the procedure.

The mediator may terminate the mediation procedure if he/she believes that any further procedure should have no purpose.

The mediator shall terminate the mediation procedure if reasons exist or appear in the course of the procedure preventing him/her from being neutral and impartial.

A written or verbal statement of a party of termination of the procedure, or a belief on the part of the mediator that any further procedure is with no purpose, shall be drafted by the mediator in the form of a separate enactment, and signed and submitted by him/her to the proceeding court.

- Principle of neutrality and impartiality: Art. 9
- Principle of equal treatment: Art. 8

Suspension of mediation procedure

64. Provision set forth in Art. 19 comprise of cases in which a mediation procedure can be terminated with no settlement achieved. Here, the LMP makes use of the notion “suspension of the procedure“ in different meaning of its usual procedural meaning. Unlike the rules of litigation procedure, in which suspension stands for temporarily suspension of action in the procedure, this notion here means final suspension (termination) of the mediation procedure.

65. Pursuant Article 19, termination (“suspension”) of mediation may occur in three cases:
   a) If any party make a statement about ending its participation in the mediation;
   b) If the mediator assess that further conduct of the procedure is not effective;
   c) If the mediator perceives reasons preventing him/her to be neutral and impartial.
66. As for the first case, the option to terminate the mediation by a unilateral statement of a party arises from the principle of free will. Parties cannot be forced to participate in the mediation against their will. However, it should be considered that an obviously non-loyal participation in the mediation procedure (instigation of mediation without readiness to be involved in searching a mutually acceptable solution) can in certain cases lead to the accountability of the party for the damage which was caused thereby. Statement about withdrawal from the mediation can be made either in verbal or written form.

67. The mandate of a mediator shall be in searching a solution together with the parties, which could, at least partially, lead to an amicable dispute settlement. He/she is granted discretion herein. Within the framework of his/her professional abilities and experience, he/she can assess whether it makes any sense, in light of all circumstances, to continue the mediation procedure any further. If he/she assessed that a party or the parties by their behavior lead to conclusion that chances for settlement are scarce or very minimal, the mediator can suspend any further action and terminate the mediation. Such his/her authority is also significant to prevent that any party misuse mediation procedure as a curtain for procedure delay.

68. Mediator must also suspend mediation when he/she finds out that, due to objective or subjective reasons, his/her neutrality and impartiality, can be challenged. More about the principle of neutrality and impartiality see comments on Article 9 and 28.

69. Suspension (termination) of mediation shall be drafted in form of a special document by the mediator. The Law does not anticipate any special conditions for the form of that act, unless it sets out it should be made in writing and signed by the mediator, stating clearly why the mediation is suspended. Informal letter to the court by the mediator shall be as a rule sufficient.
Article 20

The mediator shall be obligated to conduct a mediation procedure without any delay.

- Mediation procedure: Section III
- Responsibility of the mediator: Art. 27

Requirement of timely procedural acts

70. Mediation strengths are demonstrated only if the mediation procedure is conducted promptly, aiming at use of the parties’ will to become involved in searching of a mutually acceptable solution. Because of the past experiences there is also a fear in practice that the mediation would be used for the additional delay of the procedure. Therefore, the LMP insists on the mediator’s duty to conduct the procedure without delays. For violating of this requirement, the mediator can bear responsibility for incurred damage (see comments about the Article. 27).

Article 21

In the course of the mediation procedure, the mediator may also have separate interviews with either party individually.

- Reporting of the substance of separate meetings: Article 7 Paragraph 2

Separate meetings of mediators and parties

71. Possibility of separate meeting in which a mediator discuss with the parties the modalities to bring their points of view close and to open the room for settlement is one of the mediation strengths as alternative dispute resolutions. This technique (caucusing) is principally allowed neither in a court not in an arbitration procedure, in which it can raise doubts about impartiality of the person who is supposed to make a decision, as well as to ensure equal possibility to hearings of both parties. The mediation, however, are included in the most important means available to mediators in order to ensure open discussion.
and to take advantage of trust relations between parties and mediators. A rule according to which mediators are required to keep confidential all information they become aware from the parties during separate meetings, also contributes thereto (see comments about Article 7, Para. 2).

72. While having separate meetings, the mediator shall pay attention to treat the parties equally by meeting them interchangeably. In addition to separate meetings, it is also useful for mediator to have occasionally joint meetings with all parties.

**Article 22**

The mediator shall not give promises or guarantee any specific outcome of the mediation procedure.

- Definition of mediation: Article 2, Para. 1
- Principle of free will: Article 6

**Granting no promises and guarantees**

73. By accepting to conduct mediation procedure, a mediator also accepts best endeavor and not performance obligation. It implies both from the principle of free will (see comments about Article 6), and from the definition of mediation as a procedure in which a dispute between the parties is not directly resolved, but the parties are **assisted to achieve a mutually accepted solution**. Therefore, the mediator shall neither promise nor grant any result. If he/she would do this, the parties may be led to misconceptions, for which he/she can be accountable for damage (see comments about Article 27).
Article 23

Upon the request of the party, brought up during a separate interview, a mediator may propose options for dispute resolution, but not a solution itself.

- Separate meetings: Article 21
- Competences of mediator: Art. 2, Para. 2; Art. 3, Para. 2
- Principle of free will: Article 6

Competences of mediator to propose a dispute resolution

74. Procedures of alternative dispute resolutions differ in the part whether a person conducting them is authorized to only assist to the parties in bringing closer their views with no competences to propose dispute resolution (facilitating mediation), or a mediator is additionally authorized to propose dispute resolutions (evaluation mediation). To that end, Article 23 was phrased in somewhat unusual and ambiguous manner. Namely, as the mediator is authorized to propose options for dispute resolution if required by a party, a contrario it could be concluded that a mediator has no such authority without requirement of the party.

75. If this is required by (at least) one party, a mediator can make a proposal. It is not clear why a legislator stipulated that such a claim should be expressed in a separate meeting. We believe that there is no obstacle that the parties put forward that claim in a joint meeting. From a principle of equal treatment implies that the proposed options would be useful to submit not only to one party but to both of them, because on contrary, it is not a matter of dispute resolution options, but of informal discussion. According to the principle of voluntarism and autonomy, claim and authority to draft a resolution proposal can be granted to the mediator by both parties.

76. The notion in plural (options for dispute resolutions) could mean that at least two various proposal of resolution should be made. In our opinion it should not be construed literally, and the mediator should not be forced to produce proposals (options) which are not held credible or acceptable, just to make more proposals to the parties. The parties in terms of mediator’s proposal have always two options – to accept them or not. The statement that the mediator cannot give dispute solution is entirely self-explanatory, and reiterates what
was said about mediation and role of the mediation in Article 2, Paragraph 2; Article 3, Paragraph 2, and what implies from the principle of free will and autonomy of the parties (Article 6).

Article 24

Once the parties in the mediation procedure identify the solution to the dispute, with the assistance by the mediator, they shall draft a written settlement agreement and sign it off immediately.

- Mediation procedure: Section III
- Purpose of mediation: Art. 2, Paragraph 1

Settlement agreement

77. The purpose of mediation as an alternative dispute settlement is in finding a mutually acceptable solution by the parties autonomously. These solutions in a rule mean that both parties shall compromise and give up on at least one part of their pretensions. Insofar, an optimal solution from mediation procedure is a settlement. The LMP does not define a settlement achieved in mediation, but there is no doubt it is a matter of legal institute which has elements of procedural law (as agreement of parties achieved during the mediation for dispute settlement), and elements of the substantive law (as a civil law agreement in which a dispute is settled by mutual compromise). In case it comes to diverging between elements of procedural and substantive law (for example, if parties conclude an agreement in a form of a settlement, which entirely accepts a position of one parties), we believe that priority should be given to elements of procedural law (i.e. such an agreement shall be considered a mediation settlement).

78. Article 24 implies that three elements are important for settlement in a mediation procedure, such as:
   a.) that parties reach a dispute settlement (at least partially) therein;
   b.) that solution is a result of a mediation procedure, i.e. that it was achieved with assistance of a mediator; and
   c.) that a settlement agreement was formulated in writing and executed by all parties in dispute.

79. We believe that for mitigation of evidentiary process it would be helpful that a settlement agreement is also signed by the mediator, although it was not explicitly required by the Law (see: further comments about Article 25).
Article 25

The settlement agreement referred to in Article 24 of this Law shall have the force of a final and enforceable document.


Legal force of the settlement agreement

80. The settlement as an option to resolution of a dispute is based on the agreement between the parties and is a result of their autonomously expressed will. Therefore, the probability of the parties to comply with their own agreement is significantly higher in relation to decisions imposed in a procedure in which one party is considered a winner and the other a looser. However, for this autonomous solution to have appropriate strength, and to avoid another court procedure in case of its violation, the Law sets forth that the settlement agreement has the power comparative to the valid court decision, i.e. that is has the force of enforcement document, pursuant which, if necessary, enforcement can be directly required.

81. As opposed to any other out-of-court settlement agreement, the settlement agreement achieved in mediation has the quality of enforcement there might be an issue of proving the origin of the settlement. For the settlement agreement a minimal threshold of formality is required – signatures of the parties and written form of the agreement. In order to avoid difficulties in evidentiary process that the settlement has indeed resulted in the mediation procedure implemented according to the LMP, it would be useful to have the settlement agreement resulted from mediation procedure also signed by the mediator, who in any case assists to the parties to formulate the settlement agreement.

82. The LPM does not require to submit any other document with the settlement agreement in the enforcement procedure (e.g. agreement on selection or appointment of mediator or similar). If in the enforcement procedure the issue arises whether the settlement was resulted from mediation in accordance with provisions of the law, the party who is referring to the settlement can file these documents if necessary. It would be useful if the mediator, while formulating the settlement agreement, also makes integral therein all facts on mediation implementation which are necessary to determine how the mediation was implemented.
83. The enforcement quality can be acquired only by that part of the settlement agreement which is of condemnatory character, and which would naturally be a subject of enforcement if it was a part of a court settlement. We also believe that enforcement can only be acquired by a settlement agreement in which rights of the parties are freely disposed of.

Article 26

If a civil action is in due course, the parties shall be obligated to inform the court of the outcome of the mediation procedure immediately, and no later than before the hearing is scheduled pursuant to Article 14 of this law, by submitting the settlement agreement.

- Requirement on informing of institution of the mediation procedure: Art. 13
- Delay of the hearing due to mediation procedure: Art. 14
- Confidentiality Principle: Article 7

Requirement on informing of the procedure outcome

84. Through reaching a settlement agreement, a dispute between the parties has been resolved, but its conclusion has no effect to the course of the civil action – it is still in due course. In order to suspend or to terminate a civil action, it is necessary to take appropriate actions in the very civil action. As a rule, a part of the settlement agreement shall also refer to that effect, for example, the claimant shall be obligated in the settlement agreement to withdraw its claim, partially or entirely. In that light, Article 26 has primarily the meaning of an instruction or a monitoring character: it reminds the parties that the civil action has not been terminated and that the court should be informed of their amicably achieved dispute resolution. Also, the purpose of this Article is to avoid unnecessary burden to the court with continuing the events in the procedure.

85. The parties shall inform the court immediately, and no later than before the hearing is scheduled. This norm is also a recommendation, which shall enable the court to plan its work effectively, concerning the fact that holding a hearing after the settlement shall be unnecessary. No sanctions, however, are anticipated by the Law for failing to comply with this requirement. We believe that the court shall indirectly sanction the parties who fail to inform of the settlement in a timely manner, through the decision on the court fees.
86. The parties shall inform the court of the outcome of the mediation procedure by submitting the settlement agreement. This wording shall lead to conclusion that the requirement refers only to a successful mediation (because the outcome of a failed mediation is not a settlement agreement). On the other hand, the question arises whether the law made one step too far when it set forth that the parties should, along with the notice on conclusion of a settlement agreement, submit even the respective settlement agreement. Namely, the principle of confidentiality in broader sense also comprises confidentiality of information about the mediation outcome, which includes confidentiality in relation to the court. A settlement agreement can be made of various provision, including manners of resolution of other disputes and procedures, as well as other issues that makes entire context and settlement conditions, and which do not directly refer to the court dispute, in which the parties reached an agreement on mediation. Fortunately, this requirement is also not sanctioned; this is kind of *lex imperfecta* to be normally followed by the parties, unless there are no other significant reasons for which they would like to keep the contents of the settlement agreement confidential.

### Article 27

The mediator shall be subject to liability for any damage he/she may inflict on a party through his/her unlawful proceeding, according to the general rules of liability for damage, and or disciplinary liability in accordance with the enactments of the Association.

- Unlawful proceeding: s. on status and duties of the mediator in Article 2; Art. 3 paragraph 2; Art. 7; Art. 9; Art. 12; Art. 18; Art. 19, paragraph 3; Art. 20; Art. 22; Art. 23; Art. 28
- Association: s. Law on Transfer of Mediation affairs to the Association of Mediators (Official Gazette of BiH, No.: 52/05).

*Mediator’s liability for damage*

87. The mediator is required to conduct the mediation in accordance with the law and rules of the profession. Otherwise, he/she is subject to liability for any damage he/she may inflict and can also be held liable on other counts (the LPM explicitly mentions disciplinary liability, however the other forms of liability under special regulations should not be excluded, for example minor offence and criminal liability). Mediators, as opposed to judges, have no
immunity therefore they are subject to liability for any damage in accordance with general rules, including general liability for all forms of culpability, both intention (*dolus*) and negligence (*culpa lata, culpa levis*).

88. According to the enactments of the Association, the mediators are obligated to have mandatory insurance against damage up to the minimal amount of 50,000 KM (comp. Rule on Liability of the Mediator for Damages Inflicted during Performing of Mediation, Official Gazette of BiH, No.: 21/06).

89. Disciplinary liability of the mediator is regulated by the Rule on Disciplinary Liability of the Mediators. Among other things, the mediators are subject of liability for violation of the Code of Mediation Ethics. (both enactments are published in the Official Gazette of BiH, No.: 21/06).

### IV. Conflict of Interest

**Article 28**

The mediator may not proceed in the cases in which he/she has any personal interest, family, or business relation with a party in dispute, or if any appears in the meantime or if other circumstances exist which shall give rise to doubts in his/her impartiality.

The mediator shall not proceed in cases in which he/she has previously proceeded as a judge, or has been a plenipotentiary, legal representative or advisor to either of the parties.

- Principle of neutrality and impartiality: Art. 9
- Consent about the mediator’s further proceeding in case of existence of reasons for his/her disqualification: Art. 29

**Reasons for disqualification of the mediator (conflict of interest)**

90. Article 28 provision sets forth the duty of the mediator to take into account circumstances which may give rise to doubts in his/her integrity and neutrality in the eyes of the parties. The provision is to some extent awkwardly formulated as it differentiates cases in which mediator *may not proceed* (Paragraph 1) and those in which mediator *shall not proceed* (Paragraph 2). The scope of both
provisions is essentially equal, as both of these qualities may be a reason for disqualification of the mediator, about which he/she has to notify the parties, but they exceptionally may agree in both cases about continuation of the mediation by the mediator.

91. Although Article 28 does not mention that, the parties may also give warning about existence of circumstances that give rise to doubts in neutrality of the mediator. According to the Code of Mediation Ethics, the mediator shall, if any party has doubts about his/her neutrality, withdraw from the mediation.

Article 29

The mediator may conduct the mediation procedure even in cases referred to in Article 28 of this Law, if the parties, once informed of existence of such circumstance, have agreed to have him/her conduct the procedure.

- Reasons for disqualification of the mediator: Art. 28

Consent about the mediator’s further proceeding if reasons for his/her disqualification exist

92. If reasons for disqualification of the mediator exist (conflict of interest), the mediator shall inform the parties of the latter and suspend any further conduct of the mediation procedure. The mediator’s withdrawal from the mediation procedure shall normally suspend and terminate the mediation, unless the parties had agreed about modifying their mediation agreement and about selection and appointment of another mediator.

93. In accordance with LMP, all reasons for disqualification of the mediator are of a relative character. The parties, after they were informed of existence of reasons for the disqualification, may amicably request the mediator to continue the procedure despite of the existing reasons. We believe that the mediator shall accept to continue conducting the mediation procedure with the consent by the parties, provided he/she believes that despite external circumstances which may give rise to doubts, he/she can continue conducting the procedure in a neutral and impartial manner. Otherwise, he/she should be obligated to withdraw from the mediation.
V. – Payment of Costs for the Mediation Procedure

Article 30

The fee and compensation of the mediator’s costs, in the amount set forth in the enactment of the Association, as well as other costs necessary to conduct the mediation procedure, shall be paid by the parties in equal parts, unless the mediation agreement provides otherwise.

- Mediation Agreement, provisions on costs: Art. 11

Fees and compensation of the mediator’s costs

94. The parties shall cover the costs equally unless they agree otherwise. The fees and compensation of the mediator’s costs in the court annexed mediation have been regulated by the enactments of the Association (see: Rule on Fees and Costs of Mediation).
VI. – Requirements for Conducting the Mediation

Article 31

The mediator may be a person meeting general requirements for employment.

In addition to the requirements referred to in paragraph 1 of this Article, the mediator shall meet the following requirements:

a) a university degree,

b) completed training in mediation according to the program of the Association or according to another training programs recognized by the Association,

c) entry into the registry of mediators held by the Association.

The person who is successful in completing the training program for mediators shall be issued an appropriate certificate serving as a basis for entry into the registry of mediators in Bosnia and Herzegovina.

- Mediator: Art. 3 paragraph 2
- Selection and Appointment of the Mediator: Art. 5, paragraph 1 and 2
- The List of Mediators: s. Rule on the List of Mediators (Official Gazette of BiH 21/06).

Requirements for mediators under the BiH Law

95. For a mediation to be applied under the LMP (see comments on Article 1), it is necessary to be conducted by a qualified and registered mediator. Otherwise, the mediation outcome shall not have legal conveniences, primarily direct enforcement of the settlement agreement. Requirements referred to in Article 31 shall naturally be prerequisites for registration in the list of mediators (see comments about Article 5).

96. The Association of Mediators regulated its training curriculum by the Rule on the Training Curriculum for Mediators (Official Gazette of BiH 21/06).
Article 32

A foreign national authorized to conduct mediation activities in another country may in specific cases, under the condition of reciprocity, conduct the mediation procedure in Bosnia and Herzegovina, provided that he/she obtains a prior approval from the Ministry of Justice and the Association of Mediators of Bosnia and Herzegovina.

- Mediator: Article 3, paragraph 2
- Capacity of the mediator under the BiH Law: Art. 31

Recognition of capacity of the mediator for foreign nationals

97. The provision on rights of foreign nationals to conduct the mediation refers only to those foreign nationals who do not meet the requirements set forth in Article 31 (which does not stipulate the condition of citizenship and place of residence for the mediator).

98. A contrario, it would imply that citizens of BiH who are authorized to be mediators abroad cannot obtain the approval referred to in this Article, which most likely was not the intention of the legislator due to its discriminatory effect.

99. The foreign nationals who are licensed as mediators outside their country of origin can conduct the mediation in BiH under more conditions, which aggregates have to be met, namely if:
   a.) they are authorized to conduct the mediation in another country;
   b.) there is reciprocity, i.e. if the mediators registered in BiH can conduct mediation in the foreign country in which the foreign mediator has been registered;
   c.) they have obtained the prior approval by the Ministry of Justice and the Association of Mediators, i.e. for each individual case.

It appears that the specified conditions are set too high, particularly concerning the approval to be granted by two authorities; therefore they will make this Article entirely inapplicable until further notice/amendments.
FINAL PROVISIONS

Article 33

This Law shall enter in force on the eighth day from the day of publication in the “Official Gazette of BiH” and in the official gazettes of entities and the Brcko District of BiH.

Entrance in force of the Law

100. The provision on entrance in force of the Law is a standard provision. As the LMP was published on 12th of August, it entered into force on 20th of August 2004.
Gašo Knežević
ADR vs. Public Justice: Turn of the Tide?
A. Introductory Remarks

At this point, it is good to know that the usual addressing to state bodies, mostly courts, as authorities that handle disputes between the parties, represents actually a decision to get out of crisis in one out of three paths possible (see below). Since this way means that the state court, i.e. a public body, is the participant in a dispute seeking a resolution, and that its task is to resolve the dispute by adjudication, and in a certain way deliver justice to the parties, this way of solving disputes is often called public justice. This approach was dominant for a long time. Today it belongs to the “classics”.

Alongside “public justice“, there is another path that is seldom chosen, but which experienced an increase in popularity and affirmation in the last decades of the past century – private justice, or alternative dispute resolution – ADR. The term “private justice” shows that state and public authorities are not involved in its positioning, and therefore justice is delivered by somebody else. That somebody is a private figure who does not derive the authority and mandate to resolve the dispute from the imperium, state sovereignty, i.e. from the fact that she/he is a state body officer, but from the autonomy of the opponents who bring their dispute before her/him. Thus, it is logical that justice obtained in this way is called “private justice“.

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Some 40 years ago, a Hague course on Private International Law, followed by a piece of writing entitled: “Nationality or Domicile - Turn of the Tide” was presented to the legal community. It announced that domicile low-tide phase would be replaced by domicile high-tide era, in the sense of bringing into play that legal concept as predominant in comparison to citizenship.

It this moment, a similar dynamics develops between two new concepts - the concepts of two “justices”, but the dilemma remains the same: as put forward by a poet - ”Which way are you going Billy”?

B. Concepts and Scope of ADR

In the narrowest sense, the alternative dispute resolution (ADR) may be defined as “the processes aimed at resolution of a difference or a dispute through voluntary settlement agreement reached with the assistance of (a) third person(s).”

The central but hidden foundation of the quoted definition rests upon the notion of the negotiation. Fischer and Ury commence „The Introduction” of their well-known bestseller „Getting to Yes“ by emphasizing that all of us are negotiators, whether we like it or not. This is because negotiation represents a basic means of getting what one wants from the others. At the same time, negotiation is the passageway to every agreement, independent from the accord or disaccord of the parties’ interests. Finally, if the interests of the parties are opposed, negotiation represents the key element of every model of the alternative dispute resolution.

At this point “negotiation” will be defined as any communication (not only of verbal kind) directed at achieving a joint decision. However, negotiation occurs most frequently when two parties try to resolve a discrepancy of interests through conversation.

In the course of every-day life and in the ordinary manner, opponents enter into direct communication (negotiation) on their own accord. That means that they do not engage any third person or patron. Only in very sensitive situations do the negotiators feel the lack of their own conflict resolving capacities, and, due to that fact, they become aware of the inevitability: third, neutral person's presence. From that point of view, one may distinguish between:
1. **Direct negotiation** (*parties’ negotiation*), with negotiators being sole actors, trying to reach an arrangement, throughout the communication, and in a form of an agreement.

2. **Indirect negotiation**, characterized by assistance and support of a third neutral person, who offers different kinds of support to the negotiators. Most frequently such “third man” will not participate in the final agreement as a party (the final arrangement will be concluded only between the negotiators), but she/he will assist the parties during the negotiation procedure, and during the procedure of finalizing the agreement. The modes of involvement of such third person differ from case to case and divide the indirect negotiation into several subcategories, which will not be dealt with in this paper.

Having this in mind, and considering the social-psychological (mindset of the negotiators) and legal (settlement agreement) outcomes of negotiation, inclusion of direct negotiations in the ADR definition is equally justifiable. Therefore, for the purpose of this article, a broader definition will be used, and *alternative dispute resolution (private justice)* will be considered to encompass any proceeding that leads to resolution of disputes among legal entities and individuals by accomplishing settlement (agreement), either autonomously, or with the involvement and assistance of a third, neutral person.

Further, it is a well and widely established legal opinion among authors to regard arbitration as a member of the ADR family, and, additionally, the obvious next of kin of the negotiation process. On the other side, unlike other already described ADR methods, the method of arbitration is accusatory and adjudicative, and the final outcome of the arbitral procedure - the award - is comparable with courts’ judgments. Despite these three subclasses of dispute resolution technologies that distinguish arbitration from other ADR technologies, I am inclined to follow the **mainstream impression that arbitration is one lane of the whole ADR highway**. I will only mention that Laws on Enforcement Procedure (LEP) world-widely place those awards on equal footing with courts’ judgments when it comes to their finality and enforceability.

At this point, it will be useful to underscore once again the main difference that can be perceived in literature between the concepts of two justices: mandate of state bodies, i.e. predominately courts, for dispute resolving is based on the notion of *imperium*, state sovereignty, while the mandate of private bodies, i.e.
arbitral tribunals, mediators (conciliators), is based on the litigants’ choice, on the party autonomy.

This distinction is undisputable, but does it generate any influences and differences in the area of goals of these two procedures?

C. Objective

Negative answer to the posed question relies on their mutual social function: both private (ADR) and public justice have the same goal – that is *to resolve conflicts* between individuals, groups or collectivities, and *to reduce tensions in the society*. This turns us to the notion of *conflict* that has to be solved, irrespective of the kind of “justice” - private or public one.

*Conflict*, as a social category that presents a relation between at least, two individuals, may be defined as a struggle between people over values, or as a competition over power and scarce goods. On the other hand, I find a definition which understands conflict to be a situation in which two subjects recognize the mutual differences in goals, i.e. the differences in their own interests, to be most neutral. This relates conflict to various, sometimes completely opposing, desired outcomes and interests of individuals regarding the living situation that connects them. Definitely, a common element of all those definitions lies in notion of “interest”. As, from the legal standpoint, most rights may be perceived as standardized manifestation of interests, it becomes obvious that clash of interests causes legal conflicts too, because there is a complex interaction and interrelation between rights and interests.

The prevailing relationship and feelings towards the other party in a conflict becomes hostility, animosity. These color the entire space between the persons in a conflict and increase the level of social tensions in the society.

The basic and real cause of clashes of interests is, most often, lack of what is valued or wanted, whether something material, or some rank. When more people desire the same “wealth”, or the same “position”, it gives rise to conflict. Abundance, or at least well balanced sufficiency, inhibits conflicts, while insufficiency intensifies and suits them. Such conflict is a clash of at least two interests arising in the absence of physical or spiritual goods. As a phenomenon imminent in life, its constant follower, it does not only concern law, but, to reiterate, other scientific disciplines and methodologies too.
When a social conflict goes from “everyday” life to the field bound by legal norms, a field equipped with legal apparatus, and when legal qualifications commence, it acquires a new form of manifestation: it becomes a dispute.

Legally, a dispute is a notion of material law, and one academic defined it as a disagreement between two subjects about the subjective right which one person asserts to another.18 The subjective right of an individual, which is a cause for conflict (disagreement), is threatened or hurt by another person’s actions or occurrences.19 Persons involved, gathered and connected by the right in question, become parties in a conflict, i.e. dispute.

In that manner the social conflict, and its legal reflection – dispute, appear to be two sides of same coin, irrespective of which one is front and which one is reverse. And both of them are generated by clash of interests.

