Mediation in Bosnia and Herzegovina: A Second Application - 2

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IV. 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 could 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
Mediation may even address some of the more general problems in BiH. Studies show that mediation can improve access to justice in a variety of ways. 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. A proposed EU Directive promoting mediation in civil and commercial matters identifies its primary objective as ensuring better access to justice. 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 currently held in very 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, mediation parties will view the general judicial system more positively, which should 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. The program was very successful by conventional measures, but the most interesting aspect was its impact on social change. 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. Furthermore, they were not experienced in the art of compromise. Citizens had the choice of acquiescence in governmental action or protest. In the event that one decided to protest, one usually became a dissident and had to be an
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. The use of mediation (with appropriate training) might help build a needed culture of compromise. Both parties and representatives might begin to explore non-confrontational ways to address conflicts and begin to take personal responsibility for resolving them. 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. 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. 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. 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.

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 currently 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
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 nontalking 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 the 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.

V. THE NEW MEDIATION LAWS

Parties in BiH will now have the opportunity to test the foregoing assertions. The state and Entity legislatures have now 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
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, with 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 ruth,” which required the court to proactively find the actual truth, regardless of the parties’ procedural shortcomings. Contrary to former procedure, under which the judge conducted most of the examination, parties are now required to perform most direct and cross examinations themselves. These and other rules form the basis for a change in jurisprudential philosophy. In essence, the new procedural regime is party-centered as
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opposed to judge-centered. This new focus on individual responsibility fits well with the introduction of mediation, where the individual takes responsibility for dispute resolution.

62. See Dakolias, supra note 42, at 88. back
63. BOSN. & HERZ. CONST., supra note 18, art. II, § 2. back
64. Morrison, supra note 14, at 152. back
66. Many international efforts are underway to improve the judicial system in BiH. For instance, the international community recently helped 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 Part IV.B. The number of justice sector assistance programs is too long to list but several relevant examples include assistance with case management development, judge and lawyer training, and court computerization. For an update on U.S.-funded justice sector efforts in BiH, see http://www.usaid.ba/ (last visited Mar. 1, 2006). back
67. Some countries use the term “conciliation,” but in general, conciliation and mediation refer to the same process. For more discussion on the terms, see infra note 139. back
69. 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. back
70. Most mediation programs in developing countries are not officially connected with courts. But see Slovenian court-annexed Ljubljana District Court Mediation Program, infra note 113. back
72. Id. at 15. back
73. However, the report authors caution that a “direct empirical link has not been established.” Id. back
74. HJPC, supra note 3, ch. 1.1. 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. back
75. 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 one day of work to 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 43, at 35. back
76. 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 71, at 16-17. back
77. 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. back
78. 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, back
79. Id. at 12. This is important for a society like BiH, which places a high premium on personal relationships in business. back
60. A corrupt mediator, however, might still be able to coerce a party into settling through subterfuge or duress. back
81. ADR Guide, supra note 71, at 13, app. B. Sri Lanka Case Study, Bangladesh Case Study. back
84. Alkon, supra note 68, at 354. back
85. See World Bank Survey, supra note 43, at 49. back
86. See, e.g., ADR Guide, supra note 71, 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. back
87. Id. at 11, 17-18, app. B, South Africa Case Study. back
88. Id. back
89. Id. at 18. back
90. Id. back
91. Id. at 11, app. B, South Africa Case Study. back
92. 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.” back
93. This is to be expected in a society that emphasized the primacy of the collective. back
95. Michael T. Kauffman, From Dissidence to Dissonance, TRANSITION 5 (Feb. 21, 1997), quoted in id. at 276. See also, Raymond
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96. Haynes, supra note 94. back
97. Although there are no current statistics, anecdotal evidence indicates that BiH practitioners rarely compromise claims by settling cases out of court. back
98. In many post-communist societies, there is a desire to “shift individual responsibility to an omnipotent patriarchal social father.” Dusan Ondrusk, 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 Ottoman Empire and important governance decisions were made in Istanbul. In the twentieth century, when BiH became 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 internationally-run OHR has controlled the governance process. See supra Part II. As a result, BiH citizens have had little responsibility or experience truly governing themselves. back
99. 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 94, 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 71, app. B, South Africa Case Study. back
101. Haynes, supra note 94, at 258. back
102. ADR Guide, supra note 71, at 10 (referring to programs in South Africa, Bangladesh, and elsewhere). back
103. Alkon, supra note 68, at 346-47. back
104. See ABA/CEELI JRI, supra note 27, at 15; World Bank Survey, supra note 43, at 43. back
105. See infra Part IV.B.3. back
106. Chemonics International, Inc. is currently working on a USAID-funded project called FILE (Fostering an Investor and Lender-Friendly Environment) that is focusing, in part, on judgment enforcement efficiency. Chemonics Intl., Filing for a future in Bosnia and Herzegovina, http://www.chemonics.com/projects/?content_id=195C1B7D-8EAD-40B1-A025-DAA4A57A7B91 (last visited Mar. 2006). 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. That discussion is currently ongoing. back
108. In fact, local BiH settlements might have an even higher award payment rate since the parties are likely to be geographically and culturally closer to each other than would be the case with international resolutions. back
109. Carrie Menkel-Meadow, Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General and Varied Contexts, 2003 J. DISP. RESOL. 319, 325 (2003). Menkel-Meadow claims that host country culture is an important consideration when introducing American legal concepts like mediation. Id. She believes that, for instance, Latin American culture is closer to American culture than the formal, detached legal culture in Europe and thus would be more amenable to informal American concepts like mediation. Id. at 324-325. back
111. See, e.g., Shonholtz, supra note 95, at 405-06. Shonholtz details examples of successful mediation programs throughout Central and Eastern Europe. See also Haynes, supra note 94, at 266-67. back
112. European Commission, supra note 39, at 103-04. back
113. Dept. of Alternative Dispute Resolution, District Court of Ljubljana, Memorandum No. 46, Court Annexed Programmes of Alternate Dispute Resolution 4-5 (Oct. 2004) (on file with author) [hereinafter Slovenia ADR Program]. The court estimates a success rate (defined as court settlement or abandonment of action) of 53.6%. Id. at 5. See also Alkon, supra note 68, at 350. back
115. 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. Samuelpisar, The Communist System of Foreign-Trade Adjudication, 72 HARV. L. Rev. 1409, 1411 (1959). back
118. USTAV SOCIJALISTICKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF
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Kaloupek, supra note 120, at 999.