### D. Paths of conflict (dispute) resolution

At least three paths (procedures) for conflict resolving coexist in reality, and each of them may be chosen by the individuals in conflict as the way out. That means that the choice of paths belongs to the contestants. But, at the same time, there are very few lawyers who would allow themselves “excursions”, i.e. wider views that lead to the mentioning of force (power) as a primordial method of solving conflicts. In life, even today, it is, however, very common and (for some) a preferred method. Accordingly, Franck rightly distinguishes between following paths of resolving conflicts:20

- Power syndrome, or one-party law-making,
- Compromise syndrome, or two-party law-making and
- Impartiality syndrome, adjudication, or third-party law-making.

Starting from this classification we will try to spot three of the most basic ways of dispute resolution between individuals and groups. It is to be pointed out that the first two of them belong to ‘the private justice” zone, while the third one is split: only one half of it belongs to the “public zone”, while the other half belongs to private methods of conflict resolving.

### D.1. First path: One-party law-making

Every conflict can be resolved by force, power, i.e. by creating a new “law” by the stronger party both for himself and for the weaker party. Unfortunately, in spite of its potential efficiency, its use and amount depends solely on the
decision and scruples of the ruler who acts on his own accord, and who is personally interested, emotionally involved, which takes away any neutrality or objectivity. This only disqualifies force. However, its main shortcoming is not in its subjective violence, but in the fact that the outer world, after this violence has been used, can only find out who are the winners, but not on what substantial principles they won. Further on, the drawbacks of force are not in its inefficiency, or the nonexistence of the effects of its application (the effect is in the victory that creates “law” for opponents), but in the instability of its results and the inability of deriving principles for the future from it. Therefore, the victory of the more powerful closes the book just temporarily, until the balance of power changes, and does not give any principled solution applicable to the future and future disputes: it does not create a system. In addition to this, and as a rule, a legend is created around the defeated, and after recovery and preparation for retribution he and his heirs reopen the previously closed book. Because of the above said, force must be qualified as an unacceptable way of resolving a conflict. One may justifiably conclude that primitiveness is the essence of one-party law-making, what qualifies it for the dump of history.

D.2. Second path: Two-party law-making

In a position completely opposite to the primitivism of unilateral force are the compromise and the integrative solutions, which are based on direct and indirect negotiations and form a second path of conflict resolution. Those negotiations lead to agreement and could be finalized by new contracts between the parties in the conflict, which serve to overcome existing conflicts (differences?). The legal maxim *pacta sunt servanda* gives this type of resolution an effect of future obligatory behavior (and source of law) for both of the parties. One can properly conclude that “The parties……write their own law.” As the common efforts of the parties are built in that new agreement it is obvious why this path is labeled as two-party law-making. In the same time these common efforts of the parties, followed by their meeting of mind, derogate any primitivism from this technique of conflict resolution.

**Legal Outcomes of Negotiations.** Observed from a legal perspective, the essence of negotiations is expressed in the new contract, i.e. in the legal notion of settlement agreement which, when reached, concludes the negotiations. Settlement is a kind of negotiations-based conflict termination, arrangement which contains mutual concessions, distributive or integrative bargains. Common opinion concerning the nature of this agreement is that it can be described as bilateral, mutually binding contract, concluded between two former opponents. This contact may be concluded between persons:
• Who have capacity to conclude such contracts
• Are at the same time entitled to dispose of the right being the subject of settlement.27

Consequently, their capacity to act depends on the quality of relationship which caused the conflict.

The contemporary national legal systems differentiate between two types of settlement agreements: private (extrajudicial) settlement (PS) and the settlement before the court or arbitration (res iudicialiter transacta - CS). The object of both types of settlement is a modification and redesigning of an existing, controversial relationship, regardless of its basis (contractual, criminal or of some other type).28 Settlement is, therefore, either an integrative solution that reconciles conflicting interests, or a compromise.29

1. The main regrettable peculiarity of the first type of settlement – private one (PS) - lies in its (in)efficiency level: this kind of settlement has no direct protection through any Law on Enforcement Procedure. Given that, if one party subsequently refuses to fulfill its newly shaped obligations voluntarily, his counterpart has to file a claim, which means that the enforceability is far on the horizon. In that manner, one of the parties may, by abusing this method of amicable conflict resolution, drag out the performance of its obligations, aiming to prolong the time limits by playing “buying the time” game. In other words, extrajudicial settlement suffers from lack of any direct legal enforceability. As it is quite opposite when a court's judgment is at the stake, this drawback of private settlement provides the proponents of public justice with the ammunition for opposing.

2. But, this insufficiency of PS may be prevented by the second type of settlement - the settlement before the court, as its reverse side. Namely, if conflicting parties, in any possible manner (as after-effect of negotiation, mediation, conciliation, etc), reach full or partial agreement with regard to their conflict, concerning the claims which the parties may dispose of, they may announce it before the first instance court, at the hearing or out of it. When entered into the record and signed by the parties, this agreement becomes the agreement in a form of settlement30. Additionally, when issued to the parties, that certified copy of court record obtains the legal effects of judgment (court decision)31. The further legal protection (enforcement) of these settlements is based on provisions of the Law of Enforcement Procedure.32 The main differ-
ence between the two types is that a settlement given in court records (court one) has the legal force of effect, it is an enforceable document eligible for forceful implementation, and it provides a higher degree of certainty that the parties will act in accordance with the agreement. Given that, valuable procedural effects of CS briefly are:

- **Termination of court proceedings** (if already commenced). CS ends litigation if it refers to the whole of the claim. If reached only regarding a part of the claim (partial settlement), litigation remains partially in progress. That remaining part of the claim may be settled through court’s judgment.
- **Res iudicata effect**. Party’s exceptio rei iudicatae based on the accomplished CS will prevent any further litigation regarding the same claim and between same parties. In that manner CS acquires the legal effect of finality akin to judgments and arbitral awards.
- **Enforceability.** As the judgment that cannot be further appealed, the settlement reached before the court becomes enforceable. For the purpose of application of the Law on Enforcement Procedure, CS represents an enforcement title equal to the final courts judgment.

3. Finally, the current legislation of the European Parliament and the Council aimed to raise the mandatory level of mediation outcomes by sustaining any kind of enforceable agreements that result from mediation, recognized by member states. In that manner, mediation agreement is placed almost on equal footing to courts' judgments and arbitral awards. This equalizing is made in accordance with the legal system of the country where the request for enforcement is made, which means that the local (national) legal acts, but not supranational law, govern the procedure of enforcement. That indicates the nature and objectives of the quoted Directive: it represent a peace of “soft law”, like Model Laws are, which does not correspond to the attempt of direct unification of different legal systems, but is an invitation for mutual construction of shortcuts to enforceability. On those shortcut passageways, a kind of mail-boxes (par. 3. art. 6. – the indication of competent authorities for receiving requests) shall be placed as the addresses for direct sending of the requests for enforcement, which is designed to speed up the whole procedure of enforcement.

**Types of negotiations:** **Identification of the main highway` lines.** Methods for dispute resolution based on negotiations, with the assistance of a third person or without it, symbolize the core of alternative dispute resolution (ADR), as
it was mentioned. Their mutual characteristic is that the parties in conflict, during implementation, have direct influence on the procedure of dispute resolution and on the results towards which the procedure is leading. Beside direct negotiations, which will be left out of scope of further elaboration, there are several types of indirect negotiations tailored for different types of conflicts:

1. **Mediation (Conciliation).** Mediation, as a mainstream implies any procedure in which the parties voluntarily, and in a peaceful manner, resolve disputes with the help of a mediator\(^{36}\) who is not authorized to impose solutions, but only to assist the contestants in achieving the outcome\(^{37}\). This legal definition can be completed with the information that the mediator is a mutually acceptable, non-biased and neutral person.\(^{38}\) Whereas the goal of the court or of arbitration is a judgment (or award) that decides which party has the right and what about, which may proclaim a solution that contestant(s) may not desire, the goal of mediation is conciliation, which leads to a win-win situation acceptable to all opponents.\(^{39}\) While a judge (arbitrator) has a mandate to reach a decision, a mediator has a mandate to reconcile, i.e. to assist in conciliation.\(^{40}\) A successful mediation, as it is said, is concluded by a settlement, court, or out-of-court.

2. **Mini-trial.** Mini-trial\(^{41}\) represents a dual-phase and amicable type of dispute resolution. In the first phase, which is basically litigation,\(^{42}\) evidence and arguments are presented, and a trial is simulated, all in the presence of lawyers. After its completion, instead of reaching a decision, which would bring the mini-trial closer to arbitration, high representatives of the parties launch business negotiations, which bring the procedure close to direct negotiations. This turns the litigation into a matter of business policy with a positive final outcome – settlement.

3. **Evaluation.** Similarly to the previous method, evaluation is a kind of simulation. Parties in conflict, during the evaluation, show the evaluator, a neutral, competent and experienced person that they appoint themselves, the outlines of their conflict. Based on the practice and experience, the evaluator presents to the parties the odds of being successful in litigation, gives them the evaluation of the probable outcome of the trial. However, in case that he has the authority, he can offer advice for finding a rational mutual solution.\(^{43}\)
4. Med-Arb. Med-arb is a hybrid, dual phase procedure of dispute resolution that, in the first phase, starts as a non-adjudicative mediation, then matures into a procedure of deciding by a third person, the arbitrator, in the second phase.

There are two contradictory reasons for this turn.

The first reason can be defined as a failure of mediation. If the process shows that the parties cannot resolve a dispute in an amicable manner, by mutual settlement, and for reasons of saving financial and time resources, mediation turns into arbitration which ends by imposing the solution of a third party, by reaching a binding decision for the parties by the arbitrator.

The second reason can be defined as a success of mediation, which then raises the need to lift the binding nature of settlement agreement, i.e. the certainty that it will be implemented. In order to avoid uncertainty of private settlements, what represent the crucial starting point of all critics of ADR, upon successful completion of the mediation, in the phase when the settlement is in sight, mediation transforms into arbitration in order to compose the settlement before arbitrators. On the basis of this procedure, the arbitrator reaches a decision on settlement (award made by consent) that has the power of an executive decision and can be carried out by force. Thus, a level of certainty that the dispute is finally resolved is given. This conflict resolution is hybrid as well.

D.3. Third path: Third-Party Law-Making

From the standpoint of private justice hard-core supporters, the extreme modernists, choice of third path of conflict resolution can be viewed as the reverse side of human power - human weakness. They claimed, and still do, that introducing a third party, predominantly state judges, in solving differences between individuals is the confession and abdication of those individuals. Confessing weakness to overcome the differences in mutual relationship, leads at the same time to abdication to the benefit (most often) of the state body - the judge called to overcome the differences. Behind this form of conduct of conflicted individuals, passivity and weakness are hidden. In that court's procedure of conflict resolution and protection delivery, except the parties, it appears the judge is in the main role: processus est actus trium personarum – actoris, rei, iudici. Adjudication (which represents the legal term for the delivery of a decision on the dispute by a third person, mainly a judge) also represents an imposition of will, but an imposing of the will of an impartial, neutral person, judge, and not of a will of the parties in dispute.
In our part of the world, this third path is the most common, and the most widely spread approach of overcoming conflicts. Frequency of its exercise justifies the assertion that that path forms a traditional or even “classical” manner in which the conflicts are resolved.

But, this path is not plain and monolith because it does consist of two main forms of adjudication: adjudication by the state court and adjudication by the arbitration.\(^46\) They have their (1) similarities, but (2) differences too.

(1) Because it is said: *ne procedat iudex (arbiter) ex officio* it is obvious that both of these procedures commence with one party’s claim (or request for arbitration), i.e. according to the concept of autonomy of the parties. The law precisely regulates both procedures: the court acts in accordance with the rules of civil procedure acts, and the arbitration is conducted by a related procedure.\(^47\) Both procedures are finalized by a decision (judgment or award), which is made by the third, neutral person, whose mandate includes making that decision. The decision represents the authoritative resolution of the conflict, or dispute. It is binding for both of the parties, but most frequently it creates a “win-lose” situation, because one of them is proclaimed as winner. If the parties, or to put it more accurately, if the defeated party does not implement the decision voluntarily, which would end the dispute voluntarily, the state will do it with the use of state force, in the enforcement proceedings.

(2) From the other side, the main difference between dispute resolution through the courts and through arbitration is in the body that reaches the decision.

In case that the parties in conflict address the court, they have decided to entrust the resolution of the dispute to the state, i.e. its public servants who perform a public function. The authority of the court is the authority of the state, and it comes (is derived?) from sovereignty.

Unlike the court and the judges, arbitration and arbitrators are (most commonly) privately established means for performing legal services, a legal technique, a method for resolving disputes by the third, neutral party\(^48\) who is not a state official. Further on, arbitrators do not get their authority from the *imperium*, state sovereignty, but from the will of the parties. Arbitration has the authority because the parties in conflict want so, so arbitration becomes their own “private court”.
E. Which way are you going Billy, may I go too?

After this short inventory of main conflict resolving techniques, we shall turn to the question whether, or not, the classical court litigation that represents “public justice” is truly the best way of solving legal disputes, which represents a deep-rooted opinion among the consumers of legal services and majority of lawyers too.

If we leave the power syndrome aside due to its bad reputation, archaism, and its low place in the hierarchy of contemporary values, the real dilemma that provoked the above heading might be explained with an additional question: If Billy is a reasonable man who needs advice, which may be blindly followed also in our own conflict situation, which way of conflict resolution – ADR or public justice - should be recommended to him?

The response depends on his targeted aim.

- If his targeted aim is less expensive and less time-consuming procedure, then the answer is not wholly simple, but nevertheless clear.

1. First, from the time perspective ADR methodologies, which last less than a month or two, are “tailor-made” for Billy, which is out of question. Attractiveness of ADR becomes more obvious if one knows that the main objection, which comes from both kinds of evaluation (self evaluation and external evaluation) of judicial systems formed on the territory of former Yugoslavia, relates to the length of individual litigations. This disease of state court system goes so far that it generates the statement: “After the years of hard combat only attorneys are satisfy”.

As the evidence that confirm the above statement, the Croatia 2006 Progress Report made by the Commission of European Communities may be used. Among the shortcomings, which should be improved, the European Commission indicates “reduction of the length of court proceedings”. As the situation in Croatia is (possibly) even better than in other countries in the region, this report is also applicable to them. Given all of that, it appears that ADR has almost irrecoverable advantage, what leaves the state courts procedure far at the back.

2. From the other side, if the only criterion is cost, then arbitration, as a part of private justice path, is less appropriate when compared to public justice. This is because the costs of arbitration procedure may exceed court costs. But, one may put forward two main counter arguments:
1. Other ADR techniques, except arbitration, are to the great extent cheaper than courts.
2. Even the costs of arbitration depend on the arbitration institution that the parties opt for. If they choose a very well-known and distinguished arbitration center like ICC - Paris, the costs may reach impressive level, but if they opt for some similarly good but less famous center, the cost may be even less than the court ones. For example, estimated dispute costs for a dispute of EUR 3,5 million before the Belgrade Arbitration Center attached to Serbian Chamber of Commerce is 40,000 EURO, which is modest even compared to the state courts costs.

(3) But, if one puts together both aims that Billy wants to reach (time and money) then it looks undisputable that ADR is ahead state courts.

• If Billy wants just (rightful, fair, reasonable) solution to be reached – the use of public justice methodology (state courts) may be seriously disputed.

Kelsen considers law-making process (legis latio) as one of two outstanding manifestations of state authority. Created law does not obligate people with the value of its content, but with the fact that a state body promoted it into a “live” system and ordered its application. Therefore, the law does not obligate by its justice, democracy, truth, morality, beauty, wisdom, coherency, or any other quality. Also stupid, senseless, immoral law, in theory, formally obligates. Additionally, in public justice procedures, in court cases, state courts implement the laws and not just or ethic standards, what is undisputable among lawyers. In the same time it is almost notorious that some legal orders in some historical periods, according to the prevailing opinion, have been unjust. But, even huge discrepancy between law and ethical values, assessed by majority of population or any neutral expert-evaluator, does not exclude that legal order from the list of existing, “live” orders, whose norms have to be implemented – that order continues to function, notwithstanding the fact that it does not match the prevailing “taste” of the population. Any different approach to these issue may be consider as excessive sway of universal ethical or even political values at the field of law, for example favoring democracy then autocracy. It would be an ethical or political, but not scientific view. Any law binds by its form, not by its qualities. Any law may be unjust or imperfect, but the state courts will carry on its implementation. From the standpoint of legal science - law is to be applied independent of its value. As a final point, from the standpoint of justice, it arises that it is an illusion to expect that the final outcome of implementation of legal acts by state courts – judgment – may be
better than the law that produces those judgments. No one can make an apple-pie from the fruits of lemon tree.

On the other hand, private justice methods meet the justice to a greater extent. For example, if parties entitle arbitrators to deliver an award in accordance with the principle of justice (ex aequo et bono; amiables compositeurs), they will act directed by the principle of equal treatment, with ideas of rational and reasonable actions etc. Or, in the outcome of the negotiation, in the settlement agreement, opponents may build in as much justice as they desire. It is to be concluded that if one prefers just solution, it is to be found in ADR rather than in the court.

- More illusive ground for the proponents of private justice comes with the criterion of legal efficiency. To be accurate, the legal outcome of majority of ADR techniques is a settlement agreement, as we have already seen. As this agreement is nothing but a contract, and like all other contracts it has no direct legal protection in the Law on Enforcement Procedure, which means that if it is not voluntary fulfilled, the other party has to file a claim, and a new conflict between the same parties appears. As a consequence, the enforceability is far ahead. As already mentioned negotiations followed by settlement agreement may look as a “buying the time” game, what leads to the lack of efficiency if compared with public (court) justice, whose legal outcomes (judgments) are directly enforceable by law.

There exist at least two main arguments that may be opposed to the above revealed argumentation.

First, as we have already seen, in addition to “private form”, this contract (settlement agreement) may appear in a form of court settlement. Choice between PS and CS depends wholly on the parties. If they opt for CS, they opt for a document that has legal effects equivalent to the court judgment. The further legal protection (enforcement) of these settlements is based on provisions of the Law of Enforcement Procedure. The main difference between the two types is that a settlement given in court records is legally enforceable, it is an executive document eligible for forceful implementation, and it provides a higher degree of certainty that the parties will act in accordance with the agreement.

Second, arbitration is also a technique that belongs to the ADR list of options. Court protection and arbitration protection are protections of the same level. This means that all legal outcomes that flow from a final court judgment, also belong to an arbitral award.
Given that, if one suffers from the lack of confidence regarding sincere goals of his partner, he has two accessible options from the ADR menu, which may overcome the objection of inefficiency of ADR:

1. The first one is arbitration course of action that guarantees the same kind of protection as the court does.
2. The second one is negotiation accompanied with court settlement agreement with the same effects like a court decision.

Given all of that, it appears that the feature of efficiency belongs to some models of ADR, as much as to the court justice.

- What happened before is that legal certainty was frequently recognized as the advantage of state courts protection when compared to ADR. The chain of arguing follows: the notion of legal certainty originates in transparency: once promulgated, legal acts (laws) belong to the society, become available to the whole community and everyone may turn out to become familiar with their contents. Due to that, everyone may also predict the results of implementation of those (in advance) published laws on the given facts, i.e. everyone may predict the contents of the court’s judgment. In that manner predictability turns to be legal certainty, which represent normal environment for human beings.

But frequent clashes that occur, in every day life, between this scholastics wishful thinking regarding law implementation scheme and unpredictability of court’s judgments revitalized an old academic joke: “My theory is so attractive that the real life has to be shaped accordingly”, since unpredictability, at the present time, turns to become almost as serious a deficiency of public justice as the duration of procedure is. Contrary, as outcomes of direct and indirect negotiations fully depend on parties’ autonomy, predictability of settlement agreement contents is out of question. But, it would be fair to admit that one line of ADR - arbitration awards - concerning predictability may suffer from the similar disease like courts judgments.
F. Better More than Less

All of these four compared features of ADR and public justice, in my opinion, demonstrate that ADR has certain preponderance in comparison to court procedure, which has to turn Billy at that direction.

One can add to the above consideration that ADR techniques are regularly designed to produce results that best satisfy the parties` interests, i.e. they are “interest-based”, what is true. The focus on interests permits the consideration of issues that do not strictly belong to the dispute if appraised from the purely legal perspective. As the interest is the cause that generates both - social conflicts and legal disputes - as it is the core of all crisis, it emerges that ADR methodology is well dress to defeat the creator of all troubles – jeopardized interest.

It is fair to confess that the above said relates to ADR as a whole, but not to the particular models of ADR that shape the entire ADR. If one divides the whole ADR to its components, these parts, or some of them, possibly should be less favorable then public justice. Or some of them should be less favorable from some specific standpoint (as we noticed concerning some arbitration centers, when it comes to the costs). But this is not our point.

What is the point?

I made efforts to demonstrate that both types of conflicts – social and legal - have the same cause – jeopardized interests of individuals that have to be somehow overcome, bypassed, no matter how. At the same time, both justices have the same goal – that is to resolve the conflicts between individuals, groups or collectivities, and due to that to reduce tensions in the society. From that angle, both justices – ADR and public – have the same rival, i.e. jeopardized interest, and the same goal.

Those characteristics trigger the need of their cohabitation. As one academic noticed - public justice and private justice are not opponents, contestants, or alternatives to one another. For both, private and public justice, there is no alternative. “They should be taken as partners in the same venture – the fulfillment of the fundamental needs of the users of the justice system”.

Appropriateness of the above statement becomes even clearer if supported with the fact that ADR methods are based on the autonomy of parties. ADR
liberalism begins with freedom of choice on magisterial road: it is up to parties to decide whether they will turn to the state court, or whether they will choose some of the private justice techniques. But even more than that, if they decide to opt for some ADR paths, the final choice is not over yet. The parties can always change the initial choice and return to the public justice, given that they are complementary: once made, choice may be unconditionally replaced anytime. Replacement will occur if opponents realize that ADR is not suitable in any sense – maybe because it is not sufficiently binding, or due to some other reason of their own.

But economic efficiency of justice delivery should not be, to the greater extent, misbalanced due to usually law costs of ceased ADR procedure, and due to very modest amount of time it regularly takes. Even those expenditures may be compensated by indirect savings: savings in time and energy of management and corporation, decreasing the damage in business relations on the whole, savings stemming from opening of new business perspectives and freedoms.65

Finally, on the legal level parties have only to be aware that commencement of most ADR methods, except arbitration, does not even interrupt or suspend the limitation period,66 which means that their claim will be barred if the limitation period expires during the mediation procedure. Despite of the fact that no other legal consequences are on the horizon, this single one is too significant to be ignored. Deficiency of this Serbian legal structure becomes obvious if the period of limitation expires during the negotiation procedure: if negotiation fails no party may bring action before the court or arbitration, due to the fact that the momentum is lost. Given that, the European Parliament and the Council, in the last Directive concerning mediation, set down the rule that Member states shall ensure that none party, by choosing mediation path, shall be subsequently prevented from initiating judicial proceedings or arbitration by the expiry of limitation period during mediation process67. In that manner, the Directive imposes a kind of interruption or suspension of the limitation period, which opens a door for teamwork of public and private justice bodies in resolving of disputes, what is our above mentioned point.

If one puts arguments in that order it appears that clash between two justices is somehow fabricated. The question arises: who did it?

The main role in the private justice methodologies, contrary to courts’ methodology, is not exclusively reserved for lawyers, due to the fact that there are no professional and education barriers for the involvement of third neutral
persons in ADR. That point out that monopoly position of one whole profession is endangered by ADR. Perhaps some serious inquiry may reach completely grounded conclusions, but definitely it is out of scope of this text.

The key words that spring out this article is “the coexistence of two justices”, which leads us to the conclusion that the dilemma highlighted in previous heading (E) is not of supreme importance. Paramount significance belongs to the attempt of providing the consumers of justice system with as much remedies of conflict resolving as it is possible. ADR methodologies contribute to that final result, and due to that they are valuable as much as public justice. “Low-tide or high-tide” – this dilemma turns to be passé. 68
12 For example, Arts 30 and 31 of the Serbian Law on Enforcement Procedure, Official Gazette RS No. 125/2004
15 Bühring-Uhle, Kirchhoff, Scherer, op. cit., p. 133
16 Ibid., pp. 133 and 173
17 Mitchell, op. cit., p. 17
18 Poznić, Rakić-Vodinelčić, Civil Procedure, 1999, Belgrade, p. 5; Karamarković, Settlement Agreement and Mediation, 2004, Editions of the Union University, Belgrade, pp. 63-64
19 Stanković, Vodinelčić, Introduction to Civil Law, 2004, Belgrade, pp. 225 and further.
21 See: Stanković, Vodinelčić, op. cit., p. 240
22 Franck, op. cit., p. 3
23 Ibid., p. 3
25 Franck, op. cit., p. 4
26 This is the prevailing opinion, see: Karamarković, op. cit., p. 79 and further. For the legal nature of the settlement made before the court (CS) see: Poznić, Rakić-Vodinelčić, op. cit., p. 334
28 See: Karamarković, Arbitration and Alternative Dispute Resolution, 2001, Zagreb, p. 39
29 See: Poznić, Rakić-Vodinelčić, op. cit., p. 335
30 Karamarković, Settlement..., p. 169; Poznić, Rakić-Vodinelčić, op. cit., p. 337
31 For example Art. 323 of the Serbian Code of Civil Procedure, Official Gazette RS No. 125/2004
32 Poznić, Rakić-Vodinelčić, op. cit., p. 336; Art. 19 of the Serbian Law on Enforcement Procedure
33 Ibid., p. 336; Art. 19 of the Serbian Law on Enforcement Procedure
34 Arts 355 and 356 of the Serbian Code of Civil Procedure
35 Art. 6 of the Directive 2008/52/EC, of 21 May 2008, on certain aspects of mediation in civil and commercial matters
36 More in Pruitt, Rubin, op. cit., p. 165
37 See: For example Art. 2 of the Serbian Law on Mediation, Official Gazette RS No. 18/2005. Basically the same definition is contained in Art. 2a of the Croatian Law on Conciliation, NN, no. 163-03
38 More complete definition in: Pruitt, Rubin, op. cit., pp. 14 and further
39 Ibid., p. 17; Franck, op. cit., p. 8
40 Varady, Barcelo, von Mehren, op. cit., p. 9. Of course, this does not mean that the arbitrator cannot, during the arbitration proceedings, encourage parties to reach an agreement, to conclude a settlement during the arbitration – so-called consensual solution. On the contrary, a research has shown that the arbitrators mainly (86%) consider this to be a part of their job. See: Buhring-Uhle, Scherer, Kirchhoff, The Arbitrator as Mediator, Journal of International Arbitration, 20(1), 2003, p. 82
41 International Trade Center, UNCTAD-WTO, Arbitration and Alternative Dispute Resolution, (2001), Zagreb, pp. 39-40
42 Ibid., p. 40
43 See: Karamarković, Settlement..., p. 314
44 Ibid., p. 315
46 See Knežević, Pavić, op. cit., p. 175; Karamarković, op. cit., p. 313
47 Knežević, Pavić, op. cit.
49 See Knežević, Pavić, op. cit., p. 185
52 The second one is legis executio. See: Kelzen, General Theory of Law and State, 1998, Belgrade School of Law Editions, Belgrade, p. 317
53 Ibid., Belgrade, p. 10
54 Ibid., p. 57
55 As the examples Kelzen indicate Russian, Italian and German legal orders during the bolshevism, national-socialism and fascism that prevailed in that states. Kelzen, op. cit., p. 57
56 Ibid., p. 57
57 57 Marković, ‘Litigation Based on the Justi’, (1994) Pravni život, br. 9-10, Belgrade, p. 629
58 Poznić, Rakić-Vodinelčić, op. cit., p. 336; Art. 19 of the Serbian Law on Enforcement Procedure
59 Ibid., p. 336; Art. 19 of the Serbian Law on Enforcement Procedure
60 See Knežević, Pavić, op. cit., p. 201
61 Barbić, ‘Reforming of Croatian Legal System by Adjustment to the European Law and Economy’, (2005), Law in Economy, 44, no. 4, pp. 17 and 29
62 Bühring-Uhle, Kirchhoff, Scherer, op. cit., pp. 174 - 175
63 See Uzelac, op. cit., p. 24
64 Goldsmith, op. cit., p. 9
66 See for example Art. 11 of Serbian Law on Mediation. Official Gazette 18/2005. Similar approach is adopted by the Croatian Act, but parties may opt for interruption of limitation period by explicit agreement.
67 See Art. 8 of the Directive 2008/52/EC, of 21 May 2008, on certain aspects of mediation in civil and commercial matters
Steven Austermiller

The BiH Mediation Regime: A Practical and Legal Analysis
I. Intro

This article discusses the new Bosnia and Herzegovina (BiH) mediation laws and their potential impact on the BiH judiciary and the rule of law. The BiH judiciary faces myriad problems. Education and training of judges is substandard.\(^3\) Court contempt, subpoena, and enforcement powers are underutilized or insufficient.\(^4\) Outside of Sarajevo and Brčko, funding levels are “woefully inadequate.”\(^5\) Courtrooms and other facilities are “dilapidated and in need of repair.”\(^6\) Many of the courts carry substantial debts.\(^7\) But, perhaps the two most significant issues are inefficiency and corruption.

The BiH court system simply moves too slowly.\(^8\) A World Bank study\(^9\) indicates that it takes almost two hundred days, on average, to enforce a judgment and only about twelve percent of local firms characterize the courts as “quick.”\(^10\) One commentator noted that the courts are generally distrusted by business leaders.\(^11\) One reason for court inefficiency is that judges have to work within an environment where substantive and procedural laws are constantly changing.\(^12\)
Because they cannot access new legislation easily and there is no effective system for identifying and organizing changes, judges are understandably overwhelmed. Another reason for the inefficiency is that courts have no effective case filing and tracking systems. And finally, the system allows for excessive postponements of hearings. As a result of these inefficiencies, the BiH High Judicial and Prosecutorial Council (HJPC) reported that significant case backlogs have accumulated in many courts.

Another serious issue is corruption, or at least the perception thereof. The ABA/CEELI Judicial Reform Index survey found that “[i]mproper influences on judicial decisions are a significant problem, and they include bribes, requests for specific outcomes by friends and colleagues of judges, ex parte communications, and political pressure, most of which is exerted indirectly.”

In addition, while ethics codes are in place, they are not “widely understood or followed.” In the World Bank’s surveys of fairness and honesty, the BiH courts ranked in the bottom half of the region, with only around a quarter of respondents assessing the courts as either fair or honest. The most compelling finding was that in 2002 BiH ranked number one in all of Europe and Eurasia for the frequency of unofficial payments and gifts made when dealing with courts. This was in spite of the fact that BiH had tripled the wages of judges.

The consequences of a dysfunctional court system cannot be overstated. Individuals and businesses cannot effectively enforce their contractual rights and as a result, economic activity suffers. One study commissioned by the European Bank for Reconstruction and Development (EBRD) found that legal institutions’ effectiveness in enforcing laws is more important for foreign investment in transition economies than is the establishment of modern, pro-business laws on the books. In BiH, the perception and reality of weak enforcement of property and other rights has hurt economic development.

The World Bank survey ranked the BiH judiciary second in the Europe and Eurasia region for being an impediment to doing business.

In addition, a dysfunctional court system can also prevent individuals from enforcing human rights they have been granted in their laws. The BiH Constitution is unique in that it explicitly incorporates the rights and freedoms set forth in the European Convention for the Protection of Human Rights
and Fundamental Freedoms (European Convention) and declares that these rights “have priority over all other law.” In theory, this means that the highly developed case law of the European Court of Human Rights (ECHR) is the supreme law of the land. However, the enforcement of these rights in BiH is questionable. For instance, Article 6 of the European Convention guarantees the right of all persons to a “fair and public hearing within a reasonable time . . . ” It is likely that the slow administration of justice in BiH is violating citizens’ human rights under this provision.
II. Mediation as a Prescription

Mediation may be useful in addressing some of these problems. Like other forms of ADR, mediation is an alternative method of resolving disputes, outside of the traditional, adversarial, litigation-centered model. Mediation has been defined as a “process in which an impartial intervener assists two or more negotiating parties to identify matters of concern and then develop mutually acceptable proposals to deal with the concerns.” The neutral or mediator does not have binding authority to decide any issues. She can only help the parties resolve the matter if they are willing. Mediation can be part of an official court system (called “court-annexed mediation”) or it can be a stand alone procedure, completely independent of the courts. In either case, it is usually a voluntary procedure for all parties.

Mediation has been found to provide parties with a wide range of advantages over traditional litigation, including faster resolution and reduced costs. Developing country studies show that mediation can resolve cases much faster than traditional litigation. Mediation Boards in Sri Lanka, for example, resolved sixty-one percent of cases within thirty days and ninety-four percent of cases within ninety days, compared with the months or years it took to resolve cases in the courts. After six years of this mediation program, the Sri Lanka court backlog was reduced by fifty percent. Similarly, in BiH, mediation may help free up scarce judicial resources by reducing the number of hearings, trials, and eventually the number of cases. The HJPC cited the lack of mediation options as one reason for the significant case backlog.

Another issue that might be mitigated by mediation in BiH is excessive dispute resolution costs. In BiH, lawsuits are expensive relative to local wages. Mediation has shown to be less costly than litigation. And, mediation may help reduce high legal fees by reducing the number of court appearances and eliminating the need for costly trials.

Mediation would also provide BiH parties the opportunity to develop more creative and appropriate solutions to disputes, instead of relying on general statutes, limited or non-existent case law and potentially inconsistent decision-makers. The practical application of this benefit for the remaining war-related property and other disputes is clear. According to USAID studies, mediation may also be more effective than litigation for addressing disputes involving ethnic conflict. In addition, mediation can sometimes allow parties to resolve
their disputes while maintaining their relationship. Finally, the voluntary nature of a mediated settlement makes participants less vulnerable to corruption and allows parties to circumvent potentially compromised courts.

Mediation may even address some of the more general problems in BiH. Studies show that mediation can improve access to justice. Mediation can help poorer segments of society participate in conflict resolution where they might not have been able to afford an attorney for traditional litigation. Mediation can take place in rural areas or areas not served by a courthouse. It can occur on weekends or evenings so that participants do not have to take time off of work. Mediation’s generally informal nature may also appear less intimidating to people who view the government with suspicion or fear.

Mediation may improve citizens’ attitudes towards the BiH judicial system in general. As mentioned, studies show that the BiH judicial system is held in low regard by the population. Mediation’s emphasis on party-centered decision-making provides better opportunities for parties to resolve cases in a manner consistent with their interests. Since resolutions are voluntary, mediation eliminates the inherent coercion that a court judgment entails. Studies show that mediation tends to have a very high user satisfaction rate. As a result, parties to court-annexed mediation will view the general judicial system more positively, which may improve the rule of law.

Mediation might actually help strengthen democracy. In several cases, mediation has played a role in preparing community leaders, increasing civic engagement, and developing public processes that facilitate restructuring and social change. In South Africa, for instance, mediation programs helped prepare the country for a peaceful transition out of the apartheid era. There, an NGO called the Independent Mediation Services of South Africa began mediating labor disputes in the 1980s. It is credited with developing and training community leaders who went on to hold significant positions in the post-apartheid governments. It is reported that “their mediation training and experiences helped develop skills in consensual approaches to problem-solving and policy development.” At the end of the transition negotiations, the lead National Party negotiator indicated that “the success of the negotiations and the success of the [various mediation services] helped redirect the country from a culture of violence to a culture of negotiation.” Reports also indicate that mediation programs in the Philippines and Ukraine are helping to build an ethic of civil engagement.
Perhaps, mediation can strengthen democracy in BiH. Under the control of communism, BiH citizens were not accustomed to taking personal responsibility for decisions.57 Furthermore, they were not experienced in the art of compromise. Citizens had the choice of acquiescence in governmental action or protest.58 In the event that one decided to protest, one usually became a dissident and had to be an “uncompromising absolutist.”59 As a result, many of the “democrats” in post-communist societies have found the transition from an authoritarian system to a compromise-based democracy difficult.60 The use of mediation (with appropriate training) might help build a needed culture of compromise.61 Both parties and representatives might begin to explore non-confrontational ways to address conflicts and begin to take personal responsibility for resolving them.62 This is especially crucial for BiH given the fact that ethnic tensions remain and compromise on these issues is of paramount importance to the survival of the state.63 While it is impossible to predict with precision the kind of impact mediation might have on BiH’s fractured society, the foregoing suggests that, given sufficient time and resources, a well-conceived program might promote consensual approaches to problem solving and public policy debate, thereby strengthening this post-conflict, nascent democracy.

Some have argued that mediation and ADR are inappropriate for emerging judiciaries like BiH.64 The three main criticisms are (1) there is a lack of public trust in the legal system and that would carry over to a mediation program; (2) there is no credible threat of effective enforcement of the mediated settlement; and (3) mediation is an American export that is culturally inappropriate for societies like post-communist Europe.

The first concern arises from the fact that most post-communist judiciaries lack the requisite perception of procedural and substantive fairness. As a result, a mediation regime might suffer from the same distrust.65 However, the lack of public trust in the traditional judiciary and its personnel is actually one reason why people might turn to (non court-annexed, perhaps) mediation. Future mediators are more likely to be attorneys and expert lay persons, not sitting judges and thus, they will not carry the corruption stigma of those employed by the courts. There is no evidence that mistrust towards the traditional judiciary migrates to independent ADR institutions. To the contrary, a USAID ADR study found that mediation can be an appropriate alternative forum when the civil court system is discredited.66
The second concern is that these countries lack an effective enforcement mechanism for mediation settlements. Parties are less likely to agree to a mediated settlement if they cannot enforce the obligations contained in their mediated agreement. This is a significant concern, given the BiH judiciary’s inefficiencies. However, mediated settlements will now receive priority treatment under the new law and will be enforceable like a judgment. Thus, the settlement agreement enforcement process will be significantly streamlined. In addition, the relatively high legal expenses involved in defending an enforcement action should have some deterrence effect on potential agreement breakers. Finally, there are international programs working on improving the effectiveness of the enforcement divisions of the BiH courts. If these programs improve enforcement, mediation stands a better chance at success in BiH. Yet, regardless of enforcement efficacy, resort to court assistance might be less of a problem than is sometimes believed. Most international ADR institutions and programs report very high award compliance rates without national court assistance and there is no reason to believe that local BiH-mediated settlements would be significantly different.

The final concern relates to the theory that American-style ADR exports are culturally inappropriate for BiH. One commentator has argued that “non-talking societies” like Eastern Europe will be less amenable to exportation and assimilation of mediation than “talking societies” like the United States and Latin America. While culture does matter and one must be sensitive to these issues, the evidence shows that legal exports (if that is the appropriate term) can flourish in a multitude of places. And mediation appears to be spreading throughout Central and Eastern Europe. Even the European Commission recommends the development of mediation mechanisms for BiH. Perhaps the best example of a non-talking society’s adoption of mediation is Slovenia’s Ljubljana District Court Mediation Program, which has successfully mediated a wide variety of cases.

While mediation is not a magic bullet for the BiH judicial regime’s problems, it does have the potential to dramatically improve matters over the long term, if implemented properly and given enough time. It will reduce costs and delays for many parties, and it may help the courts begin to eliminate case backlogs. It may also improve access to justice for minorities and other vulnerable groups and, given time, it might promote the development of non-confrontational methods of resolving disputes.
III. The New Mediation Laws

Parties in BiH now have the opportunity to test the foregoing assertions. The state and Entity legislatures have passed a series of laws allowing for mediation in BiH. While ADR mechanisms are not new to this region, these laws represent a dramatic new opportunity for disputants. The laws are not perfect, and the following will detail some of the shortcomings. Nonetheless, these laws represent an important first step.

A. Yugoslav ADR History

Contrary to popular belief, alternative forms of dispute resolution are not completely new to BiH or the region. In the 1940s, following the communist consolidation of power in Yugoslavia, arbitration tribunals were formed to deal with foreign trade disputes. In the 1950s, as worker self-management became the political goal, these tribunals were replaced by a system of State Economic Courts. Yet, ADR mechanisms continued to play a role in the Yugoslav legal landscape. In 1965 for instance, the Zagreb-based Permanent Court of Arbitration at the Croatian Chamber of Economy was established to handle domestic commercial disputes. The 1974 Yugoslav Constitution explicitly provided its citizens the right to engage in mediation or arbitration. This right was further enhanced by civil procedure code provisions that allowed parties to choose their own arbitration rules. A 1978 Yugoslav Joint Venture law provided for international arbitration of disputes either in Belgrade or before a foreign arbitration tribunal. Yugoslavia was also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention). Finally, Yugoslavia was a party to the Convention on the Settlement of Investment Disputes between a State and Nationals of Other States (ICSID Convention), which provides for arbitrations in Washington, D.C. By 1990, one commentator was so impressed with the liberal laws in Yugoslavia that he suggested a merger between Yugoslavia and the (then) European Economic Community.

B. New BiH Civil Procedure Laws

After the war, other priorities kept ADR off of the legislative agenda until 2003. In that year, the Federation and the RS enacted identical new Codes of Civil Procedure (hereinafter collectively referred to as the Revised CCPs). Among many other changes, the Revised Codes introduced mediation as an explicit
option for the first time in BiH history. During the newly-created Preparatory Hearing (or earlier), judges are given the express mandate to propose mediation to the parties. The parties may also jointly propose mediation at any time prior to the conclusion of the trial. The details of mediation proceedings are to be prescribed by a separate law.

Even more interesting, Article 88 of the Revised CCPs empowers the court itself to try to persuade the parties to settle, and this includes the possible presentation of a proposed settlement solution. The law does not consider this latter mechanism to be “mediation,” but rather a court-aided effort at reaching a “judicial settlement,” which can happen at any time during the proceedings, without or without court assistance. Judicial Settlements are filed with the court and are enforceable like a judgment.

These provisions open the world of mediation and private settlement to BiH litigants. Although there was never a prohibition on parties engaging in mediation before, the legal cultural perception prohibited it. In the United States, individuals tend to feel they can do almost anything they want (every American child learns the phrase “it’s a free country”), provided there is no legal proscription. This has carried over to American litigation behavior, for better or for worse. On the other hand, in many post-communist countries, including BiH, the sentiment is the opposite; individuals tend to wait for an official mandate before they do something new. As a result, mediation in BiH required explicit, official approval before it could be introduced.

In addition, the nature of the changes brought about by the Revised CCPs further enhances the chances of mediation’s success. Under the guidance of the international community, the Revised CCPs have a strong common law flavor. For instance, parties are now explicitly required to satisfy all elements of their case or defense without any court assistance, or suffer dismissal or judgment. This represents an effective abandonment of the communist legal tradition of “material truth”, which required the court to proactively find the actual truth, regardless of the parties’ procedural shortcomings. Parties are also required to take over most direct and cross examination responsibilities, which is a shift from the former procedure that had the judge performing most of the examination. These and other rules form the basis for a change in jurisprudential philosophy. In essence, the new procedural regime is party-centered as opposed to judge-centered. This new focus on individual responsibility fits in well with the introduction of mediation, where the individual takes responsibility for dispute resolution.
C. The BiH Mediation Laws

1. Basic Provisions

In 2003, several international groups, including ABA/CEELI, Independent Judicial Committee (IJC), OHR, and the World Bank, began to assist local leaders in drafting the specific mediation law contemplated in the Revised CCPs.\(^99\) After minor revisions, BiH's first mediation law was passed in late 2004.\(^100\) Unlike the Revised CCPs, the BiH Mediation Law is a State (national) law that applies to all BiH courts, whether they are in the RS, the Federation, Brčko, or in the State Court of BiH.\(^101\)

Article 2 of the BiH Mediation Law defines mediation as a proceeding involving a neutral who assists parties in reaching a resolution of their dispute. The term “parties” is not defined. A question might arise as to whether this law then applies to a party who has not been named or served in a case, for whatever reason, but who is nevertheless involved in the dispute. The local language term used for “party” is the standard word for litigants but it can also refer to non-served or unnamed parties as well. As with the other provisions herein, there is no legislative history to assist. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation,\(^102\) which served as an important model during the drafting process, has a similar ambiguity.\(^103\) On the other hand, the U.S.-based Uniform Mediation Act (UMA),\(^104\) which sets forth a model mediation law for U.S. states, clearly defines “mediation party,” “nonparty participant” (such as experts, friends, support persons, potential parties, and others who participate\(^105\)) and “person,” among other terms.

Another question might arise as to whether the term “dispute” includes cases not yet filed, but Article 4(a) states that parties may agree to mediation before the institution of court action.\(^106\) Thus, it seems that parties are free to engage in mediation before or during court litigation. However, Article 4(a) does bar the use of mediation after the conclusion of the trial.\(^107\) This is not a significant problem since few mediations occur after trials. The Revised CCPs confirm this limitation in Article 86 and allow for an adjournment of the trial for settlement purposes only once.\(^108\)

The law provides for a default of one mediator, although parties can agree to more.\(^109\) Article 4 also repeats the provisions in Article 86 of the Revised CCPs that allow a judge to propose mediation to the parties.\(^110\) This is appropriately flexible for BiH parties.
Article 5 limits the available mediators to a list established and maintained by “the Association.” This was perhaps a legislative error because the Association was not defined in the law. Until that list and Association were established, it appeared that no mediations could take place. However, the issue was clarified in subsequent legislation enacted in the summer of 2005. The Law on Transfer of Mediation Affairs to the Association of Mediators (Second Law on Mediation) establishes that the Association of Mediators of BiH will maintain a list of approved mediators available to litigants. The Association will also maintain a fee schedule.

Interestingly, a written agreement whereby the parties indicate their willingness to mediate must be submitted to the court, if it occurs after the filing of a compliant. This may be contrary to the UNCITRAL Model, which appears to forbid a party from introducing evidence that another party was willing to participate in mediation. Under the official UNCITRAL remarks, it is noted that the proscription encourages the usefulness of mediation. Without the proscription, the indication of willingness to settle might be used against a party in a later proceeding and that potential “spillover” of information may discourage parties from trying to settle. In contrast, the UMA exempts signed agreements (such as to mediate) from its general privilege against disclosure.


Confidentiality is one of the most important parts of any mediation regime. Parties need to be able to discuss issues, compromise, and offer solutions in a manner that guarantees that what is said will not be used against them in later proceedings. Confidentiality has been called the “sine qua non of the process.” The BiH Mediation Law provides for the confidentiality of mediation proceedings in Article 7, but questions arise. It states that “the statements of parties made in the mediation may not be used as evidence in any other proceedings, without the approval of the parties.” This clear, pithy rule is probably better suited for BiH than the more complicated and equivocal provisions in the UNCITRAL Model or the UMA. However, no mention is made of documentary evidence. Could documentary evidence presented in a mediation proceeding be used as evidence in a later proceeding without the original proffering party’s consent? It depends on whether the term “statements” as used in Article 7 includes documents and other written evidence. If the legislature had meant to include documentary confidentiality, it could have
easily done so by adding a few words to that Article. One might read the first sentence of the Article, “[t]he mediation procedure is of a confidential nature,” as an intent for an expansive interpretation of the term “statements”; however, that runs counter to the plain language. This issue is crucial because the parties are obligated to submit to the mediator all relevant documentation related to the dispute.\(^{120}\)

Moreover, it is not entirely clear that views expressed or suggestions made by a party in the mediation with respect to a possible settlement are protected. Would a party’s settlement offer during separate discussions with a mediator be considered part of that party’s mediation “statements”? If not, then there does not appear to be any confidentiality protections for settlement offers or negotiations. As with documents, a party might argue that disclosure of a settlement offer runs counter to the spirit of the law, which claims that the procedure is of a “confidential nature.” BiH would be better served with a clear statement to that effect. Both the UNCITRAL Model and the UMA contain clear provisions for the confidentiality of settlement discussions.\(^{121}\) The confidentiality of settlement offers is a longstanding principle in American jurisprudence. It has undoubtedly helped create a settlement culture there. If BiH is going to create such a culture itself, this protection needs to be more clearly delineated.

The same issue arises for the confidentiality of mediator statements. Both the UNCITRAL Model and the UMA provide for the confidentiality of mediator statements.\(^{122}\) The BiH Mediation Law is silent on this. This protection is important to ensure the mediator’s candid participation and eliminate any concerns about her statements being used at trial by the parties.\(^{123}\) Again, there is general language about the confidentiality of the proceedings, but this protection should be clarified more explicitly.

While Article 7 is silent on the applicability of confidentiality to third party participants (the term is undefined), Article 16(b) provides that all participating third parties are to give written confirmation that they will adhere to the “confidentiality principle” in the mediation procedure.\(^{124}\) This is probably sufficient to protect against future third party disclosures as well as ensure full third party participation in the mediation proceedings.

The mediator must keep all information provided to her during a separate party caucus confidential unless agreed upon by all parties.\(^{125}\) This is a laudable provision that encourages parties to have a frank discussion with the mediator.
It also improves upon the UNCITRAL Model, which provides that the mediator may disclose any information to all parties, unless the party provides the information with a specific condition of confidentiality. This is a high burden to place on an unsophisticated party or a party engaged in fast-paced settlement discussions. It also opens the door to a surfeit of satellite disputes about the condition’s scope and whether it was clearly or properly delivered. The BiH law avoids these potential issues by providing for a default rule of confidentiality instead of the UNCITRAL Model’s default of disclosure.

### 3. Procedural Provisions

The BiH Mediation Law also provides a number of procedural provisions that will enhance public acceptance: all parties have equal rights; the mediator shall proceed in a neutral manner without delay; parties may be represented by lawyers; the mediator shall, at the beginning, provide the parties with a brief explanation of the goals and the procedure; the mediator may caucus with each party separately; and any party may terminate the proceedings at any time. Mediators will be subject to liability if they violate the Mediation Law. The law also provides clear and broad proscriptions against mediator conflicts of interest, which are waivable. Unfortunately, the law does not indicate that the waiver should be in writing.

Curiously, the mediator cannot propose resolution options unless a party requests this during a separate caucus with the mediator. If followed strictly, the rule would seriously limit the mediator’s effectiveness in many instances. Unsophisticated parties may not be aware that they must make this request and thus, might lose out on hearing a potential resolution option. In other cases, the fact that a party has proposed an option, as opposed to the mediator, can make a big difference in its reception, especially when the parties possess mutual distrust of each other.

If the mediation proceedings are terminated without resolution, the mediator must sign and submit to the court a written termination statement. The statement must indicate whether the termination was at the mediator’s request or a party’s request. While it is not clear from the text, it appears that the statement might indicate which party asked for the termination. Moreover, it does not prohibit any additional commentary that the mediator might wish to make, such as whether a party engaged in “good faith” negotiation or whether a party had been “the problem” in failing to reach a settlement. This is potentially problematic since the court would then be in a position to punish the seemingly difficult party.
If the mediation is successful, the parties and mediator are required to draft and sign a written settlement agreement *immediately*. They are also required to submit the settlement agreement to the court. This raises potential confidentiality concerns if the agreement becomes part of the public record. If a party knows that some embarrassing terms of a potential settlement might be accessible to the general public, the party might not want to settle. On the other hand, the vast majority of judgments in BiH are not published, particularly at the first instance level, and any interested third party would need to petition the court for approval to access the file and judgment papers. Certain categories of cases, such as domestic relations or juvenile matters, are further restricted. Under current BiH judicial conditions, this filing requirement for settlements should not deter many parties.

More importantly, the filed settlement agreement has the “force of a final and enforceable document.” Thus, a mediated settlement can be enforced in the same way as a judgment or a “judicial settlement.” This is the most significant aspect of the BiH Mediation Law. Before this, mediated settlements would be mere contracts that would require filing a breach of contract lawsuit to enforce. Now, a party can simply petition the enforcement division for action. Parties can now settle disputes with the confidence that enforcement will be much faster. This will do more to encourage mediation than any other provision in the laws.

While this automatic enforceability provision will be the most salient factor in promoting mediation in BiH, a few related concerns are worth noting. There appears to be no court review of the mediated settlement—it automatically becomes an enforceable document when it is submitted to the court. While this is expeditious, it carries the potential for awkward results. A mediated settlement agreement could contain a provision that is contrary to public policy and the enforcement division of the court would then be charged with enforcing such a provision. A second concern relates to *stare decisis*. Does a court judgment arising from a mediated settlement form any kind of legal precedent in BiH? The answer is unknown but should be clarified. This concern is perhaps less significant in BiH’s hybrid common/civil law jurisdiction where precedent currently has a limited foundation. Nonetheless, it could become more important in the future. Many civil law jurisdictions now recognize the binding or persuasive quality of precedents in practice.

One final open question relates to pre-litigation dispositions. If the mediation settlement occurs *prior* to the filing of a complaint, what is the legal effect of
that settlement agreement? The law seems to intend for such settlements to have the same effect as others.\textsuperscript{147} However, there is no court to which the parties can submit the settlement, as required under Article 26, so perhaps Article 25’s automatic enforceability provision might not apply.\textsuperscript{148} If so, the Mediation Law would have the perverse effect of increasing the judiciary’s caseload by encouraging parties to file suit (so as to qualify for the automatic enforceability provisions) instead of settling matters beforehand.

Although imperfect, the new mediation laws represent an important first step. On balance, they will effectively promote mediation as an alternative to court litigation. They will provide most parties with an officially sanctioned opportunity to resolve their disputes more creatively, more quickly, and more satisfactorily. With some important revisions, these laws can potentially have a significant impact on the BiH legal culture.
IV. The Future of Mediation in BiH

By all accounts, the future looks bright for mediation in BiH. In 2004, the World Bank (through its IFC Group—International Finance Corporation) established the first pilot mediation program in Banja Luka. By late 2005, the program reported an impressive sixty-seven percent settlement rate.¹⁴⁹ It also found that ninety-six percent of the participants would use mediation again and eighty-seven percent would be willing to pay for future mediation proceedings.¹⁵⁰ Due to the first program’s success, the World Bank/IFC established a second pilot program in Sarajevo.¹⁵¹ In June 2008, after having mediated over 600 cases, the program reported an overall success rate of 55%.¹⁵² In addition, the U.S. Federal Mediation and Conciliation Service reports that mediation projects have been undertaken in power and transportation matters.¹⁵³ The Brčko District has also created its own court-annexed mediation program.¹⁵⁴ While this demonstrates that BiH may be fertile ground for mediation, a number of recommendations are in order before mediation can be become fully integrated into the legal landscape.