123. “Yugoslavia is presently in a good position to join the European Economic Community.” Matthew M. Getter, Yugoslavia and the European Economic Community: Is a Merger Feasable?, 11 U. PA. J. INT’L BUS. L. 789, 809 (1990). “Yugoslav laws are quite amenable to the resolutions of disputes through the arbitration process.” Id. at 790. “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 Yugoslavia’s violent disintegration began only one year after this article was published.

124. ZAKON O PARNICNOM POSTUPKU BOSNE I HERCEGOVINE [CODE OF CIVIL PROCEDURE OF THE FEDERATION OF BOSNIA AND HERZEGOVINA], 53 Službeni Novine Federacije Bosne i Hercegovina (2003); ZAKON O PARNICNOM POSTUPKU REPUBLIKE SRPSKE [CODE OF CIVIL PROCEDURE OF THE REPUBLIKA SRPSKA], 58 Službeni Glasnik Republike Srpske (2003). In 2004, the BiH State (national) parliaments enacted a State Code of Civil Procedure for civil actions at the BiH State Court (currently limited to administrative law cases) and this included the same mediation provisions, word for word as the Entity codes. ZAKON O PARNICNOM POSTUPKU PRED SUDOM BOSNE I HERCEGOVINE [CODE OF CIVIL PROCEDURE FOR THE COURT OF BOSNIA AND HERZEGOVINA], 36 Službeni Glasnik Bosne i Hercegovine, arts. 53-60 (2004).

125. Revised CCPs, supra note 124, § IV(4)(b), Mediation and Judicial Settlement, arts. 86-93.

126. Id. art. 86(1).

127. Id. art. 86(2).

128. Id. art. 86(1).

129. Id. art. 88.

130. Id. art. 87.

131. Id. art. 90.

132. Id. art. 91.

133. Id. art. 7.

134. Id. art. 144.

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