A. Statutory Revisions

The first set of recommendations relates to statutory changes. As mentioned above, there are a few important amendments that would greatly improve the BiH Mediation Law. The law should clearly define “party” so that litigants understand the extent of the law’s application.¹⁵⁵ It is advisable that the definition of party include those individuals or entities who have been named but not served, as well as those (perhaps by consent) unnamed but with a direct stake in the dispute.

Some important confidentiality provisions also need to be improved.¹⁵⁶ The confidentiality of documents, not just oral statements, needs to be protected. One way is to rewrite Article 7(a) and follow the simple UNCITRAL Model language, “all information relating to the conciliation proceedings shall be kept confidential . . . ”¹⁵⁷ This would also guarantee the confidentiality of mediator statements during the process, which is not currently addressed in the BiH Mediation Law.

The confidentiality of settlement discussions in mediation proceedings must be further clarified.¹⁵⁸ While the best interpretation of the current law may be that settlement discussions or offers are indeed included within the definition
of a party’s protected mediation “statements,” it is advisable to make this
more explicit. The best way to do this is to adopt the UMA’s approach and to
provide an expansive definition of “mediation statements.” The UMA defines
confidential mediation communication as, “a statement, whether oral or in a
record or verbal or nonverbal, that occurs during a mediation or is made for
purposes of considering, conducting, participating in, initiating, continuing,
or reconvening a mediation or retaining a mediator.”159 The BiH law could
use this and add to the end, “including all statements relating to settlement
discussions.”

The legislature should also consider a few important changes to the procedural
provisions. The law should require conflict of interest waivers to be in writing.160
In addition, it should more narrowly limit the contents of the mediator’s
termination submission to the court.161 This could be accomplished by adding a
few words to Article 19(d) clearly limiting the content of the submission to “the
belief on the part of the mediator that any further proceedings are not useful.”
The BiH Ministry of Justice or HJPC could develop a mediation termination
form for use in all courts, containing standard, straightforward language that
would simply require a signature and identification of parties, case numbers
and dates. When combined with a provision requiring all mediators to use the
form, parties will be sufficiently protected against prejudicial submissions.162

More importantly, the law must be amended to allow mediators to offer
settlement options, *sua sponte*.163 The current language unduly restricts
mediators to a very limited, facilitative role, unless one of the parties requests,
during a separate interview, that the mediator propose resolution options.164 An
amendment could be made by striking the first part of the sentence in Article
23(a), which states “Upon the request of a party, brought up during a separate
interview, the mediator may propose options . . . “ This would eliminate the
need for the mediator to wait for a party to request that she propose solutions
and instead allow mediators to tailor the roles they play to the needs of the case.
Ultimately, it would improve the settlement rate.

Regarding the automatic enforceability of settlement agreements, the legislature
should consider adding an article providing for a court approval requirement of
mediated settlements before they receive the Article 25 automatic enforceability
characteristics. This would protect the system from the anomalous instances
whereby they are charged with enforcing a provision that is contrary to public
policy.165 The current rule not only allows for potentially awkward results, but
is also inefficient. Currently, a case may be dismissed based on a settlement that
is only reviewed years later and found to be contrary to public policy—after one party breaches and claims this as a defense to enforcement. As a result, the parties might end up back in court disputing the enforcement issues, the original issues, and, perhaps, hold an additional claim against the mediator. Furthermore, in some cases, the current rule will not protect public policy at all. There is no guarantee that the offending agreement will ever be breached. A case might be dismissed based on settling parties agreeing to, for instance, involuntary servitude. If the agreement is never breached, the courts have lost any control over the matter. This is not an effective or efficient method of protecting public policy.

With the proposed approval requirement, the presiding court could raise any public policy issues immediately after settlement, thereby allowing for a better chance of agreement revision, as opposed to dealing with it in an adversarial disposition potentially years later. This proposal is not without local precedent. The BiH Revised CCPs provide for court review of “judicial settlements,” and the court has the power to strike all or part of those settlements.

Finally, Article 25 should be amended to clarify whether a pre-litigation, mediated settlement is entitled to automatic enforceability. Some well-run jurisdictions do provide for different treatment depending on whether a case has been filed. However, as mentioned above, this creates an incentive to sue. That could significantly raise the costs of settlement. Since BiH parties face relatively high legal fees, this is an unwarranted burden. Furthermore, the BiH court system is already struggling with inefficiency and a significant case backlog so this incentive to sue would add to these problems. Given the foregoing, the better rule in BiH would be to allow for all mediated settlements to enjoy the automatic enforceability provisions. This was probably the intended rule anyway. Accordingly, Article 25 should be clarified with the following language: “[t]he settlement agreement referred to in Article 24 of this law, whether reached before or after the initiation of court proceedings, shall have the force of a final and enforceable document.”
B. Implementation Strategies

Despite the assumptions built into many legal reform projects, new laws in and of themselves are not the solution. Therefore, another set of recommendations relates to implementation strategies. First, there will need to be extensive training for the mediators. The BiH Association of Mediators (AoM) has a strong general training program in place. However, in BiH some parties may expect subject-matter expertise from mediators. Therefore, the standard training program will have to be augmented with specialized training in areas such as drafting settlement agreements or in specific legal subjects like property disputes arising from the war or personal injury. In addition, it may be useful to recruit mediators from the ranks of certain industries like mining, insurance, or organized labor and then provide them with specialized training.

The AoM would be well-served by developing a long-term training plan that moves beyond the general standardized mediation training and incorporates the foregoing strategy. International donors may be more willing to fund specific training programs (labor-management mediation, for instance), if presented with a strategy that identifies clear, targeted benefits, like the reduction of industrial strikes. In any case, all training modules should focus, as much as possible, on interactive role-playing and skills development and avoid over-reliance on lecture, theory, and law. The IFC’s BiH Action Plan appears to incorporate many of these ideas.

Second, sitting trial court judges will need to be trained on how to identify appropriate cases for mediation and encouraged to make the suggestion to parties. They will, in essence, be the gatekeepers. In the short term, parties are not likely to suggest mediation to each other for two reasons. First, their lawyers may be unfamiliar with mediation and second, a suggestion of mediation might be taken as a sign of weakness. Therefore, it will be incumbent on the judges to take proactive steps to refer cases to mediation.

The IFC’s BiH Action Plan includes a provision for judge training. It also includes a provision to incentivise mediation with judge awards. It is unclear how successful this creative idea will be but it is worth a try. The judges could also be given an incentive by creating internal provisions that favorably count mediated settlements in the statistical tracking mechanisms.

Third, the attorneys will need extensive training on the advantages of mediation and how to participate. In 2004, the ABA held a number of single
day awareness events for attorneys, but this is only a beginning. Initial follow up training modules should focus, in part, on how mediation can work in favor of attorneys’ pecuniary interests. Bar associations like the ABA may be best positioned to work with the BiH bars on this. Attorneys need to be convinced that mediation is not a threat to their livelihood. If they are not convinced, they will shun mediation and prevent it from gaining further acceptance. The official attorney tariff might be amended to provide for contingency fee agreements or other creative arrangements. These agreements could provide attorneys with a stronger financial incentive to settle cases. At present, such agreements are not allowed but there are relevant future efforts planned.

Another way to improve acceptance is to initially recruit mediators from the ranks of the bar associations. Once convinced, attorneys need to learn how to participate effectively in mediation (i.e. compromise) and how to advise their clients. It is encouraging that the BiH Action Plan also includes a focus on lawyer training.

Fourth, the BiH law schools might consider developing textbooks and teaching materials on mediation. Law faculties might even consider making mediation (or ADR generally) a mandatory course for all students. The law students represent the future of the judicial system and they are more likely to embrace novel concepts like mediation than sitting judges or practicing attorneys. There are many U.S. law school mediation courses available for consideration. One idea would be to obtain international funding for the placement of an American professor at each of the six BiH law faculties. In addition to teaching a mediation/negotiation class, the professor might provide training for a local professor to take over the class in the future.

Fifth, special care should be taken with regard to commercial disputes. While the World Bank believes that commercial disputes have the greatest mediation potential, there remains a problem with settlement authority. In the BiH pilot commercial mediation sessions, company representatives were often mid-level managers who did not have ultimate settlement authority and were reluctant to compromise, perhaps out of fear that upper level management would disapprove of any concessions. Future training efforts should sensitize companies to this issue and promote the in-house decentralization of settlement authority. In addition, the legal community should be careful not to promote mediation as a solution only for commercial disputes or business people. Mediation has great potential in many different kinds of disputes. The Slovenia mediation program reports a higher settlement rate with domestic relations
cases than with commercial cases and at least one-half of the mediated cases in the World Bank’s pilot program were non-commercial disputes.

Sixth, ethnic divisions will have to be considered. As mentioned above, mediation may be effective in addressing ethnic issues. Because of their recent war experience, many BiH citizens may have difficulty accepting a member of a different ethnic group as truly neutral and objective. Judges and attorneys will have to take this into consideration when contemplating mediation. One way to address this is to have the AoM provide parties with the opportunity to conduct a brief interview of potential mediators so that they can ask personal questions and assuage their concerns about bias or prejudice. In cases of cross-ethnic disputes, the AoM might suggest a mediator that is a member of the third major ethnic group. This might require the AoM to recruit mediators from all three ethnic groups to be available in each region. Mediation may also have non-litigation applications in ethnic relations issues and these opportunities should be explored.

Seventh, potential litigants will need to be informed of mediation through a general public awareness campaign. If people understand that mediation is an option, they are more likely to request it from their attorneys and courts. However, any campaign needs to carefully craft the message for this culture. Public promotions should emphasize cost and time savings. Promotions should avoid emphasizing the degree of personal involvement in the mediation process, because BiH citizens feel more comfortable with the idea that disputes are best resolved by the fiat of an institutional decision maker, not through personal negotiation. The BiH Action Plan targets resources for this.

Finally, mediation has to be given sufficient time to develop. It took decades to develop in the United States and proponents cannot expect a quick adoption in BiH. With the new CCPs and the various international projects underway, the entire BiH judicial landscape is already changing at near revolutionary speed. Judges and lawyers need time to learn about the changes, digest them and acquire the necessary skills. Only then will they be in a position to fully and confidently embrace mediation. A culture of individual-centered responsibility may begin to develop, and mediation will both benefit and assist in this transformation.

Accordingly, local and international assistance providers need to develop long-term strategies. They should commit to at least five years’ financing for the training and public education initiatives. A collaborative approach involving
the World Bank, the United States, and the European Union would be most effective, since it would expose local professionals to many different kinds of mediation approaches. This time period would provide the opportunity to expand the initial World Bank pilot project to other cities in a measured fashion. Specific provisions should also be made for international assistance in statutory reform. The revisions should not be left to those with limited mediation knowledge and experience, and should utilize international experts well-versed in ADR.

Mediation should also be better integrated into other long-term assistance efforts and not be seen as merely a stand alone project. Human rights programs that focus on legal NGOs or improving access to justice should include funding for mediation training. Programs that seek to improve minority or gender equality could also explore mediation as a means of achieving such goals in a more expedited and creative fashion. Minority return programs could focus on mediation as a way of resolving property and other disputes outside of the formal court system. Target industries, like insurance, banking, utilities, or mining, might consider obtaining private loans or grants to focus on establishing permanent mediation boards for labor/management and other disputes.

V. Conclusion

The complex BiH court system suffers from serious problems and does not meet the needs of BiH society. Mediation, while not a panacea, may eventually contribute to judicial efficiency, reduce exposure to corruption, improve access to justice, and could, given the right circumstances, help develop an ethic of compromise-based dispute resolution and ultimately, help strengthen democracy through improved civic engagement.

For mediation to have such an impact, it will need the right legal framework, the right training regime, and most importantly, enough time. The new Mediation Laws and Civil Procedure Codes are excellent first steps, but they need important revisions. They also need to be supported by creative, long-term implementation strategies that promote mediation at all levels of the judiciary and support public engagement with this process. The IFC’s Action Plan and the BiH MOJ’s Justice Sector Reform Strategy represent excellent plans which address many of the implementation needs. Now those plans need to be implemented.194
American Bar Association/Central and East European Law Initiative, Judicial Reform Index, Bosnia and Herzegovina, 6-9 (2001) [hereinafter ABA/CEELI JRI]. ABA/CEELI, now called ABA ROLI, is a public service project of the American Bar Association that advances the rule of law in the world by supporting the legal reform process throughout the world. ABA/CEELI had an office in BiH from 1995 to 2008. More information about ABA/CEELI is available at http://www.abanet.org/ceeli/home.html. The Judicial and Prosecutorial Training Centers have mandated that all BiH judges receive four days of continuing education each year. This is a good start. In addition, there are a number of programs funded by CIDA (Canadian Intl. Dev. Agency), USAID, Council of Europe, the European Union, and others that focus on helping the Entity Judicial and Prosecutorial Training Centers develop greater capacity for future programming.

Id. at 15.

Id. at 16. ABA/CEELI considered this to be a “significant impediment to judicial efficiency.” Id. Most courts also lack appropriate office equipment and computers. Id. at 32. The European Commission found that “[w]ith some very limited exceptions, the level of funding for the courts is inadequate and a significant impediment to judicial efficiency. Some courts do not have sufficient funding to pay for basic services such as electricity, heating, telephones or postage, and these services are frequently cut off for failure to pay the bills.” European Commission, Functional Review of the BiH Justice Sector 63 (March 2005), available at http://www.delbih.cec.eu.int/en/reviews/Mof_report_PDF/justiceoverview.pdf [hereinafter European Commission].

European Commission, supra note 3, at 73. HIPC, supra note 4 at ch. 6.2.1. The HIPC calculated a total of over twenty-two million KM (fifteen million dollars) in accumulated court debt as of the start of 2004, which was twenty-seven percent of the courts’ total annual budgets. One reason for the large debts is that the courts had to pay for large increases in judge and prosecutor salaries. Because their budgets did not increase, the courts paid these salaries from other budget line items for operational expenses, and these other expenses then went unpaid. European Commission, supra note 3, at 63.

The official case filing and tracking systems are not very useful. ABA/CEELI JRI, supra note 1, at 31. However, this dearth of quantitative data on judicial efficiency is common for a developing judicial system. See Maria Dakolias, Court Performance Around the World: A Comparative Perspective, 2 Yale Hum. Rts. & Dev. L.J. 87, 89 (1999).


Id. at 31-33 (referencing 2002 figures).


An example of the massive legal changes can be seen in the 2005 OHR Mission Implementation Plan. There, OHR identifies the following legal changes for 2005: “Establish modern civil, commercial, and criminal codes and procedures, measures for the security of judges and witnesses, regulations for administrative disputes, plus laws governing obligation and enforcement of civil judgments. Additionally, proper appellate procedures and addressing complex trans-border or cross-Entity criminal matters, such as illegal immigration and money laundering, will be put in place.” Office of the High Representative, OHR Mission Implementation Plan, task 1.1 (Mar 7, 2005), available at http://www.ohr.int/ohr-mbo/ohr-mip/default.aspx?content_id=34144.

In most courts, only the presidents and department heads receive copies of the official gazettes, which is the only place the text of the laws are published. ABA/CEELI JRI, supra note 1, at 32-33.

Laurence Dakolias, supra note 9, at 185-87.

ABA/CEELI JRI, supra note 1, at 24.

Id. at 25.

World Bank Survey, supra note 7, at 37-38.

Id. at 37.

Amazingly, the survey found that after the tripling of judges’ salaries, the prevalence of unofficial payments at courts increased by roughly sixty percent. Id. at 40-41. See also Rougeux, supra note 9, at 185-89.


See, e.g., Rougeux, supra note 9, at 179, 185-90. The BiH courts’ inefficiency may actually contribute to their corruption by increasing incentives to “speed up the process through extrajudicial methods.” Id. at 188. For a general discussion on the relationship between property rights and economic development, see Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (Basic Books 2000).

World Bank Survey, supra note 7, at 48-49.

See Dakolias, supra note 6, at 88.


Many international efforts are underway to improve the judicial system in BiH. For instance, the international community helped the BiH adopt a new civil and criminal procedure code that has radically changed the manner in which court proceedings occur. These new codes have common law adversarial aspects, streamlined pre-trial procedures and strict time limits for cases. See infra note 31.

Some countries use the term ‘conciliation,’ but in general, conciliation and mediation refer to the same process. See infra note 31.


In contrast, "arbitration" involves a neutral ruling on some or all of the contentious matters, which can either be binding on the parties or non-binding.

Most mediation programs in developing countries are not officially connected with courts. But see Slovenian court-annexed Ljubljana District Court Mediation Program, infra note 75.


Id. at 15.

However, the report authors caution that a "direct empirical link has not been established." Id.

HJPC, supra note 4, at ch. 1(a). The HJPC also stated that mediation "may prove to be an efficient way of reducing the number of cases coming before the courts in the future." Id.

Attorneys’ fees are standardized and they had been raised so high that a recent law was passed in the Federation that limits legal fees for the average monthly salary in the Federation, Zakon o Izmjeni i Dopuni Zakona o Advokaturi Federacije Bosne i Hercegovine [Amendment to the Law on Attorney’s Profession], 18 Službeni Glasnik Federacije Bosne i Hercegovine, art. 31 (2005). In the World Bank survey, only one in four respondent firms assessed BiH courts as ‘affordable.’ BiH was ranked the sixth least affordable court system in Europe and Eurasia. World Bank Survey, supra note 7, at 55.

This is because it often involves lower filing and administration fees, streamlined procedures, and sometimes by-passes lawyer representation requirements altogether. ADR Guide, supra note 34, at 16-17.

Id. at 12-13. Referencing studies of mediation programs in Sri Lanka, Bangladesh, and the United States for evidence that users often prefer mediation over litigation because of the flexible and creative solutions available.

Id. at 11. A mediation case study in Bangladesh indicates that it may also counteract discrimination and bias against minorities in the courts. However, there are also arguments to the contrary. Id. at 14.

Id. at 12. This is important for a society like BiH, which places a high premium on personal relationships in business.

A corrupt mediator, however, might still be able to coerce a party into settling through subterfuge or duress.

ADR Guide, supra note 34, at 13, app. B. Sri Lanka Case Study, Bangladesh Case Study.


Alkon, supra note 31, at 354.

See World Bank Survey, supra note 7, at 49.

See, e.g., ADR Guide, supra note 34, app. B. Sri Lanka Case Study, Bangladesh Case Study. In addition, "user satisfaction is often an indirect proxy for more focused issues like cost, access and delay." Id. at 12.

Id. at 11, 17-18, app. B. South Africa Case Study.

Id.

Id. at 18.

Id.

Id.

Id. at 11, app. B. South Africa Case Study.

Id. at 18. In the Philippines, mediation is being used to manage land reform issues and in Ukraine, it is being used to “manage economic restructuring issues in the mining and steel industries.”

This is to be expected in a society that emphasized the primacy of the collective.


Haynes, supra note 56.

Although there are no current statistics, anecdotal evidence indicates that BiH practitioners rarely compromise claims by settling cases out of court.

In many post-communist societies, there is a desire to “shift individual responsibility to an omnipotent patriarchal social father.” Dusan Ondrusek, The Mediator’s Role in National Conflicts in Post-Communist Central Europe, 10 Med. Q. 243, 247 (1993). The problem of lack of personal responsibility in BiH is even more acute than in neighboring post-communist countries. Because of BiH’s unique history, most important decisions were made exogenously by foreigners. For hundreds of years, BiH was part of the Turkish Ottoman Empire and important governance decisions were made in Istanbul. In the nineteenth century, when BiH become part of the Austro-Hungarian Empire, control shifted to Vienna. In most of the twentieth century, decisions were made in the Yugoslav capital, Belgrade (in Serbia). Following independence, NATO essentially forced an end to the BiH civil war. Since then, the UN-sponsored OHR has controlled the governance process. As a result, BiH citizens have had little responsibility or experience truly governing themselves.

Mediation can help in post-conflict societies like BiH. Nancy Erbe, The Global Popularity and Promise of Facilitative ADR, 18 Temp. Int’l & Comp. L.J. 343 (2004); Haynes, supra note 56, at 275-80. Relative to the survival of BiH as a state, see Timothy Waters, Contemplating Failure and Creating Alternatives in the Balkans: Bosnia’s Peoples, Democracy, and the Shape of Self-Determination, 29 Yale J. Int’l L. 423 (2004), for an argument that BiH is a de facto failed state and that de jure partition should be considered. See also ADR Guide, supra note 34, app. B, South Africa Case Study.


Haynes, supra note 56, at 258.

ADR Guide, supra note 34, at 10 (referring to programs in South Africa, Bangladesh, and elsewhere).

These tribunals eventually developed a near jurisdictional monopoly over disputes between parties from communist countries and handled many of the international disputes involving parties from capitalist countries. Samuel Pisar, The Communist System of Foreign-Trade Adjudication, 72 Harv. L. Rev. 1409, 1411 (1959).


In 2004, ABA/CEELI assisted in this effort by sending ten BiH enforcement judges and administrators to Slovenia to study that system and determine if any parts of the Slovene model could be adopted in BiH.

Yugoslav laws are quite amenable to the resolution of disputes through the arbitration process. "Yugoslavia is a party to numerous arbitration conventions, including the Geneva Convention of 1927, the Geneva Protocol of 1923, the European Convention of 1961, and the Washington Convention of 1965." Id. at 799. While it might be unfair to speculate on how realistic such a proposal was, it is worth noting that Yugoslav violent disintegration began only one year after this article was published.

Pisar, supra note 77, at art. 86(b).

"Yugoslavia is presently in a good position to join the European Economic Community." Matthew M. Getter, "Yugoslavia is a party to numerous arbitration conventions, including the Geneva Convention of 1927, the Geneva Protocol of 1923, the European Convention of 1961, and the Washington Convention of 1965." Id. at 799. While it might be unfair to speculate on how realistic such a proposal was, it is worth noting that Yugoslav violent disintegration began only one year after this article was published.

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104 Uniform Mediation Act (amended 2003), note 100, ¶ 7; Diaz & Oretskin, supra note 100, at 797.

105 UMA, supra note 102, at § 2(4) cmt. 4.

106 BiH Mediation Law, supra note 98, at art. 4(a)

107 Id.

108 Revised CCPs, supra note 86, at art. 86, 112.

109 BiH Mediation Law, supra note 98, at art. 3.

110 Id. at art. 4.

111 Id. at art. 5.

112 Zakon o Prijenosu Poslova Medijacije na Udrugu Medijatora Bosne i Hercegovine [BiH Law on Transfer of Mediation Affairs to the Association of Mediators], 52 Službeni Glasnik Bosne i Hercegovine (2005). The mediator must have a university degree and have completed the Association’s training program or another recognized program. BiH Mediation Law, supra note 98, at art. 31.

113 BiH Mediation Law, supra note 98, at art. 30. Parties are to split mediation costs that are payable to the Association in equal parts, unless otherwise agreed. Id.

114 Id. at art. 4(c), 13. The agreement to mediate must include the following information: information about the parties to the agreement, their legal representatives, a description of the dispute, a statement of acceptance of the mediation principles found in the Mediation Law, the place of mediation and the fee structure. Id. at art. 11.

115 UNCITRAL Model, supra note 100, at art. 10(1)(a).

116 UNCITRAL Model Guide, supra note 100, ¶ 64

117 UMA, supra note 102, § 6(a)(1). See also id. § 6(a)(1) cmt.2. In practice, most settlement agreements in the U.S. contain some form of confidentiality provision whereby the parties promise not to disclose the contents, except under limited circumstances. These provisions though are subject to evidentiary and public policy needs that might override the parties’ private confidentiality agreement. Id. And, the mere fact that a person attended the mediation is not confidential. Id. at § 2(2) cmt.2. However, the UMA does provide confidentiality protections in the case of communications “made for purposes of considering … initiating, continuing, or reconvening a mediation or retaining a mediator.” UMA § 2(2).


119 BiH Mediation Law, supra note 98, at art. 7(a).

120 Id. at art. 17. This expansive production requirement is probably useful for most disputes, since it encourages candor, but it might be impractical for larger, document-intensive cases. Perhaps, the mediator and the parties could informally agree to waive this provision in the interests of judicial efficiency, although there is no opt-out provision that allows parties to modify these rules. In contrast, the UNCITRAL Model provides for opt-outs to any provision and the UMA provides for written opt-outs of the confidentiality provisions. UNCITRAL Model, supra note 100 at art. 3.

121 UNCITRAL Model, supra note 100, at art. 10 (3)(b); UMA, supra note 102, at ¶ 4.
122 UNCITRAL Model, supra note 100 at art. 9-10(d); UMA, supra note 102, at § 4(b)(2).
123 UMA, supra note 102, at § 4(b) cmt. 4(a)(3).
124 BiH Mediation Law, supra note 98, at art. 16(b).
125 Id. at art. 7(b).
126 UNCITRAL Model, supra note 100, at art. 8. The UNCITRAL Model comments to art. 8 indicate that during the drafting process, “the suggestion was made that the party giving the information to the conciliator should be required to give consent before any communication of that information may be given to the other party. . . . That suggestion was ultimately not adopted, notwithstanding the recognition that such a practice was widely followed with good results in a number of countries . . .” UNCITRAL Model, supra note 100, Comments, ¶ 59.
127 BiH Mediation Law, supra note 98, at art. 8.
128 Id. at art. 9.
129 Id. at art. 20.
130 Id. at art. 15.
131 Id. at art. 18.
132 Id. at art. 21. This is the “yes-talk” provision. Luis M. Diaz, Yes-Talk Rule Prevails Over Non-Talk Rule in Mediation, in International Business Litigation and Arbitration 2004, at 427 (PLI Litig. & Admin. Practice Course, Handbook Series, Order No. 110-00P0, 2004).
133 BiH Mediation Law, supra note 98, at art. 19(a).
134 Id. at art. 27.
135 Id. at art. 28-29.
136 Id. at art. 32. In contrast, in the United States, mediators often propose settlement ideas, sua sponte.
137 Id. at art. 19(d).
138 In practice, a professional, thoughtful mediator is unlikely to prejudice a party (and the mediator’s reputation) by purposefully assigning blame. As with the BiH Mediation Law, the UNCITRAL Model does not provide disclosure protections. In contrast, the UMA does provide strict limitations on mediator reports. UMA, supra note 102, § 7 and Comments thereto.
139 BiH Mediation Law, supra note 98, at art. 24.
140 Id. at art. 26; Revised CCPs, supra note 86, at art. 90. This might limit mediators to those who are capable of drafting or at least understanding settlement agreements.
141 ABA/CEELI IRI, supra note 1, at 29.
142 Id.
143 BiH Mediation Law, supra note 98, at art. 25.
144 In theory, the trained, approved mediator would try to ensure that this does not happen. However, the mediator does not have the experience or resources of the court.
145 Since this question opens the door to a much larger debate about the role of stare decisis in BiH, the author will not offer guidance on this and instead prefers to defer to the legal evolutionary process under way.
147 A strong argument can be made that art. 25 is unequivocal in that all settlements made under this law enjoy automatic enforceability. Furthermore, Article 23(1) of the Law on Enforcement states “[e]nforceable documents are the following . . . other documents prescribed by law as an enforceable document.” Zakon o Izvršnom Postupku Republike Srpske [Law on Enforcement Procedure of the Republika Srpska], 59 Službeni Glasnik Republike Srpske (2003); Zakon o Izvršnom Postupku Federacije Bosne i Hercegovine [Law on Enforcement Procedure of the Federation of Bosnia and Herzegovina], 32 Službeni Novine Federacije Bosne i Hercegovine (2003) [hereinafter collectively referred to as the Law on Enforcement].
148 Given this possibility, a cautious attorney might advise her client to file a complaint prior to the mediation just to ensure enforceability of the settlement. Of course, the very act of filing may reduce the chances of settlement between the parties. If pre-litigation, mediated settlements do enjoy automatic enforceability, the pre-litigation, non-mediated settlements clearly do not receive such privileges. This creates an incentive for pre-litigation disputants to utilize mediation, even if they think they can resolve matters without a neutral party.
152 Center for Effective Dispute Resolution, Action Plan for Developing Mediation in Bosnia and Herzegovina, 3 (June 2008). [hereinafter BiH Action Plan]. The Action Plan was developed by CEDR as part of the IFC mediation assistance program in BiH and is envisioned in the Justice Sector Reform Strategy created by the BiH Ministry of Justice.
155 See discussion supra.
156 Id.
158 See discussion supra.
159 UMA, supra note 102, § 2(c).
160 This change could be achieved by simply inserting “in writing” into the text of Article 29. See discussion supra.
161 Id.
162 An alternative would be to adapt the more complicated UMA provisions that limit the authority of mediator disclosures to an authority. See UMA, supra note 102, § 7.
163 See discussion supra.
164 BiH Mediation Law, supra note 98, at art. 23.
165 Article 21 of the Entities’ Law on Enforcement recognizes the CCP proscriptions against party dispositions contrary to public policy. Law on Enforcement, supra note 145, at art. 21.
Unless law enforcement subsequently becomes involved.

See, e.g., UNCITRAL Model Comments, supra note 100, ¶ 90, referencing divergent Australian enforcement rules for mediated settlements in connection with a pending case and those settlements without a pending case.

See discussion supra.

See supra note 38.

See supra note 145 and accompanying text.

Pre-litigated, mediated settlements would not have the immediate court supervision proposed above for settlements made during litigation. The legislature might consider making provision for these settlements to be submitted immediately to a court for review prior to automatic enforceability. This would provide the same benefits as for those settlements made during litigation. However, it would carry the additional administrative burden of court involvement when there was none before. It would also raise settlement costs for the parties.

The South African mediation training programs might be a useful model for a BiH labor-management program. See ADR Guide, supra note 34, at app. B, South Africa Case Study.

In addition, the BiH Action Plan includes a pilot program to resolve utilities disputes through mediation. Id. at 14-15. Construction disputes are also targeted. Id. at 26.

Id. at 20-21.

Id.

Unfortunately, BiH judges have an informal quota of cases to resolve each month. See ABA/CEELI Rule of Law Program in Bosnia and Herzegovina, http://www.abanet.org/ceeli/countries/bosnia/program.html.

Program report of the ABA/CEELI Rule of Law Program in Bosnia and Herzegovina, supra note 1, at 31. If mediated settlements are counted in the same way as a full judicial disposition, judges will find it to their benefit to suggest mediation so as to more easily reach their quota.


BiH Action Plan, supra note 150, at 18.

Attorneys have the flexibility in their schedules to handle mediations from time to time. There will not be enough initial demand for a practitioner to make a living mediating full time. Of course, mediators need not be attorneys.

BiH Action Plan, supra note 150, at 18-20.

Domestic relations cases had a 61.4% success rate and commercial cases had a thirty-nine percent success rate. Slovenia ADR Program, supra note 75, at 5.

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Mehmed Hadžić

Mediation in Labor Disputes in Legislation of Bosnia and Herzegovina
Summary

Methods of negotiation, compromise and cooperation between social partners in the labor system, inter alia, also include mediation in which, in addition to the parties in dispute, a third, neutral, professional, and impartial party is also present, whose role is to assist in resolving the existing dispute, but also to build relationships which can consequently prevent occurrence or continuation of dispute situations. While there are various terms for consensual methods of labor dispute resolutions, such as conciliation or mediation, that may often stand for various types of proceedings, they are fundamentally affiliated with the fact that parties themselves reach a peaceful dispute resolution with assistance of mediation.

Labor relations are one of the first areas in which amicable dispute resolution has been spread, because the parties are able to achieve a resolution by changing perception which brings stability in labor relations.

Key terms: labor dispute, mediation, mediator
Introduction

In its substance, labor legislation is generally associated with three elements: (1) individual and collective rights in relation with and arising of labor, (2) exercise of rights in relation with and arising of labor, (3) protection of rights in relation with and arising of labor. Relevant elements of exercise and protection of rights in relation to labor rely on:

- Protection forms (internal and external),
- Protection authorities (employer, court, alternative authorities, administrative and inspectorate authorities, representatives of labor),
- Two-tier decision-making (a principle aiming at more objective approach in the procedure of exercise and protection of rights arising of labor),
- Legal remedies (regular, special) and
- Protection procedure (labor law, litigation, administrative, alternative)

Protection of rights arising of labor relations can be initially observed in terms of the employee role in exercising labor rights. In that light, the protection can be divided in preventive and restitutive, or restoring protection. In the preventive protection, the employee is a passive subject, since its status entitles him to acquire and exercise labor rights contained in the national protection legislation, collective agreements, or in heteronymous and autonomous sources of labor law\(^2\). In restitutive\(^3\) or restore\(^4\) protection, the employee has an active role in protection of his/her rights arising of and in relation to labor. Namely, the employee has to initiate a protection procedure of already established rights he/she is entitled to.

Depending on circumstances, procedure, and form of its exercise, the protection can be divided in: (1) internal (in the environment including an employer) and (2) external (excluding an employer).

(1) Internal protection of rights arising of labor initially depends on type of the employer, with whom an employee exercises his/her rights and duties. Since the laws on labor set forth that employer may be either a legal or natural entity for whom an employee shall perform specific activities, the internal protection is associated with: companies, institutions, natural and legal entities, international organizations, civil service, craftsmen, tradesmen, and independent professions and activities.
Therefore, the notion ‘employer’ in labor legislation means a variety of working environments, which moving from specific to general, affects the system of internal protection rights.

(2) Protection of rights arising of labor relations in the working environment with no employer, as the employee rights may be breached in various ways, i.e. by numerous actions and events, or failures, in the labor law is associated with: a) judicial protection, b) alternative - extrajudicial protection related to conciliation, arbitration, mediation, c) administrative protection by inspection oversight, and d) collective action of employees (strike).

The protection of rights arising of labor relations is indisputably an important element of the labor legislation, because it has the highest significance from the employee’s point of view. This is particularly obvious on occasions when employees cannot exercise established rights and interests. In these situations, the role of labor legislation is exclusively measured in relation to the degree, results of exercising and protection of rights in relation with and arising of labor. Therefore, the labor legislation appears as an instrument of protection of individual and collective rights in relation with and arising of labor, while its essence is reduced to manners of voluntary exercise or to legal instruments of enforcement of only “legally protected rights and interests”. Thus, as in some other legal fields, the labor legislation comes from the fact that it is not sufficient to be entitled to a right, but it is more important to efficiently exercise the protected right, either in voluntary or enforceable manner. Lately, the need to resolve conflict situations in relation with and arising of labor led to increased use of alternative dispute resolution methods due to their efficiency and effectiveness for labor disputes. In dealing with the topic of mediation in labor legislation of Bosnia and Herzegovina, it is necessary to refer to the notion of labor dispute, and normative framework of amicable dispute resolution.

1. Labor Dispute

A labor dispute is usually determined by personal and causal criteria. Definition of a labor dispute has evolved taking into account the social, political, and economic status of the former Socialistic Federal Republic of Yugoslavia and its transformation to the market economy. Namely, a labor dispute used to be defined as: “A dispute between an employee and a base organization, i.e. an employer,
or between employees of specific factions of the organization, employees and organization authorities, or organization’s employees and authorities of social and political community or, finally labor unions and chambers, or another employers’ association, on occasion of violation of individual or collective rights of employees, which shall be resolved by legally authorized bodies and in a lawfully regulated procedure.”

In the context of contemporary market economy, a labor dispute is defined as: “a dispute between an employee, and under specific conditions unemployed person, and the employer, or as a dispute between a team of employees, a group of employees, or labor union and authorized bodies of the employer or a chamber, or another employer’s association, on occasion of violation of individual, or on occasion of violation, regulation, application or interpretation of collective rights in relation with and arising of labor, which shall be resolved by authorities stipulated by the law or other regulations in accordance with the regulated procedure.”

Respectively, in a more simplified fashion, if a party contesting the employee, or labor union, is denominated as “the Employer”, then we can defined a labor dispute as: “a dispute between an employee, or labor union, and the employer, on occasion of violation or regulation of rights arising of labor, which shall be resolved by authorized bodies in a stipulated procedure.”

If all its elements of substantive law (parties, subject matter of dispute) and procedural law (resolution and proceeding bodies) are included, the labor dispute shall mean: “A dispute between an employee and the employer, or labor union and the employer, respectively the employers’ association in relation to conclusion, existence, or termination of individual or collective employment agreement which shall be adjudicated before the competent court or another authority in an established procedure.”

From the foregoing definitions, it may be concluded that the immediate link to rights, obligations, and liabilities arising of labor is an essential element which stands for the most subtle characteristic of a labor dispute.

Generally, the basic division of labor disputes can be in individual and collective ones, as well as in legal and interest disputes. An individual labor dispute shall be a dispute between an employer and one or more employees who appear as individuals representing rights and obligations of parties in dispute regarding a certain labor relation or relations. A subject matter of an individual labor dispute is violation of a single, individual and personal right, respectively determination of obligations or immediate personal interest arising of a labor relation. Unlike an individual labor dispute, the collective labor dispute represents a type of labor dispute arising of violation of collective
rights or due to protection of collective interest in relation to the collective labor relations. It is characterized by collectivity in terms of entities (parties) and the subject matter of dispute, and shall be resolved with participation of a third party (in a judicial and so called alternative methods) and by methods of collective (industrial) action.12

In relation to the subject matter of dispute, the labor disputes are divided in legal and interest disputes. The subject matter of labor disputes is determination or exercise of individual (individual labor disputes) or collective (collective labor disputes) rights and obligations which are established by the law, by-laws, a collective agreement or an individual employment agreement. Interest labor disputes are generally related to the collective labor disputes between an employer and its organizations and a collective representative of employees, which occurs in the event of failed negotiations about collective regulation of labor relations (i.e. on conclusion, renewal, revision or extension of collective agreements).13 This would be collective interest labor disputes in more narrow terms. In broader terms, collective interests of employees can be subject of collective labor dispute in case of a need to protect broader professional and economic and social interests than those subject to collective negotiations.14 Interests of individual labor disputes are not subject of legal regulation due to their limitation of social and economic value.15 Namely, concerning individual income or other rights, the employer approaches an employee as an economically weaker party according to the principle “take it or leave it”, because each individual employment agreement is partially adhesive agreement as well.16

2. Normative framework of amicable labor dispute resolution

2.1. Individual labor disputes

As a starting point of analysis, it is important to note that the notion of amicable dispute resolution in context of labor legislation of Bosnia and Herzegovina is broader than the notion of mediation. The notion of amicable labor dispute resolution can also mean, besides the mediation, which is characterized by existence of a third neutral party, direct negotiations between conflicting parties. In Bosnia and Herzegovina, in addition to the BiH institution level, the laws on labor17 anticipate that a collective agreement or labor’s rulebook can determine
the procedure of an amicable resolution of individual labor disputes.\textsuperscript{18} Whether a neutral third (an individual or a council) party will participate in an amicable resolution of individual labor disputes depends on adopted solutions set forth in each collective agreement itself: field-related agreement, concluded for the specific territory, or for one or more employers, or on labor’s rulebook. In the contemporary practice and in applicable field-related collective agreements in the Federation of BiH and in Republika Srpska, an amicable resolution of an individual labor dispute shall mean direct negotiations between an employee and the employer with potential participation of trade union representatives as protection representatives of employees’ rights. Concerning the procedure of amicable dispute resolution is related to the anticipated precondition under the collective agreement or labor’s rulebook, a conclusion may be drawn that conciliation in the framework of individual labor disputes is exclusively linked, provided there are no adequate provisions of collective agreements or labor’s rulebook, to the judicial protection or mediation procedure under \textit{lex specialis} regulations, more precisely, to the mediation procedure anticipated by the Law on Mediation Proceeding.\textsuperscript{19} The choice of one or another option of amicable resolution is discretionary decision of the respective employee, but in the current situation in the field of labor disputes in Bosnia and Herzegovina, the judicial protection remains a dominant form of protection of rights arising of labor disputes. Therefore, even if the amicable resolution of individual labor dispute is anticipated, however it was impossible to find a solution, the time limitation for institution of judicial protection commences as of the date of failed negotiation, i.e amicable resolution procedure. If the conciliation procedure has not been completed within a “reasonable time period”, the employee maintains the right to file a claim to the competent court. In any case, amicable resolution of individual labor disputes under collective agreements or labor’s rulebook actually represents negotiations of two parties, but not mediation in terms of its meaning which anticipates the existence of a third neutral party. In certain circumstances, due to misconception of the bare essence of mediation or its equalization with the amicable dispute resolution under a collective agreement or a labor’s rulebook, there is a danger that parties in dispute \textit{a priori} refuse mediation and institute a litigation proceeding immediately. The very value of mediation is in introduction of a standard of amicable dispute resolution with participation of a professional neutral party based on unified rules for the entire territory of Bosnia and Herzegovina.
2.2. Collective labor disputes

As opposed to individual labor disputes, the laws on labor of BiH explicitly set forth a neutral third mediation council to participate in amicable resolution of collective labor disputes, which shall consist of a representative of employees and the employer and a person selected by parties in dispute. The procedure of amicable resolution of collective labor disputes relies on the agreement of the parties, but it is binding under the law, or it is a procedural prerequisite for organizing and leading a lawful strike. The strike is another lawfully protected right and the procedure of exercising economic and social rights of employees. Before commencing a strike, but also in course of the strike, the parties in dispute are obligated to conduct a procedure of amicable dispute resolution. On contrary, the strike can be declared unlawful and as such can be prohibited. In BiH, a strike can be organized both in case of interest labor disputes or disputes due to conclusion, amendments of collective agreements, and in the event of legal labor disputes related to the application of binding legal provisions. These solutions are not in compliance with accepted standards that only interest collective labor disputes are eligible to be resolved by a collective action – the strike. A neutral third party in amicable resolution of collective labor disputes is a separate authority which is established by the parties in dispute. The authority shall also determine the procedure according to which the conciliation procedure shall be conducted. In the Federation of BiH, if parties have not agreed about the manner of amicable dispute resolution, a mediation procedure shall be conducted pursuant to the Law on Labor. Taking into account specific features of the territorial organization, the identical procedure shall be also conducted in Republika Srpska. In Brčko District of BiH, the only difference in comparison to the entities’ solutions lays in the fact that a third neutral party in the mediation council shall be exclusively appointed by the parties in dispute. The parties in dispute can accept or refuse the proposal of the mediation council, but if they do accept the latter, it shall have the same effect as a collective agreement. Therefore, the mediation procedure is not identical throughout Bosnia and Herzegovina due to its territorial organization or non-existence of unique norms regulating relations arising of labor. Also, it has to be pointed out that conciliation procedures are conducted in accordance with internal rules for purpose of preventing a strike, and the national Law on Mediation Procedure shall not be applied to them, primarily because of its binding character. Provisions of the Law on Mediation Procedure could be applied in those cases in which a mediation procedure is not binding, and these are predominantly legal collective agreement in which the trade union has not commenced the strike, or those disputes that can be resolved before the competent courts.
3. Applicability of mediation in labor disputes

In terms of co-relation between mediation and labor disputes, a crucial issue has been rising: Are all individual and collective labor disputes eligible for resolution through mediation? The prevailing view is that the answer to this question is in the subject matter of the dispute. Parties can agree on the mediation procedure only in those disputes on rights which they can freely dispose of. The applicability of arbitration procedure is very similarly treated for dispute resolution. In labor legislation there are numerous provisions which regulate the protection minimum of rights in relation to labor and arising of labor. This protection minimum can be increased, or the scope of protection minimum or rights can be extended respectively, only by means of a collective agreement or labor’s rulebook. The negotiation of employment conditions or employment policies are not allowed which may lead to cancellation of the legally stipulated minimum of rights (i.e. you cannot agree on working hours without a right to daily recess, break between two business days and weekly recess, also you cannot agree on annual leave shorter than the legally anticipated annual leave, you cannot agree on the salary which would be less than the lowest salary anticipated by the law or a collective agreement, etc.). Also, there is a range of extra-contractual provisions referring to the employee and the employer such as discrimination ban of persons seeking employment, and employed persons, then reassignment of women during pregnancy and nursing period to other jobs, application of work protection measures, etc. Therefore, any disputes arising of violation of rights protected by cogent norms, so-called status disputes, regardless whether the rights are set forth in the employment agreement or not, would not be eligible to mediation, because on contrary, it would lead to aggravated violation of rights in relation and arising of labor. Also, those disputes which are exclusively subject of judicial protection cannot be eligible for mediation. All other labor disputes in which parties can freely dispose of their rights are eligible to mediation. No doubt, eligibility to mediation is extremely delicate issue and should be carefully assessed in every individual dispute. Of course, certain property claims of parties in dispute arising of status disputes may be eligible to mediation, because parties to these disputes can voluntarily dispose of these claims. These are the disputes which would be potentially subject to judicial decision about their status issue, and then depending on the court’s decision, the parties in dispute can resolve property claims arising of status dispute by means of mediation.

Collective labor disputes, particularly interest ones, are eligible to mediation. However, in the context of indicated mandatory conciliation, the issue arises...
whether these disputes can be resolved pursuant regulations of the Law on Mediation Procedure. The affirmative answer shall mean meeting of certain procedural prerequisites. At the same time, another important issue remains open: legal effect of the agreement arising of procedures pursuant to the Law on Mediation Procedure, and those before mediation councils, established under the law on labor, which has effect of a collective agreement. Namely, an agreement achieved before a certified mediator pursuant regulations under the Law on Mediation Procedure, has effect of enforceable document, which shall grant stronger legal protection of a collective agreement, since parties in dispute can opt directly for the enforcement procedure. Hypothetically, due to existing solutions, it can occur that the agreement achieved before a certified mediator under the regulations of the Law on Mediation Procedure stands simultaneously for both a collective agreement and enforcement document.
4. Expertise of mediator

The expertise of a mediator is with no doubt an important element of mediation in all kinds of disputes, but in labor disputes the expertise of mediator shall be particularly emphasized. This is related to the economical and social significance of labor disputes, which in course of judicial procedure have certain specific features. Therefore, in the Law on Civil Procedure Code the provisions referring to specific resolution of labor disputes are particularly defined: urgency, time limitations for enforcement of actions, time limitations for appeals. Also, the repercussions which these disputes have to the Employer shall not be neglected given the expenses for reimbursement of damage and reduced productivity.

In that context, in addition to the general condition of employment, the requirements for a person to become a mediator in Bosnia and Herzegovina are the following:

a) University degree,

b) Completed training program according to the curriculum of the Association or any other compatible curriculum acknowledged by the Association,

c) Registration with the mediators’ list maintained by the Association.

The person, who successfully completes the training for a mediator, shall be issued the appropriate certificate, which is a precondition to be met in order to be registered in the mediators’ list. For the moment being, the certified association for mediation affairs in BiH is the Association of Mediators of Bosnia and Herzegovina, to which the mediation affairs have been transferred pursuant to the Law on Transfer of Mediation Affairs to the Association of Mediators. In addition to the completed training, the mediator has to continuously improve his/her skills. A mediator shall be responsible for maintenance and improvement of his/her professional skills himself/herself.

Although mediation in Bosnia and Herzegovina is still in its early stage, without a special and necessary specialist profile for certain types of disputes, each mediator shall pass certain specialist trainings on labor relations and labor disputes. Special training is necessary to develop understanding of importance of continuity of relations between the employer and the employee, and particularly because of subordination relation. Unlike the classical contractual relations characterized by equality of actions and equal treatment of parties which imply from the mere agreement, this equality of arms is especially pointed out in the labor relations through the status of employee.
who is entitled to guaranteed rights in accordance with the law and collective agreement which the employer has to comply with. In each individual dispute, the mediator shall be able to recognize whether it is a matter of status rights or rights the parties may voluntarily dispose of. On contrary, due to ignorance of parties in dispute and the mediator, it can occur that the agreement, as a final stage of mediation, contains provisions which directly oppose the legally binding protection minimum. A skillful mediator shall, in addition to the subject matter of the mediation, take care of importance of improvement and maintenance of correct and fair relations between the employer and the employee, because the relations are crucial for resolution of the existing and more importantly prevention of future disputes.

Expertise of mediator can be crucial in resolving collective labor disputes, especially those related to certain interests, which are not subject to judicial resolution. In numerous cases and following the commenced strike as a result of failed conciliation, the parties in dispute are forced to talk to each other again and seek common solutions.

In the future, as the number of disputes proceeded through mediation increases, the very mediators shall inevitably seek for more specialization, which, in addition to the quality, will also result in more settled cases.

5. **Mediation at workplace as prevention of disputes**

Mediation at workplace represents a kind of an early detection of dispute. Thereby the dispute is prevented to escalate and to spill over beyond the working environment. It is important for both small and large working environment, and all kinds of employers (business, non-business, and public services). Having in mind that employees at average spend 40 hours a week together, it is inevitable to lead to dissented opinion in communication both between the employees and their superiors. Employers shall treat mediation as reduction of potential future expenditures implying from litigations before competent courts or other authorities. Also, the productivity is boosted through mediation, because employees perform better and achieve better results in a friendly and relaxed environment with no high tensions. The employers can have mediation conducted by its trained staff or by retaining professional organizations. Even, if they do not retain professional assistance, the employers shall acquire certain techniques of mediation, thus they can resolve or prevent escalation of disputes between their employees themselves.
Although there is some progress with employers in Bosnia and Herzegovina, the awareness about the importance of mediation at workplace is not very high and about the advantages achieved through this type of conflict resolution methods. The changes are definitely to come with the new market economy, because in addition to profit wasted by paying of litigation costs in labor disputes, in number of dispute cases a good business reputation can also be lost.33

6. Economic, social and legal importance of mediation in labor disputes

Conflict situation in labor relations as a rule lead to undesired consequences which are demonstrated in failure to exercise right relating to labor and arising of labor, or failure to exercise subordination of employer and employee in an undisturbed manner. Conflict situations of social partners - participants to the collective labor relations have as a consequence the failure of exercising collective rights, but also failure to undisturbed performance of work processes and other activities.

Economic importance of mediation, as a one of alternative labor dispute resolution methods with the employer (business entities, public institutions, civil services, non-governmental sector, etc.) is particularly important primarily in two segments. First, it is about reduction of existing costs related to the remuneration of costs in ongoing disputes, and second, it is a matter of reduction of future costs through the prevention of dispute occurrence. Currently, in Bosnia and Herzegovina the obligation to pay financial claims related to labor disputes often lead the employers to bankruptcy, or commence of a liquidation procedure. Mediation, as an instrument of prevention of dispute occurrence, improves communication within working environment and increases motivation which results in higher productivity.

The social significance of mediation is related to a less painful and more efficiency overcoming of existential risks. Labor relation is in most cases the foundation of employees’ existence. Through mediation the employees may in an easier, cheaper, and more efficient way realize their claims arising of labor relations, since the procedure is based on interests, but not on rights. Judicial procedures are unlike mediation more expensive and last much longer, what leads an employee to a more aggravate financial situation. Mediation, as a way of prevention of disputes, offers to employees certain security of employment and enables them to perform the maximum results in a more relaxed atmosphere.
Legal importance of mediation in all types of mediation is that it leads to the relief of the state judicial apparatus. It improves the speed and efficiency of dispute resolution. As it was already noted, the speed and efficiency in context of labor disputes is also paid lots attention to in a regular judicial proceeding due to consequences, which these types of disputes leave to existential status of employees. Also, the legal importance of mediation is in the fact that it tends to preserve good relations between parties in dispute, or between the employer and the employee, and the important part of the labor protection legislation is devoted to the security of employment. It may sound as a paradox but mediation generally, including labor disputes, may be efficient only in those legal systems which have strong and efficient judiciary. The basic motivation of institution and acceptance of mediation, if we exempt the commitment to maintain good relations between the parties in dispute, is a “threat” by litigation, on the contrary, the parties will loose the interest in mediation. It can be alternative only if it would be more efficient that the judicial procedure.

The higher presence degree and improvement of quality shall be strived in the future through the establishment of normative standards, or adoption of special right for mediation in individual and collective labor disputes, relied to the existing Law on Mediation Procedure and establishment of special authorities for this method of dispute resolution.  

\[34\]
Preventive protection does not mean here any joint action by the employees and the employer at meeting, trainings, etc, which can be closer to the classical notion of prevention, but it is the duty of the employer to grant all employees to exercise their rights established by the Law.

Restorative means rights to reimbursement of damage (tangible and intangible) provided it is not possible to reverse the original status before the violation. Of course, these two protection types shall be also observed both in aggregated and alternative fashion, since in most cases the employee seeks the reversal of the original status (re-employment) and reimbursement of damage, and only if he/she fails in both claims, he/she seek fulfillment of one of them.


Paths of Mediation in Bosnia and Herzegovina

Ibid.

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Restorative means the restoration to the previous status (with all pertaining rights) before the violation occurred arising of labor relation.

If he/she fails in both claims, he/she seek fulfillment of one of them.

Dedić S., Gradaščević-Sijerčić J.; Radno pravo-drugo, novelirano i prošireno izdanje, Pravni fakultet Univerziteta u Sarajevu, Sarajevo 2005, p. 434

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Slovenian equivalent: Mediation council is established on the territory of Brčko District. It is composed of three members, i.e.: employers’ representative, a representative of the major trade union in RS and the Employers’ Association of Republika Srpska. Art. 165 st (2) ZOR-a RS

Of course, it is important to note that the employer as a party in employment agreement always have to comply with law, collective agreement, or the minimum rights of employees protected by an autonomous act. Of course, it is important to note that the employer as a party in employment agreement always have to comply with law, collective agreement, or the minimum rights of employees protected by an autonomous act. Of course, it is important to note that the employer as a party in employment agreement always have to comply with law, collective agreement, or the minimum rights of employees protected by an autonomous act.
According to the cited authors, Dike M. i Potočnjaka Ž., in context of arbitration settlement of labor disputes, in disputes related to discrimination ban, the dispute on payment of salary, termination of employment contract or another issue arising of individual labor relations in which the claimant rise violation of any of his/her rights, will be eligible for arbitration. In this procedure, the arbitration tribunal shall adjudicate on right to salary, on lawfulness of terminated employment agreement or any right arising of labor relations, which parties to that right can principally dispose of. On merits of the claim, the arbitration tribunal shall decide based on whether cogent rule on discrimination ban was violated; it should resolve the discrimination issue in a prejudicial manner. Dika M. i Potočnjak Ž; Arbitražno rješavanje radnih sporova; cit. p.246 ftnt.19. This view cannot be taken in context of amicable dispute resolution by mediation, as in mediation a third neutral party has no the possibility to impose a solution. In mediation, the power of decision-making is in the hands of parties in dispute, but it has to be noted that they are led by interest and not a right. In the opposite event, the parties will loose the interest in mediation for they would not be able to negotiate on status issues such as discrimination or lawfulness of termination of employment agreement, since there is not middle solution in these disputes, for example, parties cannot agree that an employee was slightly or partially discriminated, or that the termination of employment agreement was partially unlawful. Also, favorizing the attitude of one party leaving the other party unsatisfied is contrary to the very essence of mediation.

Art. 31 of the Law on the Mediation Procedure

In accordance with amendments to this Law, mediation affairs shall be transferred to any other association of mediators for the territory of entire Bosnia and Herzegovina following their proper registration with the competent Ministry of Justice of Bosnia and Herzegovina. The Association of Mediators in Bosnia and Herzegovina has adopted numerous rulebooks published in the Official Gazette No. 21/06 that set forth their work:

- Rulebook on registration of mediators
- Rulebook on mediators’ list
- Rulebook on referral to mediation,
- Code of Mediation Ethics,
- Rulebook on liability of mediators for damage incurred during performing mediation affairs,
- Rulebook on disciplinary liability of mediator,
- Rulebook on remuneration and compensation of mediation costs,
- Rulebook on the training curriculum for mediators,

On mediation in the workplace see more in:

- Krivis J.; Can We Call a Truce? Ten Tips for Negotiating Workplace Conflicts;
- Papa J. M.; Business Mediation: A Better Way To Resolve Conflict;
- Thomas R.; Conflict Management Systems: A methodology for Addressing the Cost of Conflict in the Workplace; all listed articles are published at www.mediate.com
Jagoda Ribica
Aleksandar Živanović

Role of the Association of Mediators of Bosnia and Herzegovina in Development of Mediation
In less than eight years, from the idea of introducing the mediation in the legislation of Bosnia and Herzegovina, a legal framework was created, by-laws were enacted, dozens of mediation training curricula were made, mediators have been registered, and the mediation was made available throughout the country. In the given time period, there were about seven hundred mediations conducted, out of which sixty per cent resulted in mediated settlements between the parties. In achieving these results, the Association of Mediators of Bosnia and Herzegovina has played a crucial role. The activities have been continuing though, because further popularization of this institute and its advantages is still ahead of us, particularly in comparison to other traditional generally accepted dispute resolution methods.
The establishment of the Association of Mediators of Bosnia and Herzegovina was of a crucial importance for the introduction of mediation in Bosnia and Herzegovina as it was the proponent of the idea and activities for creation of a legal framework and promotion of the mediation as a method of alternative dispute resolution. The idea of founding the Association came from a group of trainees of the “Third Neutral Party Course” implemented by the Canadian Institute for Conflict Resolution in the time period between 1998 and 2002. This training program was dedicated to experts and activists in implementation of the activities related to return of refugees and inter-ethnic reconciliation. The trainees were predominantly activists of non-governmental organizations, welfare centers, and teachers. In 2000, the persons of other professional backgrounds showed interest in the course, among them a growing number of judges and prosecutors. The course curriculum was comprised of theoretical and practical training on conflict resolution approaches, neutrality, facilitation, mediation, dispute resolution in groups, etc.

Some thirty people attending the course recognized the opportunity to use the potential of acquired knowledge and skills in the justice reform process and to introduce the mediation in the legal system of Bosnia and Herzegovina. The Founding General Assembly Meeting of the Association took place in Tuzla in March 2002. The creation of preconditions for introducing the mediation as an alternative dispute resolution method was set as an overall goal, more efficient and effective access to justice for natural and legal entities that can satisfy all parties in dispute, and consequently assist in taking off the burden of the courts. As a reminiscence on the “Third Neutral Party” course, the founders maintained the acronym of the title - TNS in its logo, and in years to come, the Canadian Institute, although having no projects in Bosnia and Herzegovina, has remained a partner to the Association of Mediators.

The Association defined its main activities: conducting of mediation affairs, implementation of training courses for trainers in mediation, and issuance of certificates to trainers, training curricula development for mediators, and issuance of certificates to mediators, and special training courses for judges, lawyers, mediation beneficiaries and other stakeholders, promotion of mediation as amicable dispute resolution, monitoring of achievements in mediation development in the region and internationally, and networking with similar organizations.

On November 5, 2002, the Association was registered with the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina as one among
first associations at the national level (Decision No. RU/44/02). Nowadays, the Register of Associations is maintained by the Ministry of Justice of Bosnia and Herzegovina.

The Association is a non-profit and non-party organization, however, it is a professional organization based on membership, and structured in accordance with the Articles of Associations. Although the state granted it special authorities in the field of mediation, it is entirely independent and self-standing in terms of its business operations.

Following the Founding General Assembly Meeting, the Association had commenced drafting the Action Plan and project proposals for introduction of alternative dispute resolution in Bosnia and Herzegovina. Meetings in Sarajevo, Banja Luka, and Tuzla helped in establishment and strengthening of cooperation with ministries of justice, associations of judges and prosecutors of both entities, International Judicial Commission – IJC, and American Bar Association – Central Eastern Europe Legal Initiative – ABA CEELI, which were the proponents of judicial system reform process at that time.

The Board of Directors of the Association promoted the idea of introduction of the mediation into practice and did the initial fundraising for activities, such as: enactment of the law, establishment of the training center for all new mediators, and the study trips to other countries in order to get acquainted with their mediation models. The Association of Mediators of Bosnia and Herzegovina is funded in accordance with its Articles of Association out of membership fees, grants, and its own revenue pursuant the Law. Since the funds raised by membership fees were insufficient for any serious work towards achieving the overall goals, the Board of Directors focused on drafting project proposals and meetings with donor organizations in order to raise funds for more intensive start-up activities.

In the meantime, the Association and the Canadian Institute managed to provide few training courses in mediation in cooperation with association of judges and prosecutors, but also to participate in several training courses in drafting project proposals and strategic planning implemented at that time by various non-governmental organizations and ABA CEELI.
Advocacy for a Legal Framework

The Board of Directors of the Association advocated for amendments of procedural laws, because to introduce the mediation, it was necessary to introduce the provisions which would enable judges to refer the parties in dispute to a mediation procedure. The idea of introducing the mediation was supported by the ministries of justice of both entities, as well as by international organizations implementing or supporting justice sector reform, thus they made few proposals and forwarded them into the legislation procedure. In 2003, the Laws on civil and criminal procedures were adopted in Republika Srpska and the Federation of Bosnia and Herzegovina, which set forth the option for a judge to propose to the parties in dispute, if he/she deems it purposeful, to try to resolve the dispute by the mediation, but also the same proposal may be made by the parties themselves. These amendments of procedural laws represented the crucial point for mediation development in the country and they paved the road to creation of a full legal framework.

The Association’s Board of Directors drafted a project proposal for training courses, establishment of the training center, and advocacy for drafting the law, which attracted the interest of the South East Enterprise Development, SEED in 2003. In April 2003, the Association signed a Partnership Agreement with this organization covering the following activities: drafting the law on mediation procedure, implementation of the mediation training course, drafting the implementation methodology, conducting the pilot projects in courts, public campaign for purpose of informing the general public about advantages of the mediation and provision of technical assistance to the Association of Mediators aiming at its capacity building.

The establishment of a working group for drafting the Law on Mediation Procedure had followed, and the working group was made of representatives of the Association of Mediators of Bosnia and Herzegovina, Ministry of Justice of the Federation of Bosnia and Herzegovina, Ministry of Justice of Republika Srpska, Independent Judicial Commission, the Office of High Representative, SEED, and ABA CEELI. The draft law was sent into procedure to the Council of Ministers of BiH, which forwarded the latter to the Parliamentarian Assembly for adoption in December 2003.

The Law was adopted in June 2004, in almost identical text as the one proposed by the working group. The law set forth in details the mediation procedure, principles, and role of the mediator in the process, as well as limitations for
mediation cases with an ongoing court trial. The law also anticipates the non-mandatory out-of-court mediation in Bosnia and Herzegovina. The reason for that was not to burden courts additionally by another method of dispute resolution, and that parties exhausted by long standing procedures, can be offered the option to negotiate about their dispute solutions out of court in a pleasant atmosphere. The Working Group opted for the principle of voluntarism as the major principle in mediation.

The Law on Mediation Procedure sets forth that parties in dispute may reach an agreement, prior or after the institution of a court procedure, to attempt to resolve their dispute in a mediation procedure. If a court procedure has been instituted, the parties may agree about the mediation procedure after a trial judge during the preparatory hearing makes a proposal for dispute resolution by the mediation as an appropriate method for the case in question, or if the parties agree to resolve the dispute by mediation before the main hearing is concluded.

The main principles underlying the mediation procedure are: a) voluntarism of the parties – in institution of the procedure, selection of the mediator, and decision-making; b) confidentiality – in relation to the foregoing and towards all stakeholders in the mediation procedure; c) equality – in the mediator’s relation towards the parties and d) neutrality – in relation of the mediator towards the contents and dispute solution.

According to the Law, all persons meeting the general employment requirements may deal with the mediation, along with special prerequisites regarding the university degree, completed mediation training course and entry into the Register of mediators.

However, by the Law on Mediation Procedure the members of the Parliamentary Assembly of Bosnia and Herzegovina did not grant the competence to the Association of Mediators to conduct mediation affairs, therefore the Law could not be applied. Namely, in Article 1, paragraph 2, the Law anticipates that “mediation affairs shall be by a separate law transferred to the Association or associations of mediators by the procedure set forth by that law”. It was necessary to initiate adoption of a new law which will transfer the competences to the respective association.

The Board of Directors of the Association of Mediators became actively involved in the advocacy of a new law adoption which would resolve this issue, and after
one year long activities with the Ministry of Justice and parliamentary caucuses in the Parliamentary Assembly of Bosnia and Herzegovina, this document was submitted into the parliamentary procedure. The Law on Transfer of Mediation Affairs to the Association of Mediators was adopted on July 28th, 2005. This Law regulates the transfer of mediation affairs to the Association of Mediators of Bosnia and Herzegovina, as well as the procedure to transfer the mediation affairs in case a new association of mediators is registered. Also, it stipulates that mediation affairs shall be performed in accordance with the Law on Mediation Procedure.

The completed legal framework and positive indicators from the pilot project implemented in the Basic Court of Banja Luka and the Municipal Court of Sarajevo encouraged the Association to commence preparations on creating the prerequisites for regular application of the mediation procedure. In late 2005, the Board of Directors along with judicial experts commenced drafting a set of rules and the code of mediation ethics, which were adopted in February 2006.

The Rule on the Registry of Mediators regulates establishment, prerequisites for entry, manners of maintaining and erasing from the Register of Mediators of the Association of Mediators of Bosnia and Herzegovina, and the Rule on the List of Mediators regulates the contents and publishing of the mediators’ list of the Association in official gazettes, courts, ministries of justice in Bosnia and Herzegovina. The Rule on Referring to Mediation regulates in detail a procedure of referring cases to mediation, and the Code of mediation Ethics sets forth the norms of professional code of conduct of mediators in performing mediation affairs. The costs of mediation procedure are regulated by the Rule on Fees and Costs of Mediation. For quality insurance of mediation affairs, the Association also adopted the Rule on Liability of the Mediator for Damage Inflicted during Mediation, and the Rule on Disciplinary Liability of Mediators. The mandatory training for mediators is set forth in the Rule on Training Curriculum for Mediators.

The public announcement for entry into the Register of Mediators followed, after which the first group of 33 certified mediators was registered in May 2007. Their registration created the preconditions for the Association to perform the mediation affairs pursuant to the 2004 Law, as an alternative dispute resolution for all citizens of Bosnia and Herzegovina.
Application of Mediation

Although the legislation framework had been incomplete for some period, the first pilot project “Introduction of Mediation in Basic Court of Banja Luka” started in cooperation with the SEED in April 2004, and one year later, a pilot project also started in the Municipal Court of Sarajevo. In cooperation with partner organizations, the Canadian Institute for Conflict Resolution, the Ministry of Justice, and the involved courts a solution to apply the mediation pursuant existing legal framework was found.

Judges of these two courts proposed the mediation procedure to the parties, and the parties who accepted that proposal were referred to the Mediation Center (established during the pilot project), in which mediation was conducted by mediators who completed mediation training course for needs of the pilot project. The parties at that time had neither the opportunity to institute the mediation procedure prior a court procedure, nor to participate in the mediation procedure unless their cases were trialed by the courts involved in the pilot project.

The mediation procedure, if the parties reached an agreement, usually ended in having a written agreement drafted with the assistance of the mediator, which was certified before the judge as a court settlement. The mediators in the pilot project were provided by the Association.

As it was funded by the SEED, the mediation was free of charge for all kinds of disputes at that time, except for commercial disputes, for which the parties had to pay the administrative fee to SEED in the amount of 100 KM.

The results of the pilot project demonstrated that the mediation was an appropriate method of dispute resolution, particularly for commercial and labor disputes. By late 2006, more than 600 mediations took place in pilot projects, out of which 56% were resolved by an agreement. In about 90% of cases, the parties, who signed the agreement, also implemented it voluntarily either entirely or partially, which also proved the mediation effectiveness and these cases did not go back into the enforcement procedure.

This working method was applied until the entry of first mediators into the Register in May 2007, when a regular application of the Law on Mediation Procedure has commenced, thereby making possible to the parties throughout Bosnia and Herzegovina to institute the mediation procedure prior or during a
court procedure. As the mediated agreement has the effect of an enforcement
document, it was no longer necessary to certify the latter in the court as a court
settlement.

For various reasons, conducting of mediations did not start right away. It took
few months until the new procedures took off in these two courts that already
had the experience in referring cases to the mediation procedure. The general
public was still not familiar enough with the procedure, and on the other hand,
since the SEED project was over, the parties had also to cover the mediation
procedure costs themselves.

The Association of Mediators in collaboration with the Basic Court of Banja
Luka and the Municipal Court of Sarajevo, and the Canada – Bosnia and
Herzegovina Judicial Reform Project (JRP), commenced to work on adjustment
of procedures to new circumstances, and to draft new forms for the mediation
procedure and referral of the parties by courts. An agreement was reached that
the court should also, in addition to the preparatory hearing and for purpose of
a more efficient information campaign about the mediation, note the prosecutor
about the mediation on occasion of filing the suit, and the plaintiff on occasion
of submitting the suit for response tužbe na odgovor, which is regulated by the
Memorandum of Understanding signed between the Association of Mediators
and respective courts.

Between June and December 2007, 12 mediations took place in a regular
procedure, and in 2008, this figure was increased to 42 mediations. Simultaneously, the first parties seeking to resolve disputes prior institution
of a court procedure had appeared. An increasing interest in mediation also
continued during 2009.

Out of total number of mediated disputes in a regular procedure, 75% of
disputes ended with an agreement of the parties, which represented significant
progress in comparison to the pilot project. It is important to emphasize that
the parties implement the settlement agreements in most cases voluntarily.
In a survey about the parties' satisfaction and evaluation of the mediation
procedure conducted by the Association, it was found out that more than 95%
of the parties considered the mediation an appropriate procedure for resolution
of their disputes, the procedures were rated high, and any party with a dispute
value of more than KM 3,000 believed to had saved significant time and funds
by the mediation procedure.
The mediation deems especially appropriate for commercial and labor disputes, division of marital property, and other disputes for which there is a good will by both parties to resolve the dispute by a settlement agreement, if it not contrary to the enforcement regulations.

In order to improve acquaintance of courts and parties with the mediation procedure, the Association also paid, in addition to the regular trainings for judges, visits to the courts throughout BiH in late 2008, presenting them the practice of Banja Luka and Sarajevo courts and distributing them forms for referring the parties to the mediation procedure. These activities yielded some results in early 2009, when additional five courts commenced to regularly propose the mediation procedure to the parties.

The commitment of several companies and other legal entities to include in their agreements a clause on attempt to resolve disputes prior to the court procedure by the mediation, also contributed to the mediation application in dispute resolution. The Association knows about five legal entities using this possibility, and in past few months of 2009, the Association was approached by first parties referring to the respective clause. A more extensive application of this clause and expected positive experience in its application prior to the court procedure may have a significant impact on the further development and popularization of the mediation.

In order to additionally motivate the parties to opt for the mediation, the amendments to the Law on court fees are currently ongoing at the entity and cantonal levels.

The Law on court fees of Republika Srpska sets forth that if the parties, who have paid the court fee, reach an agreement in the mediation procedure, shall be entitled to 50% court fee refund, provided they submit a request to the court. According to data available to the Association, similar solutions will be also adopted in several drafts of cantonal legislation on court fees.

The Association of Mediators in Bosnia and Herzegovina is currently analyzing options of introducing the mediation in domestic disputes and criminal cases involving the juveniles in collaboration with “Save the Children” from Norway, as well as how to institute the mediation in the second instance and in criminal procedure related to the property claims, which are already anticipated by the laws.
Mediation Procedure

The mediation shall be instituted by submitting a request to the office of the Association of Mediators in Sarajevo or in Banja Luka, notwithstanding whether the mediation was proposed to the parties by the court or they opted for the procedure themselves. The possibility was also left for a third party to request the mediation procedure, about which the Association shall note the parties in dispute. In any case, in order to schedule a mediation meeting, it is necessary to obtain a written consent of all parties in dispute. The mediation request may be submitted either by mail or in person.

When the Service of the Association obtains the consents of all parties in dispute, it shall submit to the parties the following: the List of Mediators for selection of the proceeding mediator, unless the proceeding mediator was not already indicated in the request; Agreement on Mediation – to be signed no later than the mediation meeting; guidelines on advance payment of mediation fees, which includes 50% of administrative costs and advance payment of the mediator’s fee plus Value Added Tax (VAT); as well as the informative materials about the mediation.

When the parties in dispute make advance payments and select the mediation, the Service of the Association will schedule the mediation meeting.

The parties conduct the mediation in collaboration with the selected mediator. The mediation meetings which are conducted with the Association of Mediators have usually the following stages:

- Introductory remark by the mediator, including the mediator’s introduction and introduction of the parties and possibly of other present persons, a closer definition of the mediator’s role and the mediation procedure, and particularly of the principle of neutrality, impartiality, voluntarism and confidentiality;
- Introductory remark by the parties in relation to their view of the dispute and definition of the problem framework which has to be resolved;
- Definition of interests, through discussion about problems, needs, and wishes of the parties, their concerns, experience, feelings and values;
- Suggestion and analysis of possible options, in which the parties are entitled to bring up possible options that shall meet their needs and interests defined in the previous stage, they analyze acceptability of the options (their consequences, alternative solutions, comparison
with legal requirements, rights of the parties, rights and interests of the child and expert know-how and advise);

* Definition of the proposals, the mediator and the parties focusing on the acceptable options, future activity development plan, responsibilities and the relation;

* Drafting the agreement, or transferring the agreed option into the written text of the agreement, along with obligations, responsibilities, time limitations, enabling the parties to conduct consultations with lawyers, experts, etc, the signing of the agreement.

During the mediation, the mediator may talk to the parties jointly or separately without attendance of the other party.

In case the mediation ends with agreement of the parties, the mediator shall draft the settlement agreement to be signed by the parties, the mediator, and other representatives in the procedure (plenipotentiaries and others). The mediator shall certify the settlement agreement with the stamp and that agreement shall have the effect of an enforcement document. The mediator shall prepare a report about the conducted mediation and its duration to the Association, following which the Association shall issue the invoice including the costs which were possibly not covered by the advance payment.

**Mediation Training Curriculm Development**

In 2004, the Board of Directors submitted the project proposal on development of the official mediation training curriculum of the Association of Mediators in Bosnia and Herzegovina to the Canadian International Development Agency. This project proposal included the development of four training curricula for future mediators, judges, and lawyers, final beneficiaries, and training for mediation trainers, as well as publication of accompanying handbooks for each of them. Train-the trainers courses were completed by some 20 persons within this program. Out of that, seven were certified as trainers of the Association to train the new mediators.

As the completion of the training curriculum, which is a prerequisite for the entry into the Register of Mediators, collided with the adoption of the Law on Transfer of Mediation Affairs to the Association of Mediators, it became self-sustainable even upon its first application, because the trainees had to pay the
training fees. The interest in the training curriculum of the Association was also shown by the general public, and the training was also attended by persons who had no plans to deal with mediations or by the persons, who could not perform these activities due to conflict of interests (judges, prosecutors), and by persons who did not have a university degree. The skills offered by this training are recognized as useful in everyday communication, in private or professional use, therefore a great interest was shown for the training courses.

The regular training for mediators is comprised of two parts:
- “Mediation 1 – Training for the mediators” which takes five days, and
- “Mediation 2 – Get prepared for the conduct of mediation”, which takes two days.

The training curriculum for the mediators includes the following themes: theory of conflict, analysis of conflict, dispute resolution methods, the notion of alternative dispute resolution, theory of negotiation, the path to reaching an agreement by negotiation, negotiation styles, negotiation role play exercises, the notion of mediation, general principles of mediation, stages in the mediation procedure, communication skills, mediation role plays, legislation framework and the mediation model in Bosnia and Herzegovina, practical application of mediation in Bosnia and Herzegovina, the procedures and forms in use in the mediation procedure, mediation models in other countries, watching of video records of mediations or a real mediation procedure.

In accordance with the Rule, the mediators are obligated to continuously improve their skills in annual two-day trainings, which are organized by the Association. To date, one two-day training curriculum for registered mediators was developed in collaboration with judges of the enforcement department of the Municipal Court of Sarajevo and the Basic Court of Banja Luka, and with the support of the Canada-Bosnia and Herzegovina Judicial Reform Project, along with the accompanying handbook related to the drafting of the settlement agreement in the mediation procedure as an enforcement document. Development of one more training curriculum is currently ongoing, i.e. regarding acquaintance of the mediators with innovative procedures in the mediation procedure, and exchange of experience in best practices.

During 2006, the Association of Mediators in Bosnia and Herzegovina established the cooperation with the Judicial and Prosecutorial Training Centers of Republika Srpska and the Federation of Bosnia and Herzegovina respectively, that included the training on mediation in their modules of mandatory training
courses, thereby providing the information about alternative dispute resolution, procedures, communication skills necessary to referral of the parties to the mediation procedure to a wider number of judges. The training of judges in cooperation with the Centers is provided by the Association once to twice a year. In addition to the trainings, the visits and seminars are organized in some courts, aiming at introduction of regular procedures of referral of the parties to the mediation in practice.

In 2007, the Association of Mediators in cooperation with the Canada – Bosnia and Herzegovina Judicial Reform Project also recorded the domestic training video program featuring 60 minutes of a mediation meeting, enabling the trainees of various curricula to see the procedure in question. The video material has been regularly used in trainings of mediators, judges, lawyers, and tentative parties of the mediation procedure.

**Institutional Cooperation in Mediation Development**

From the very beginning of its activities, the Association of Mediators developed the cooperation with local institution for purpose of mediation development, commencing with legislation drafting, through development of procedures, to public campaign implementation. This cooperation was particularly emphasized with the Ministry of Justice of Bosnia and Herzegovina, the Ministry of Justice of Republika Srpska, and the Ministry of the Federation of Bosnia and Herzegovina, and the High Judicial and Prosecutorial Council which have been providing support to the mediation development by their decisions in the country ever since, both in pilot projects and in regular procedure. In the course of 2007 and 2008, the activities on drafting of the Judicial Sector Reform Strategy for the time period 2008-2012 were implemented, as well as of the Action Plan for Commercial Mediation Development, which created the prerequisites for the financial support as well.

The courts also commenced recognizing their own interests in the mediation development in terms of case backlog reduction, but also it raised their expectations of resolving more cases prior to court procedures, thereby reducing the inflow of cases into courts, and they have been providing support in informing the parties about the mediation. In the judicial training, the
existing collaboration with the Judicial and Prosecutorial Training Centers of Republika Srpska and the Federation of Bosnia and Herzegovina respectively is also of an immense significance.

Concerning the bar associations, the Association of Mediators organized presentations on the mediation for lawyers in collaboration with the Bar Association of Republika Srpska and the Bar Association of the Federation of Bosnia and Herzegovina. Yet, reactions of individual lawyers vary. Fewer numbers of lawyers recognized the opportunity to become registered as mediators and nowadays they are quite successful in conducting the mediation procedure. Another group of lawyers regularly refer their cases to the mediation procedure, and through their efficiency and effectiveness they strive to gain the trust and remuneration for their performance, while on the other side there are also lawyers, who stand aside or by means of motions request from courts to stop sending them materials on mediations, since they are not interested in resolving cases by that method. Development of support within the professional bar community is still a challenge similarly as it was the case in other countries.

In the forthcoming period, the Association has a plan to continue developing the cooperation with business entities, associations of employers, and chambers of commerce in order to promote the mediation as a method of commercial dispute resolution, and generally of cooperation with the non-governmental sector in terms of promotion of efficient and effective access to justice and human rights.

Concerning international organizations and donors, the major support to the Association was provided by the Canadian government, through Canadian International Development Agency and other Canadian organizations active in Bosnia and Herzegovina in the mediation development in general, especially the Canadian Conflict Resolution Institute and Canada – Bosnia and Herzegovina Judicial Reform Project, International Financial Corporation – IFC, in development of commercial mediation, and the “Save the Children” from Norway in the part of domestic mediation development and the mediation in criminal cases involving juveniles. The Association also maintains contacts with the mediators from neighboring countries and various international forums and networks.
Challenges to Mediation Development

The mediation affairs and other activities of the Association of mediators related thereto are partially funded out of the own funds, but it is still required for a half of the Association’s annual budget to raise funds through donations through project applications on tenders of domestic and international organizations. Although, in comparison with other non-governmental organizations in Bosnia and Herzegovina, it is a very high degree of self-sustainability, only when the mediation becomes fully established with number of cases counted in thousands, one can state that the majority of objectives set by the Association were fulfilled.

The activity holders of the Association were also members of the Board of Directors for number of years after its foundation however in October 2008 the preconditions were created for professional employment of an administrative coordinator and an Executive Director. Improvement of the Association’s structure shall also help in realization of previously mentioned objectives.

Although the alternative dispute resolution was also applied in certain forms in the former system, (e.g. by resolving disputes in a community by peace councils), in the post-war period through peaceful dialogues, and even though a new framework was established for application of the mediation as a lawful dispute resolution procedure, the parties still incline to litigation procedures. They are disturbed neither by lengthy court procedures nor by procedural fees adding up during that period. On the other hand, a part of general public has still not been informed about this dispute resolution method and it is necessary to invest additional efforts and time to convince them to try “something new”.

To date, from discussions with the parties interested in the mediation procedure the Association also draw a conclusion that sometimes, even prior to the institution of a court procedure, the parties are, especially natural persons, so conflicted among themselves that there is no person who would be able to bring them at the same table. Yet, they are usually not aware of advantages offered by the mediation procedure which are reflected in efficiency and effectiveness of dispute resolution in which the parties with the assistance of the mediator propose their own dispute solutions in a realistic scope therefore they are often committed to voluntarily implement the agreement. In addition to that, in the mediation procedure, their agreement has the effect of an enforcement document which guarantees for its enforcement. The additional advantage is that the procedure provides the opportunity to improve relationships between
the parties, so that the parties can come closer to the agreement, even though not all issues were entirely resolved in the procedure.

The positive experience, for instance in commercial disputes, the parties managed to collect a part of their receivables necessary for further investments in the manufacture, repayment of loan installments etc.; a clause on mediation in the agreements made parties attempt the mediation before going to court, and make it possible through a settlement agreement to collect debts of tens of thousand Convertible Marks without a court procedure; situations in which former spouses managed to divide marital property with no farther deepening of their conflict having an agreement which is a guarantee that there will be no further misuse thereof; employees who managed to have their employment service paid – these are the experiences the Association must use in the further promotion of mediation, as a procedure in which the interests of the parties can be reached in a most efficient and effective manner.

One of the challenges is to retain a part of the bar community, which is currently indifferent or reluctant to the use of mediation as a dispute resolution method. Some countries ensured a higher tariff for lawyers who resolve disputes in the mediation procedure and the code of the lawyers’ ethics set forth the liability of lawyers to inform the client on options and advantages of the mediation procedure, a solution frequently proposed by participants of the public discussions on mediation, even by the lawyers themselves.

The crucial activities will still remain to introduce the procedures of referring the parties to the mediation procedure in all courts of Bosnia and Herzegovina, promotion of mediation in the business sector, expansion of the mediation application field, implementation of the national strategies and action plans related to this area, and application of international and European standards, recommendations and directives related to the mediation.

After the improvement is made in the field of the foregoing challenges and the number of cases being resolved by the mediation procedure increases, there will be necessary to open new offices of the Association of Mediators, in order to respond to all requests. For the moment being, two offices of the Association and 63 registered mediators in the field meet all necessary requirements and are able to meet even multiplied interest in mediation.

For more details please refer to the web site: http://www.umbih.co.ba
3 Law on Civil Procedure of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina No. 53/03, Art 86; Law on Civil Procedure of Republika Srpska, Official Gazette 58/03, Art. 86; Law on Civil Procedure before the Court of Bosnia and Herzegovina No. 36/04, Art. 53; Law on Criminal Procedure of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina No. 35/03, Art. 108; Law on Criminal Procedure of Republika Srpska, Official Gazette of Republika Srpska No. 50/04, Art. 108; Law on Minor Offense of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina 20/04, Art. 22.

4 Law on Mediation Procedure, Official Gazette of Bosnia and Herzegovina No. 37/04

5 The Law on Transfer of Mediation Affairs to the Association of Mediators, Official Gazette of Bosnia and Herzegovina No. 52/05

6 Pravilnici i kodeks medijatorske etike, Službeni glasnik Bosne i Hercegovine br. 21/06

7 Law of Court Fees, Official Gazette of Republika Srpska No. 73/08, Art. 35.
Fatima Mrdović
Branka Skoko
Judiciary and Mediation
Introduction

The mediation has been introduced into the legal system of Bosnia and Herzegovina by adoption of the new Civil Proceeding Codes (hereinafter: CPC) published in the Official Gazette of the Federation of Bosnia and Herzegovina No. 53/03 and 73/05, and in the Official Gazette of Republika Srpska No. 58/03, 85/03 and 74/05, which provision of Article 86 sets forth that no later than during the preparatory hearing the court can, provided it may serve the purpose related to the very nature of dispute and other circumstances, propose to parties to resolve a dispute in a mediation proceeding, while the parties themselves can jointly make such proposal prior to the conclusion of the main hearing.

1 Fatima Mrdović has been a judge in a Cantonal Court of Sarajevo since July 2007. She graduated at the Faculty of Law of Sarajevo, and obtained a Master Degree from the University of Minnesota Law School. She participated as a judge of Municipal Court of Sarajevo – Commercial Department in the Pilot Project “Introduction of Mediation in the Municipal Court of Sarajevo”, and she completed the Train the Trainers Program for judges in referral of cases to mediation organized by IFC and Judicial and Prosecutorial Training Center of the Federation of Bosnia and Herzegovina. She has been dealing with commercial dispute resolution since 2001.

2 Branka Skoko holds a Master degree in the field of commercial law in the theme “Takeover of Shareholder Companies”. She has been employed as a judge in the Basic Court of Banja Luka in the Commercial Department, which deals with resolving disputes concerning rights and duties in legal traffic of goods and services, property and other rights over real estates, rights arising of securities, copyrights, industrial property, and bankruptcy and liquidation proceedins, as well as other disputes under the competence anticipated in the Law on Courts in Republika Srpska.
However, alternative dispute resolution has been existing for a longer time period in the legal tradition, in which certain types of disputes, usually the commercial ones, had been resolved in out-of-court settlements, prior to instituting proceedings but also in course of the proceedings, often resulting in withdrawal of the lawsuit or conclusion of a judicial settlement. The conciliation institute in civil proceedings arising of domestic law was mandatory pursuant to provision of Article 410 of the former Civil Proceeding Code of the Federation of Bosnia and Herzegovina, according to which the court in course of the entire proceeding, was obligated to aim at conciliation of married spouses.

The Law on Obligation Relations, taken from the previous legal system also stipulates in provisions of Article 19 the duty of participants in obligation relations to aim at dispute resolution by means of adjustments, mediation, or any other amicable manner.

This provision represented the basis for introduction of mediation as one of the alternative dispute resolution methods into the legal system of Bosnia and Herzegovina which has been inherent to the European legal practice ever since 18th century. Thus the conciliation proceedings in France were mandatory in all cases adjudicated before the regular courts in civil matters, whereas the 1906 Civil Proceeding Code of France anticipates obligation of any judge to encourage the parties to achieve a settlement (Meditation in France, 55-Jan Disp. Resol, E. Galliard, J. Edelstein).

A first specific and practical step towards application of provisions of Article 86 of the new CPC was made by launching a pilot project “Introduction of mediation in the Basic Court of Banja Luka and the Municipal Court of Sarajevo“, by SEED organization (IFC), because this project created the preconditions for work of mediators and implementation of mediation proceeding in Centers of Mediations in Sarajevo and Banja Luka.
Launching a Mediation Pilot Project in the Basic Court of Banja Luka

In the Basic Court of Banja Luka a pilot program of alternative dispute resolution by mediation and neutral dispute assessment was introduced in April 2004. The goal of this project was to provide answers to practical issues on possibilities of mediation application in BiH. It is the first court in Bosnia and Herzegovina in which the mediation has began to be implemented, i.e. specifically in relation to resolution of old commercial disputes. Before the pilot project was launched, lots of programs and measures were undertaken as prerequisites for introducing of alternative dispute resolution. Therefore, with the financial assistance of the Canadian International Development Agency (CIDA), Canadian Institute of Conflict Resolution (CICR) the training program in dispute resolution in BiH was implemented between 1998 and 2002. More than 700 members of professional community, including judges and attorneys, passed through the trainings in mediation, facilitation and other forms of alternative dispute resolution (ADR) methods. This program led to establishment of the Association of Mediators in BiH, which played a crucial role in adoption of the law supporting the mediation use in the court proceeding and together with IFC had launched the first pilot project.

The Basic Court in Banja Luka was selected as a first court in which the mediation pilot project was launched in BiH based on the following criteria: the largest court in Republika Srpska, significant backlog of cases especially in the commercial department, readiness of court employees to provide support to implementation of the pilot project, majority of judges were trained in mediation and they expressed interest to sustain the introduction of mediation, availability of a large group of mediators in Banja Luka.

The major role in the implementation of the pilot project was played by the Mediation Center, in which mediators conducted mediation proceedings in cases referred to by the court. The major role of the court and judges was to recognize the eligible cases for mediation and, following the acceptance of the parties, to refer them to the Mediation Center for a mediation proceeding. Most cases were commercial cases (about 50%), some cases arising of domestic law (about 25%), labor cases (about 15%) and other civil cases.

To June 2004, mediation proceedings were successfully accomplished in 90 disputes, and in that way the funds amounting to 3,087 Million KM were released after having been previously blocked in multiannual civil proceedings.
Launching a Mediation Pilot Project in the Municipal Court of Sarajevo

The pilot project in Sarajevo was launched in 2005, i.e. within the Commercial Department of the Municipal Court of Sarajevo after the Memorandum on Participation in the Pilot Project “Introduction of Mediation in the Municipal Court of Sarajevo” between the Municipal Court of Sarajevo, IFC SEED, and the Association of Mediators of Bosnia and Herzegovina had been signed.

The Municipal Court of Sarajevo primarily opted for participation in this project because it was in line with requirements of the justice sector reform process in Bosnia and Herzegovina which aim was to implement new legislation in the field of procedural law and to create modern, efficient, and independent judiciary. Particular significance is paid to the efficient resolution of commercial disputes, primarily for purpose of developing local economy, but also to stimulate the foreign investors by creating the environment which is more appropriate and safe for investments.

There were several reasons to include the Municipal Court of Sarajevo in this project. First and foremost, the understanding of alternative dispute resolution as a backlog reduction opportunity in the court, and at that time there were about 3000 cases per judge. Time needed for backlog reduction was over four years which was extreme and unacceptable for proceeding of commercial cases, therefore it was decided that judges should, in all cases they deem appropriate, propose to parties to resolve cases in a mediation proceeding. In that event, the dispute resolution itself will move out from the court, and in case of a successful mediation, the case will be considered resolved. In case the mediation fails, the case will be returned to the court for a regular court proceeding.

The second reason why the Municipal Court of Sarajevo participated in the Pilot Project was to support the development of mediation as an alternative dispute resolution method, which was entirely in compliance with BiH applicable legislation which had been encouraging parties to resolve their cases amicably, but also it was in line with the requirements of the Justice Sector Reform Strategy, aiming at creation of prerequisites to have as much possible cases concerning traffic of goods and services resolved in a fashion that would positively affect parties’ businesses, i.e. reconstruction and development of economy which was destroyed during the war atrocities to a major extent.
The third reason was to support the Association of Mediators as a young organization which could prove its affirmation in this region only through positive effects of mediations in the society. Acceptance, i.e. support to be provided by the professional community, was of vital importance for its revival and development in this region.

First activities of the Municipal Court of Sarajevo addressed the judges of the Court Commercial Department in order to make them familiar with the mediation proceeding and its advantages compared to a judicial proceeding, and skills needed for selection and referral of cases, i.e. the parties to a mediation proceeding. The special significance by all participants in the Project was given to the continuous training of judges, for the most efficient selection of cases, the best possible preparation for the mediation by timely information and enlightening the parties of benefits of mediation, and for the purpose of better acceptance of mediation as an alternative to a lengthy judicial proceeding. For that reason, the judges attended numerous seminars, joint workshops with mediators, and organized a study visit to The Netherlands for purpose of learning about judges’ experience from other countries in which mediation had existed for a longer period of time. These activities were extremely significant, well-organized, and entirely fulfilled their goal, i.e. preparation of judges for application of the provision 86 of Article of the CPC, which sets forth proposed mediation to the parties for those cases for which the latter would, according to the judge's assessment, serve a purpose.

Following the signing of the Memorandum and after the Law on Transfer of Mediation Affairs to the Association of Mediators (“Official Gazette of Bosnia and Herzegovina”, No. 52/05) had become effective, and the premises of Mediation Center in Sarajevo were equipped, the prerequisites were met to select eligible cases for mediation.

In the time period between September 2005 and March 2007, the judges of the Commercial Department of the Municipal Court of Sarajevo notified the parties in 1073 cases on opportunity to resolve their case in a mediation procedure providing them with general guidelines on the proceeding and provision of the Law on Mediation Proceeding, and proposed them to resolve their dispute by means of mediation. In the same time period, the parties accepted mediation in 139 cases, about which, pursuant to the concluded Protocol, the Mediation Center was informed in order to institute a mediation proceeding. Out of 130 cases, in which the mediation was scheduled, as per data obtained from the Mediation Center of Sarajevo of 3rd January 2007, the
disputes in 36 cases were entirely resolved (27.69%), the agreement was not achieved in 46 cases (35.38%), and in 39 cases (30%) the mediation did not take place, it was agreed to continue with mediation in seven cases (5.38%), ad in one case the outcome was not known, and in another one the new mediation appointment was scheduled.

Experiences of the Pilot Project
Banja Luka

The Pilot Project actually represented a mediation project attached to the courts. The surveys were supposed to demonstrate justifiability of case referral to mediation and whether any need for mediation during the litigation proceeding exist. There have been the same difficulties to date, because the mediation was relatively a new phenomenon in our judicial system, thus the market surveys had to follow the information on all benefits provided by mediation as an alternative dispute resolution method.

The judges acquired major experience in course of the Project. First, the mediation was promoted as another dispute resolution method and as an aid to courts in backlog reduction, the parties were given the possibility to negotiate before a third neutral party and thereby achieve the common resolution and realization of their interests with all the advantages the mediation proceeding has in comparison to a litigation proceeding.

However, the Project did not yield the expected outcome in terms of more referred cases to the mediation and more settled cases. Some of the judges, following the seminar on referral of cases to mediation, focused more on scheduling judicial settlement conferences, deeming that the judge already had a more significant role and that it would be easier to schedule a judicial settlement conference than to refer the case to the mediation.

On the other hand, the mediation proceeding due to both its informal nature and its isolation from a judicial proceeding, leaves the parties without procedural protection which is available in a litigation proceeding, making the parties less inclined towards the mediation.

Moreover, the principle of confidentiality also prevents court supervision over the mediator's performance. The access to mediation also inflict additional costs, which was justifiably criticized as an additional burden for the parties, and on the other hand, it can be objected that the parties, for purpose of saving
time and money, sacrifice the justice and accept the solutions that are not in compliance with the law.

Also, another problem occurring in the course of the project was reactions of attorneys regarding acceptance of mediation. The initial negative reaction is a common phenomenon that happens in all countries in which the mediation was introduced as a new dispute resolution method. The reason thereof lays in attorneys’ concern that their fees would significantly drop due to brevity of a mediation proceeding and that the mediation would directly jeopardize income sources of attorneys. However, by involving attorneys into the training programs on mediation and its advantages, this problem has been gradually narrowed.

Sarajevo

Having in mind both the introduction of new procedural solutions into the case law and overburdened courts, it can be stated that the judges devoted significant part of their time to selection of cases referred to the mediation. Judges also proposed to the parties to attempt resolving their case by mediation even if a real potential for a judicial settlement conference had existed, because it was a matter of a proceeding in which the parties themselves, with participation of a mediator, should resolve their dispute, and the settlement agreement they achieve should have an effect of enforcement document as it would be the case with an effective and enforceable judicial decision itself. In each case, which was eligible to mediation in terms of the subject matter of dispute, and in which the parties were willing to resolve the dispute, and not to fight for a court decision, the judges did their best to actively contribute to decision-making of the parties in favor of mediation and provided support for such decisions.

On occasion of selecting cases, the judges used their own work experience with parties and commercial dispute resolution, but also the new skills and know-how they acquired in trainings. The same methods and tools used by mediators were deployed, i.e. mediation was proposed as one of the options the parties can opt for as a problem resolution method in communication between the parties. To that end, the parties were notified about mediation properties and its benefits, and the decision itself on whether that method would suit them was let to the parties. The parties were offered the possibility to raise questions and have their dilemmas explained and provided with thorough information that could be useful for decision-making.
A number of questions addressed the mediators and their quality. To that end, the court did not have enough information besides the requirements necessary for registration of mediators into Register. It was noted that parties, besides explanation that the mediator was only assisting them to achieve a dispute resolution which would suit them best, they expected to have highly qualified and in broader community well established and experienced lawyers. Besides neutrality of mediators the parties almost always preferred expertise and professional authority, as a guarantee of the quality of their settlement agreement.

In many cases it was observed that the parties were ready to accept the mediation to postpone a judicial decision only, with no sincere desire and will to resolve a disputable situation they happened to have. For the same reasons, the mediation was accepted by both defendant and plaintiff in the event they were not ready to undertake actions anticipated by the Civil Proceeding Code.

Cases in which parties really wanted to resolve their dispute and to continue business cooperation were indeed completed in a mediation proceeding. Since the legislation which would render mediated settlement as enforcement documents did not exist during the Pilot Project, because both the Law on Transfer of Mediation Affairs to the Association of Mediators and by-laws – Rules of the Association of Mediators - had not been effective at that time, the parties returned to the court after they reach an agreement in mediation and concluded a judicial settlement.

In this way, the judges received feedback information from the parties, and it was possible to learn whether the mediation met their expectation and whether it would be an acceptable dispute resolution method in the future. Since the parties, immediately after the mediated agreement was achieved, concluded a judicial settlement, the judges deemed that the parties who accepted the mediation and achieved an agreement, really understood the principles of the mediation proceeding and were also satisfied by their active participation in negotiations, and they did not have objections to the mediator’s performance. It has to be emphasized here that the parties did not have objection to the mediation fees, which were symbolic during the Pilot Project indeed, since the Project had secured funding, and the parties participated only partially in financing of mediation.

The parties, who did not accept the offered mediation, justified it frequently by their suspicion in possibility of dispute resolution without a judicial decision
although they were explained advantages of the mediation as a voluntary, informal, fast and cost-effective dispute resolution method. These doubts were usually rooted in lack of trust in real intentions of the other party, which was a consequence of bad experience in mutual business relations, or in their own lack of readiness to accept the negotiation principles and to assume responsibility for the made decision.

Some parties *a priori* rejected mediation, having no desire to hear or learn about reasons that could affect their decision in case they would accept the mediation, while the other ones accepted the mediation, but behaved rather passively after that, or similar as in a judicial proceeding, they attempted to postpone the mediation and eventually they were not ready for the agreement.

The parties that did not achieve an agreement in a mediation proceeding, pointed out a passive attitude of the other party and lack of a real intention to resolve the dispute in negotiations, or they stated that they had different expectations of the mediators and expressed doubts or suspicion in their expertise and experience. These were usually the parties who expected that the mediators would be actively involved in the dispute resolution process in terms of proposing a final settlement and decision-making, which indicated that they were not entirely familiar with the mediation concept.

**Mediation from a Court Perspective**

First of all, it is necessary to differentiate between the mediation which is conducted before a judicial proceeding was instituted and the mediation which takes place in the course of an already instituted proceeding. In the first case, the parties decide themselves in which cases they will opt for a mediation proceeding. Mediation may be instituted also when there is a clause on mediation in the contract, and this is a very good method to institute the mediation in commercial disputes. This clause provides to the parties that any dispute arising of the contract should be attempted to be resolved by mediation, and prior to institution of a judicial proceeding.

In cases when a judicial proceeding has already been instituted, a first step towards a successful mediation is appropriate selection of cases in which mediation can be successfully conducted. This possibility is anticipated in Article 86 of the CPC, that provides a court with the possibility to propose mediation to the parties on the scheduled preparatory hearing, if deems it would
serve the purpose concerning the nature of dispute and other circumstances, and the parties can make the same proposal by conclusion of the main hearing. Pursuant Article 4 of the Law on Mediation Proceeding a judge shall, in course of the preparatory hearing, make a proposal to resolve the dispute by a mediation proceeding, if he/she deems it purposeful concerning nature of a dispute and other circumstances.

The Law anticipates that a judge shall make a proposal for mediation if he deems it purposeful. It is purposeful to propose the mediation if it is permitted and if the judge believes that the mediation may have a positive effect to preservation of good relations between the parties, saving of time and money both for parties and courts, to the outcome, case backlog reduction in the court, access to justice, and building of public confidence in the rule of law.

It is necessary to reiterate that the mediation, at least in the initial stage of the Pilot Project, but also later was relatively unfamiliar option, and therefore was not very popular both with those who refer cases to mediation and the parties, particularly with the attorney. Therefore, it is of critical importance to provide information and establish communication in order to encourage all stakeholders to initial cooperation, and to achieve certain results in that way. During multiannual application of the proceeding in the Basic Court of Banja Lika, we are proud to state that we managed to encourage many stakeholders to become involved in the project and to have them created their own opinion about the proceeding, be it even a negative one.

On occasion of assessment of cases to be selected for mediation, the judge shall have in mind that some cases are not permitted to be settled in a mediation proceeding (Article 3 Paragraph 2 of the CPC), to take into consideration the nature and circumstances of a specific case, then his/her own experience as a judge, and also assessment of the eligibility of the parties. These criteria may be divided in objective and subjective: the first ones address the nature of a case and eligibility of mediation, and the second ones to the parties’ previous positive experience in an amicable dispute resolution, their mutual relations, and their will to achieve an agreement and to continue their collaboration, etc. In general, it can be stated that there are no specific rules in assessment of the cases considering that each case is specific in itself, but when there is a well-balanced combination of subjective and objective criteria, provided the mediation is permitted, there is always a possibility for mediation.

The court may also conduct automatic referral of cases to mediation by initiating the mediation at the initial stage of a dispute, upon receiving the lawsuit and
response to the lawsuit, in a way that the plaintiff or its plenipotentiary may be verbally informed about the option of dispute resolution in a mediation proceeding on occasion when a lawsuit is submitted in person, and to provide the defendant with the promotional material of the Association of Mediators and to offer the appropriate forms to the parties to fill out and submit to the court.

If the lawsuit was submitted per mail, the court may also notify the plaintiff about the possibility to apply the mediation by enclosing the promotional material of the Association of Mediators along with the defendant’s response to the lawsuit. The court will submit the same forms to the counter-party.

Eventually, a special role of the court is emphasized during the preparatory hearing or in course of the main hearing. In that case, the court shall make an assessment whether a specific case is eligible to mediation, to take enough time to make the parties familiar with the proceeding, and to propose the latter to the parties. Notwithstanding the afore mentioned objective criteria and potential types of disputes submitted to mediation, on occasion of eligibility assessment for mediation, first and foremost we took into consideration subjective factors, and we believe that they represent a quality-based criteria and higher guarantee of the mediation success, or a well-selected and eligible dispute.

Thereto, we particularly had in mind the following:

- Are the parties in a permanent relation, e.g. domestic and labor disputes or permanent business relations;
- The nature of parties’ relation, whether they are business or family related;
- Emotional component, ability of parties to resolve a dispute by negotiations;
- Financial aspect and potential of continuation of business relations in the future;
- Need to resolve a dispute in a confidential manner, or without presence of the public;
- Brevity of dispute resolution;
- Awareness of parties to be able to reach an agreement;
- Adversity of a lengthy judicial procedure for the party which has already invested major material funds in a legal relation;
- Previous failed negotiations, for which the court established that a third neutral party may assist the contested parties to sit around table again;
- Clear opinion about which party has right, and which one has wrong, because the party which has right will not accept mediation and it is illusive to expect it, and to waste time on persuasion. (therefore in these cases, in which there is no firm legal status of either of the parties, their attention should be drawn to the possibility of an amicable dispute resolution, because these are exactly the disputes that take the most lengthy time due to a extensive evidence presentation in order to establish factual state to which a legal norms may be applied);

- Number of participants on plaintiff’s and defendant’s side (in these cases more time is required for the parties to agree on the viewpoints for an agreement, especially if the parties have a complicated decision-making mechanism, e.g. a Board of Directors which meets less frequently for decision-making).

On occasion of selection of cases eligible for mediation, the judge has also – in addition to the duties set forth by the law - to be efficient, to monitor the cases, observe the relations between the parties, to make assessment of their legal status, their interests and needs. It is vital that parties acknowledge the efforts of a judge to resolve the dispute, and not only to divest himself/herself of a case.

The judges are aware of the fact that in the referral of cases to mediation, the hearing of parties represents a critical stage for parties’ acceptance of mediation however it simultaneously requires the most intensive efforts. Our judges had enough experience and knowledge to recognize all factors affecting the selection of an eligible case for mediation. The judges in other courts are rather unfamiliar with mediation, thus well-balanced information is crucial; not only about what mediation is, but also about the option to choose mediation in a specific situation. The practice proved that information about mediation which is provided verbally to the parties happened to yield the best results. Surveys demonstrated that parties represented by an attorney in the proceeding choose mediation significantly less than the parties which had no representation and which directly participated in the proceeding and who received the information on mediation from a judge directly.

It is hard to establish the indicators and counter-indicators of referral and selection of cases. We believe that the best indicator is the readiness of parties themselves to negotiations. Based on their own experience, mediators themselves also confirm that a successful mediation depend not only on a case type, but also on the attitude and will of the parties. Parties have to be
prepared and able to discuss the resolution of their dispute, to take their mutual interest into consideration, and to be willing to continue their future relations, especially business relations. It is also vital that a judge on occasion of referring a case to mediation is willing and able to pay due attention to the parties, to establish their commitment to an amicable dispute resolution and to achieve an agreement through mediation, regardless of the legal status of parties in a judicial proceeding. Frequently, the parties were not ready for mediation in an early stage of the proceeding, because they had been affected and afraid that if they would accept the mediation, the other party may have looked at that move as an “action of the weaker party“. In these cases, indication and referral by the court may assist to the parties to opt for the mediation, because the authority of the court contributes to understanding of seriousness of this proceeding. On the other hand, the parties, be it due to the lack of knowledge or to fear, do not want to propose mediation, thus the initiative by a judge helps to a great extent that parties give their own consent.

Concerning the most convenient time to refer parties to mediation, dissenting opinions existed. One part believed it should be done as soon as possible before the conflict between the parties escalates. The other part deemed that the conflict between the parties should be let to reach a certain maturity stage before the parties decide to withdraw from a judicial proceeding and to sit around the negotiation table. Certainly, there are cases which are by their nature entirely inappropriate for mediation. It means, we used various types of instructions, most frequently in civil disputes upon a verbal instruction given by a judge. Next to that, the decision-making by the parties was mitigated by written invitations along with instructions on mediation and its specific advantages in comparison to a judicial proceeding. When the invitation to parties was sent, the court also attached a letter in order to do the favor to the parties to become more familiar with this dispute resolution method. In addition to instructing parties about mediation by a judge, other court employees were also involved in promoting the mediation. In administrative cases, in a very early stage of the proceeding, court staff informed the parties about mediation option, which proved to be very efficient, because the conflict did not escalate too much.

According to the present experience, we can say that the mediation proved as ineligible in the following cases: cases in which there is obvious or potential use of violation or harassment; in which one or more parties are alcohol, drug or other addicts; if private or public interest would be better met by a judicial decision; when the achieved settlement agreement is neglected; or when the parties attempt to avoid their obligations by means of the achieved settlement
agreement; when a judge establishes that parties only want to procrastinate the proceeding without a sincere intention to achieve an agreement; when parties misuse the mediation only to obtain more information about the case.

Also, to date experience proved that cases related to real estate, establishment or denial of paternity, in case one party is under a bankruptcy proceeding, or in case one party is a state institution, employment termination, are not eligible for mediation. Also, a number of parties in dispute are also a very vital factor in case of eligibility assessment for referral to mediation (in case more parties are authorized to make decisions and to become familiar with the dispute case, approving consent to mediation may be more difficult).

In any event, the practice and time will tell what cases are mostly eligible for mediations, i.e. what factors are in cases not suitable for mediation.

Looking it from the judicial perspective, the judiciary is willing and able to adequately refer cases to mediation. By means of awareness raising and consultations concerning the mediation, the courts will contribute to strengthening of this alternative dispute resolution method and that both the parties and their plenipotentiaries will increasingly make use of this tool in the future, both in an initial stage of the proceeding and prior instituting a judicial proceeding. Hereby we would like to note that mediation in our country is used on a voluntary basis and courts may organize a mediation proceeding as it suits them the most. That means that best practices are developed which may be further factors of measuring the use of this dispute resolution method. It is necessary to monitor the results by caseload, costs in these cases, and other indicators.

**Legislation Framework of Mediation and Access to Justice**

In course of the justice sector reform in BIH, new procedural laws were passed, which rendered opportunity to regulate the mediation as one of the methods of alternative dispute resolutions, and relations between the court administering justice in cases and the mediation. Pursuant provision of Article 86 of the CPC, as it is emphasized, the judge shall be authorized to assess whether it is convenient to resolve a dispute in a mediation proceeding, and to make a proposal of mediation no later than on scheduled preparatory hearing.
Judges of the Commercial Department of the Municipal Court of Sarajevo began significantly to apply this legislation provision during the Pilot Project. Concerning an extremely large number of cases and the need of an urgent resolution of case backlog, in all cases in which preparatory hearings were scheduled, an assessment of mediation eligibility of the case was conducted, by evaluation of the nature of the case, complexity degree, parties in dispute, and specific procedural situation. In case, the defendant disputed only amount and not the counts of the lawsuit claim, the judges deemed the dispute to be resolved in a new fashion, and there were no obstacles that parties in an informal proceeding, such as the mediation, attempt to achieve amicable settlement of the disputed situation.

It was normally the tradition among the judges of the Municipal Court of Sarajevo to make the parties aware, prior adjudication, of an option of amicable dispute resolution and judicial settlement conference, therefore the judges had previous experience concerning communication to parties, their reactions to such proposals and effects of such communication to the dispute outcome.

Judges did not face the problem in application of the provision of Article 86 of CPC. However, as the choice of mediation as a dispute resolution option is directly related to the parties' acceptance, because it is matter of a voluntary proceeding, the very outcome of its application is not only linked to the court actions, but it has to be viewed in a broader context.

Having in mind that court actions on a case start by the mere filing of a lawsuit, due to cost-effectiveness of the proceeding, i.e. cost and caseload reduction in the court, it would be most convenient to propose mediation in earlier stages of the proceeding, prior some considerable costs are already inflicted. For that reason, a rational legal solution is that a judge can propose mediation to the parties no later than the scheduled preparatory hearing, because this is the stage in which the parties already made up their mind and offered their evidences, therefore it is possible for the court to assess the nature of a specific case and ability of parties to resolve it by adjustment, mediation or and other amicable manner, instead of waiting for a judicial decision and its enforcement.

This assessment is very important in commercial disputes for their prompt resolution, i.e. not only it is a matter of a specific disputable relation, but also the entire business movement and society development able to cope with challenges of a contemporary market economy, as well as the reputation of the country and its rule of law, as these relations often includes a foreign elements,
application of international private law and provide exercise of rights to free
flow of goods and capital.

Therefore, according to the governing laws, the court may propose mediation
to the parties no later than on preparatory hearing, while the parties may bring
forward such proposal if in agreement no later than the completion of the main
hearing. Since the parties may agree about a judicial agreement in dispute in
course of the entire proceeding, that practically means that the law makes
possible to the parties to resolve their dispute in course of an entire judicial
proceeding in an amicable fashion.

If the mediation is observed as an alternative to a judicial proceeding, the
afore mentioned solution is good, because if mediation could be proposed in
course of a second instance proceeding, i.e. after a court has already made a
decision, the parties would be practically able to alter the court decision, for
which no option is set forth by the law. In addition to that, in later stages of
the proceeding, the dispute becomes more complex and the parties stick to
their positions firmly and no positive impact on negotiation possibilities can
be expected.

It is much more significant to propose mediation in earlier stages of the dispute;
first of all, it has a more efficient and effective impact on reestablishment of
relations which were disturbed due to the dispute, but also it meets interests
of the parties and positively influence backlog reduction of cases which do not
have to be necessarily resolved by the court.

Training of Judges in Mediation

Training of judges in the field of alternative dispute resolution, and particularly
in mediation, within the Pilot Project had very good quality and was
comprehensive. The major importance of that training was good planning and
use of resources by the organizers, which resulted in an entirely new way of
presentation and use of experience and knowledge of experts from the countries
in which mediation is accepted and mediators are affirmed as professionals and
in the framework of the judiciary but also in broader community.

In addition to that, the training was not limited only to the role of judges in
referral cases to mediation proceeding, but the latter also included the judges
in acquiring of skills of a mediator in order to have better understanding of
mediation cause, which is necessary for creating their own attitude towards the mediation, but also decision to refer parties to mediation and persuasiveness of such a decision.

Various types of trainings, such as seminars, workshops, working sessions, presentations, exchange of experience with judges from other courts, participation in the work of international conferences, and a study trip to The Netherlands, which were implemented in the framework of the Pilot Project for all judges involved in it, had crucial importance for introduction of mediation into the court practice. The mediation was not only the interest of judges in commercial departments, but also the judges and parties in civil proceedings.

**Mutual Relation between Judiciary and Mediation**

To date practice, as well as acquired experience, have to be continually developed. Mediators cannot expect more significant increase in number of mediations, unless this dispute resolution method is not supported by judges whose assessment of case eligibility and the way it is presented to the parties are of critical importance.

Moreover, one has to bear in mind that judges themselves must be convinced that mediation is an efficient alternative to a judicial proceeding that is realized in a way which meets professional standards and does not challenge exercise of rights, and entirely meets interests of the parties, which is basically a reason for acceptance of mediation.

To that end, it is vital to support empowering of the Association of Mediators with the goal of affirmation of a new profession and achievement of new standards in mutual communication. However, the mediators have the most important role in that, and their motivation to create a recognizable image and reputation in the community in which they work. It is not necessary for them to be supreme experts and experiences lawyers, although it is very desirable to have them among mediators if they are willing to attempt that particular career, but it is important that they well-established professionals whose reputation would contribute both to the proceeding and the parties themselves, and the eventual outcome, not only for themselves but for the mediation in general. That reputation has to be achieved and maintained of mediation to attract those parties which have no interest or hesitate considering that there is any chance to resolve the dispute themselves.
Closing Considerations

Cases eligible for mediation

All cases are not equally eligible for mediation, and it depends more on the character of parties themselves than on the mere case. The major critical factor is to which extent the parties are able and willing to negotiate. Most frequently it is possible in cases of debt collection, of course in case the counter party is solvent. Special cases are those in which one party is a state authority and an issue is raised to which extent state authorities may negotiate and participate in mediation. It is important to bear in mind that mediation offers variety of options given the nature of dispute, and that parties may come up with creative options based on mutual confessions and discussions.

A successful referral to mediation is made of recognizing the parties which are ready to resolve their case in a non-judicial fashion, and proper awareness of all stakeholders of mediation and its benefits. The court will refer a case to mediation when it deems that parties would have more benefits thereof and they would be able to establish mutual contacts and find a solution based on their common interests. (e.g. in domestic, business and similar relations). In these cases the mediation is the most effective.

Measures for Mediation Incitement

Present practice has proved that public, i.e. citizens have not been familiar enough with benefits and potentials of the mediation yet, for which they incline to a judicial dispute resolution which again leads to increase of caseload and burden of the courts. The mediation is not used to the extent it should be used.

For that reason, awareness rising among citizens and institutions on all strengths and weaknesses of mediation is vital using all methods of awareness rising (media, seminars, round tables, professional publications, chambers of commerce and other professional groups, etc).

The awareness of mediation among business community is especially important to understand the importance and possibility of resolving disputes outside of courts and further continuation of business cooperation and communication. Also, it is crucial to involve attorneys as a professional group which may play a major role in information campaign and consultations concerning the
mediation, since they are the first profession to be addressed by the parties seeking advice how to resolve their disputes in the best possible way. Attorney can refer parties to mediation even before instituting a judicial proceeding. It is also desirable to establish legal aid centers which would also play a significant role in advising the parties to resolve their disputes in negotiations with the assistance of mediators prior to instituting a judicial proceeding.

One of the incentive measures for mediation use by the court is establishment and equipment of special offices in the court building in which mediators can conduct mediation proceeding. In our opinion, the mere fact that mediation takes place in a court building provides a feeling of security and seriousness of parties and thereby they would be more inclined to accept resolving disputes by mediation.

In addition to that, aiming at stimulation of parties to accept the court proposal about mediation is also regulation of mediation proceeding fees. In that context, Article 35 of the Law on Court Fees (“Official Gazette of Republika Srpska”, No: 73/08) sets forth that if parties reach an agreement during a judicial proceeding and no later than the main hearing to resolve the dispute in a mediation proceeding, and if they achieve a settlement agreement therein, they are entitled to court fee refund amounting to 50%, and also fixed payment by a mediation proceeding can be accepted which can be suitable for the both a mediator and parties, regardless of their financial status.
The initial success of the mediation but also the enthusiasm of numerous proponents about the procedure in many European countries gave impetus to European Union to show interest in this procedure which eventually led to initiation of harmonization of legislation in all member states.

In late 90s, the European Union recognized that an inefficient approach to justice might jeopardize the full exercise of “four major freedoms” and to make proper economic activity impossible throughout the common market. Efficient judiciary, but indirectly also a more effective dispute resolution, have become the major objectives of the European policy aiming at establishment of freedom, security, and justice for all. The European Commission then commenced with extensive activity of creating enhanced conditions for better access to justice by establishing “adequate dispute resolution processes”. One of the models the European Union member states intensively started applying in order to make its judiciary more accessible, particularly to business people, includes the use of various mechanisms of alternative dispute resolution, in particular the mediation.

Lada Buševac holds MA degree in out-of-court dispute resolution. For the moment being, she is in charge of Global Development of ADR as a Corporate Product of the International Finance Corporation (IFC). The major objective of this initiative is to provide full consolidation and harmonization of activities, methodology and best international practice in the field of out-of-court dispute resolution, especially mediation and arbitration, in the interest of faster market development particularly in developing countries.
In 1998 and 2001, the European Commission issued the Recommendations, which primarily referred to the consumer dispute resolutions through mediation. Although they primarily referred to consumers’ disputes, its major value was in emphasizing the significance of uniformed high criteria for providing out-of-court services of dispute resolution. First positive results of the mediation application were noted in 2004 Eurobarometer, in which 2/3 of respondents were positive about non-judicial authorities concerning dispute resolution, including the mediation, stating that they would rather be ready to entrust their case to a specialized non-judicial authority than to the court.

Based on these findings and in order to better understand possibilities of the mediation application in other areas, the Commission published the Green Paper in 2002, which was put into an extensive public consultation process. In the Green Paper, the Commission pointed out that development of non-judicial dispute resolution systems ought not be regarded as a remedy for correcting operational errors of the judicial system, but rather as an alternative based on consensus for cases which are more suitable to be resolved by a third neutral party than by a judicial decision or arbitration award.

The techniques of alternative dispute resolution such as mediation enable the parties in dispute to establish a dialogue and to come to the proper resolution of their dispute through negotiations, and not to remain closed up in conflict dynamics and confrontation which inevitably determines the winner and looser at the end of the dispute. The major goal of the Green Paper is to provide answers to the delicate matter of balance between flexibility and need for quality outcomes, and harmonized compliance with the court proceeding.

Taking into account the feedback from business people who recognized advantages of the mediation and started making use of it throughout the Union, but also the analysis of numerous consultation rounds and discussion materials, the Draft Directive on Certain Aspects of Mediation in Civil and Commercial Cases was prepared, which aimed at recognizing the mediation as the most adequate dispute resolution method offering the most efficient access to justice. The Draft Directive sets forth introduction of a sound relationship between mediation and judicial proceedings by “establishing minimum common rules in the Community on a number of key aspects of civil procedure, and on top of that, by providing the necessary funds for the courts of the Member States to actively promote the use of mediation, without nevertheless making mediation compulsory or subject to specific sanctions.”
The European Parliament and the Commission adopted the Directive on Certain Aspect of Mediation in Civil and Commercial Matters on April 23, 2009. The purpose of the Directive was to make easier dispute resolution related to cross-border contracts, but also to promote amicable dispute resolution along with insurance of sound relationship between mediation and judicial proceedings.

Main elements of the Directives are the following:

i. The Directive obligates the Member States to more intensive trainings of mediators emphasizing the necessity of development of and adherence to voluntary codes of conduct by mediators as well as other effective quality control mechanisms concerning the provision of mediation services.

ii. The Directive entitles any judge throughout the Union to require parties in any event to attend an information session on mediation, and if a judge deems it appropriate, to refer the parties to the mediation immediately.

iii. The Directive makes possible for the parties that a settlement reached as a result of a successful mediation can have a status similar to a court decision that renders the agreement enforceable. This can be achieved, for instance, by confirming it in a judgment, stamp by a notary public, thereby rendering the settlement enforceable everywhere in the Union pursuant to the communitarian laws.

iv. The Directives ensures the mediation to take place in atmosphere of full confidentiality of information. Use of information disseminated during the mediation procedure in subsequent judicial proceedings is forbidden provided the mediation is not concluded by signing an agreement. This provision is of major importance since it provides the feeling of information confidentiality to the parties, but also it encourages them to make further use of the mediation. In accordance with that, the Directive ensures that the mediator cannot be invited to witness in any subsequent judicial proceedings disclosing any information which was exchanged during the mediation procedure.

v. The provision of the Directive on limitation period and legal remedy shall ensure that the parties who opted for the mediation shall not be restricted to institute a litigation procedure because they wasted some time in a mediation proceeding. The Directives shall thereby ensure that the party has the absolute guarantee to institute a judicial proceeding in case the mediation fails.
The previously noted main elements of the Directive, subject to transposition by May 11, 2009 in all EU Member States, render obvious that the mediation has been gaining on importance and significance while companies throughout the EU were among the first that have recognized its advantages.

Due to very high court fees the companies all over the European Union promptly began to accept the arbitration, negotiation, and mediation as the most appropriate and acceptable mechanisms of dispute resolutions. The study of *The Economist* proved that even the number of arbitrations and litigation proceedings were decreased to 60-75% for the reason of increased popularity of the mediation. It is notable to mention that in 1962 there were 11% of civil cases before the courts in the USA compared to only 2% nowadays, mostly thanks to the effects of the out-of-court dispute resolution mechanisms. In London, 3,000 mediations take place with an average success rate between 70-80%.

In November 2007, the Center of Efficient Dispute Resolution published the results of comprehensive economic effects of commercial mediation on the business activities and success of the companies. The Study concludes at the end that “reaching an earlier dispute resolution, which would end up in a civil proceeding before the court, the corporate mediation as a profession can save a billion of pounds in terms of time-management, preserved relations, maintenance of productivity and court fees”. In total, as of 1990 onwards, the mediation according to the Study contributed to savings of 6.3 billion pounds of the companies in the United Kingdom.

Furthermore, the related study of dispute management effects in a corporate context on the overall reputation revealed that the outcome of a dispute has a great impact on the business operations of the entire company. How a company deals with its disputes affects the sale and overall reputation of the company, therefore it shall become an integral part of a structured marketing strategy. Consequently, the introduction of mediation as a corporate tool in the process of dispute resolution strategy development, as a component of the marketing, becomes crucial for reputation of the entire company.

The precise reasons of the use of mediation by companies are additionally enlightened in the study by *PriceWaterhouseCoopers* in Germany. According to its report, 69% of companies use the mediation because it reduces the possibility of dispute escalation, 14% of them promote thereby the best internal practices, and 17% do that because the mediation contributes to savings.
Despite the fact that first initiatives of introducing the mediation were officially instigated by a consumer protection platform in the European Union, the businesses however recognized the value and significance of mediation and commenced treating it as a priority among choices of commercial dispute resolution methods. Bosnia and Herzegovina on its path of European integration, in the face of numerous problems in the judicial sector, demonstrated an enviable level of readiness to act quickly to contemporary trends and was among first countries in the region that has began with introduction of mediation. Along with the legislative regulations, essential infrastructure and public campaign, the enthusiasts led by judges also initiated pilot projects that provided empirical data on the mediation acceptability rate in Bosnia and Herzegovina. The analysis verified that mediation had its place in the legal system of BiH and that the longstanding tradition of Amicable Councils and the application of arbitration had created a fruitful soil for the mediation use as a less formal proceeding, but also that there were still room for a more intensive mediation development, particularly regarding participation of companies.

**Expectations of the Companies in Bosnia and Herzegovina**

What expectations do the companies of Bosnia and Herzegovina have with reference to commercial dispute resolution? How do they resolve disputes nowadays, and what do they want?

Bosnia and Herzegovina is a market of some 12,000 companies, out of which some 70% have had between 10-50 or more civil proceedings instituted before courts in the passed three years. The survey of the World Bank on the state administration efficiency in provision of optimal corporate conditions established that each judicially enforced contract amounts to almost 40 per cent of the total amount of the party's claimed value. Some informal estimates of other costs generated in a dispute resolution proceeding may increase the mentioned amount for the margin of additional 20 per cent. The simple calculation proves that a dispute value of some 100,000 KM may cost the party up to 60,000 KM if the case is resolved by a regular judicial proceeding.
The research conducted by IFC in 2007 demonstrated that companies in BiH expressed an extremely low level of satisfaction with performance of judicial institution, notwithstanding the instance level (Graph 1). Although we can clearly observe dissatisfaction and existence of objective impediments to the efficient dispute resolution, yet only some less than five per cent of responding companies use the alternative dispute resolution mechanisms. One of the reasons for such practice is our legal culture which is based on continental legal tradition of full codification of relationships and compliance with only legally defined conducts, therefore almost 80 per cent of domestic and foreign companies seeking a dispute resolution root their opinions in the existing legislation and not in the sector practice, specific practice or common sense. Change of this practice may, as seen in the developed countries of the European Union, lead to significant case backlog reduction, be it as a prevention method or through referral to mediation after the court proceeding was instituted.

A conclusion may be drawn that companies in Bosnia and Herzegovina expect and need a more efficient dispute resolution method, which would make an efficient, effective and cost-effective dispute resolution possible. The mediation may be one of the solutions but the problems arise with the level of trust and acceptance of mediation as a reliable exchange instead of a formal court proceeding. The analyses of the limited sample of the previously mentioned
pilot-project in Banja Luka and Sarajevo, speak in favor of the fact that the well-established infrastructure and professionalization of mediation, as well as satisfaction with the outcome along with compliance with basic principles of mediation, significantly increases the satisfaction level with achieved settlement agreements.

Furthermore, it is interesting to note that besides to poor general awareness of the mediation proceeding, there is still a significant number of respondents claiming they are very well familiar with the Law on Mediation Proceeding, even up to 82 per cent of foreign companies and 58 per cent of domestic companies. They were also familiar with the fact that the agreement reached in mediation has the effect of an enforceable document, 82 per cent of foreign companies, respectively 67 per cent of domestic companies responded positively.
Do you know that the agreements reached through mediation are equal to court decisions

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Graph 3.

The data mentioned in the previous paragraphs sound truly encouraging for efficient and simple acceptance of mediation as a new institute in the judicial practice of Bosnia and Herzegovina. On the other hand, both indicators in the field and direct responses of companies participating in the survey still prove the opposite. Although 65 per cent of foreign and 67 per cent of domestic companies expressed the readiness to discuss the possibility of dispute resolution by mediation, the number of companies using the mediation is surprisingly low (Graph 3).

The way how we perceive dispute or conflict concerning human or corporate relations has drastically changed in the passed thirty years. Traditionally, the conventional dispute resolution method exclusively by judicial institutions, or in consensually inclined society, is currently undergoing a significant metamorphosis. A dispute is no more the issue of victory or defeat, but the issue of finding common values through compromising negotiations based on mutual interests.
Important progress in theoretical dealing with conflict in context of sociological changes have strongly commenced to affect the existing infrastructure in developed societies, but also increasingly in the countries such as Bosnia and Herzegovina under the influence of intensive integration processes. Nevertheless, the research demonstrates that for majority of disputes the companies face in this region the legal framework is used in defining their opinion in relation to the dispute resolution (Graph 4).
Although the survey demonstrated that many companies opt for the appellate procedure (Graph 5) after a court proceeding was completed, imposing additional costs and time, there is still small number of companies which primarily opt for mediation.

The survey very clearly enlightened major impediments for the mediation development in Bosnia and Herzegovina, particularly from the companies’ point of view. It is necessary to invest additional efforts into trainings of company managers, since in most companies they are the only decision-makers about any dispute resolution method. In medium sized and big companies, there are mostly legal departments and training of personnel of these departments can lead to improvement of internal procedures in dispute resolution methods and to the more intensive use of mediation. Inclusion of a clause on mediation into contracts may be one of the efficient instruments of increased use of mediation.

The Association of Mediators in Bosnia and Herzegovina should more actively present its activities to the private sector. This can be one of the crucial factors of successful mediation promotion. Namely, in the initial stages of mediation introduction, the Association of Mediators maintains the Register of Mediators, and for that reason it is a principal guarantor of knowledge and professionalism of certified mediators. The trust of companies in the mediator’s performance
will to a great extent influence their decisions to resolve the disputes in a mediation procedure. A more extensive survey of corporate experience and especially the experience related to the mediation would assist designing of more effective training courses and mediation promotion and eventually increase use of mediation for dispute resolution.

Potential new surveys should be conducted on a larger sample in order to obtain statistically more significant results, and to involve groups of small-sized companies. Namely, some surveys indicate that small sized companies quite often do not attempt to resolve disputes because they have no sufficient resources available to institute court proceedings. Therefore, the properly focused mediation promotion campaign along with clearly emphasize of all advantages important for small-sized companies might have crucial effects for their business operations. A potential new research should pay particular attention to understanding of the cultural and psychological barriers for mediation use.

**Closing Remarks**

Fifteen years after the war which was ended by negotiations, Bosnia and Herzegovina is on its path to European integrations. Along with numerous steps undertaken to make the society of BiH more organized, secure and more attractive in economical terms, we still talk about numerous shortcomings impeding faster economic development. The judiciary in BiH is far from functional. Many studies and analyses indicate that citizens are still victims of bureaucratic, complex and unorganized system which to the great extent exacerbates the establishment of an efficient system of access to justice in accordance to the model in the EU member states.

For a dispute resolution, the companies in Bosnia and Herzegovina have to pay about 40 per cent of the total claim to the benefits of court fees. Losses in direct and indirect costs can be easily calculated in billions. In addition to that, no choice of alternative methods leaves the court as the only option, which is not able to accept and resolve such a high number of cases, consequently being condemned to a case backlog in advance, as well as lengthy proceedings going over many years, etc.
On “the wings of reform wind”, all countries in the region of South East Europe commenced with activities of introducing mediation few years ago. Bosnia and Herzegovina has certainly joined new trends and initiated many activities in order to make gradual acceptance of mediation by the domestic legal system possible. The progress in the right direction has been made to create prerequisites for introduction of mediation in Bosnia and Herzegovina, starting with creating a legal framework, establishment of basic infrastructure and testing of possible models by means of two pilot-projects. However, the overall positive progress has still not been sufficient to make the mediation self-sustainable option in the legal system of Bosnia and Herzegovina. Numerous risks daunt to harm its further development ranging from refusal of professional communities to accept it, such as the bar associations, to misconceived model of referral of cases to mediation and the role of mediators in the process of administrative dispute resolution.

In order to reduce negative repercussions of these weaknesses, it is necessary to ensure a more intensive engagement of judges and professional bar community in the mediation development by defining very clear incentive models. It is necessary to make the current administration mediation system simpler and more flexible through the Association of Mediators in Bosnia and Herzegovina in order to involve mediators stronger into direct promotion of mediation and development of its practice throughout the country. Furthermore, it is needed to develop and improve the training models by liberalization of market. To date, only one institution with limited capacity is authorized to train and certify mediators, which can represent in a foreseeable future, if it already has not, a critical bottleneck of mediation development. Finally, it is in the interest of better acceptance of mediation by business people of Bosnia and Herzegovina to promote the use of mediation along with well-conceived incentives in strategically selected sector such as construction and insurance sectors.

It is clear that application of mediation is neither the only medicine for diseases present in the judiciary of Bosnia and Herzegovina, nor it is the saving option for our companies facing numerous problems of transition, but provided a systemic reform and appropriate infrastructure building we can speak about a noteworthy prevention of inefficient judiciary, as well as of choice options in resolving of domestic and international disputes for all companies that want to feel progress by decreasing the costs by the use of mediation.


Green Papers are discussion materials related to specific themes prepared and published by the European Commission. Primarily, these are the documents sent to a specific public – organizations and individuals – who are invited to participate in the consultation and debate process. In some cases, they also give impetus to subsequently drafted legislation.

The Green paper itself had 21 questions on key elements related to various forms of alternative dispute resolution mechanisms, such as clauses on referral of cases to mediation, limitation period and restrictions, confidentiality, validity of acceptance to participate in mediation procedure, enforcement of signed agreement, certification and rules regulating their liability. By 31 January 2003, the Commission received more than 160 responses/comments about the Green Paper. Generally, the comments were positive both in terms of possibility of a new mechanism and in terms of the approach taken by the Commission in the decision-making process on future application of mediation. Also, the important technical and social context of mediation application was emphasized. As a result of these extensive consultations the Commission decided to undertake two specific initiatives following the Green Paper: a) drafting a uniform European Code of Conduct for Mediators and b) drafting the Directive on Mediation Application in specific aspects of civil and commercial cases. The purpose of the Code of Conduct, subsequently also adopted, was to establish the code of ethics for mediators throughout the Union in order to prevent abuse and unconscious performance of individuals. More details at: http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm

Out of which the Green Paper is certainly the most significant, but also the analyses and reports prepared by CEPEJ - European Commission for the Efficiency of Justice with the Council of Europe, which provided a detailed overview of needs, potentials and obstacles to introduction of mediation in member state countries of Council of Europe. More details in Analysis on assessment of the impact of Council of Europe recommendations concerning mediation, Mediation Working Group (CEPEJ-GT-MED), CEPEJ (2007) 12. www.coe.org [academic search 24 July 2008]


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