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. After minor revisions, BiH’s first mediation law was passed in late 2004. 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, Brcko, or in the State Court of BiH.

Article 2 of the BiH Mediation Law defines mediation as a proceeding involving a neutral party 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, which served as an important model during the drafting process, has a similar ambiguity. On the other hand, the U.S.-based Uniform Mediation Act (UMA), clearly defines “mediation party,” “nonparty participant” (such as experts, friends, support persons, potential parties, and others who participate) and person,” among other terms.

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

The law provides for a default of one mediator, although parties can agree to more.
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 complaint is filed. 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 agreements 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.

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. 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. 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. 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 provides that all participating third parties are to give written confirmation that they will adhere to the “confidentiality principle” in the mediation procedure. 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 confidential all information provided to her during a separate party caucus unless agreed upon by all parties. 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
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
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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.\(^{180}\) 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.\(^{181}\) 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.\(^{182}\)

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.\(^{183}\) 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 would not apply.\(^{184}\) If that were the case, 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.

VI. 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, BiH. By late 2005, the program reported an impressive sixty-seven percent settlement rate.\(^{185}\) 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.\(^{186}\) Due to the first program’s success, the World Bank/IFC established a second pilot program in Sarajevo.\(^{187}\) In addition, the U.S. Federal Mediation and Conciliation Service reports that mediation projects have been undertaken in power and transportation matters.\(^{188}\) The Brcko District has also created its own court-annexed mediation program.\(^{189}\) While this demonstrates that BiH may be fertile ground for mediation, a number of recommendations are in order before mediation can become fully integrated into the legal landscape.


136. ZAKON O POSTUPKU MEDIJACIJE BOSNE I HERCEGOVINE [BIH LAW ON MEDIATION PROCEDURE], 37 Službeni Glasnik Bosne i Hercegovine (2004) [hereinafter Chicago international Dispute Resolution Association Peter V. Baugher, President One S Wacker Dr Ste 2800 Chicago IL 60606 USA 312-409-1373 cidra@sw.com Copyright 1999 - 2009 by CIDRA. All Rights Reserved
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BiH Mediation Law].

137. Id. art. 1.

138. UNCITRAL Model Law on International Commercial Conciliation, U.N. GAOR, 57th Sess., Supp. No. 17, U.N. Doc. A/57/17, Annex I, art.9 (2002), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf [hereinafter UNCITRAL Model]. The UNCITRAL Model is the UN’s effort at recognizing the growing interest in mediation and at promoting non-contentious methods of dealing with disputes. Luis M. Diaz & Nancy A. Oretskin, The U.S. Uniform Mediation Act and the Draft UNCITRAL Model Law on International Commercial Conciliation, in INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 2002, at 791, 797 (PLI Litig. & Admin. Practice Course, Handbook Series, Order No. H0-00GP, 2002). It also represents an effort to provide uniform mediation rules across various countries, especially in emerging commercial fields like Internet disputes. Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, ¶ 17 (UNCITRAL 2002) [hereinafter UNCITRAL Model Guide]. In this author’s experience, the UNCITRAL Model has gained widespread acceptance and many transitional countries have looked to it as an appropriate model. This may be due to the fact that the UNCITRAL Working Group was composed of representatives from a wide range of countries and legal traditions. In this context, it is appropriate that this UNCITRAL Model was used in BiH. The BiH Mediation Law does resemble the UNCITRAL Model to some extent. The UNCITRAL Model may have an international competitor in the October 2004 Proposed EU Directive on mediation, which seeks to promote mediation and harmonize the rules among EU Member States. See Proposed EU Directive, supra note 83, § 1.1.1. The proposal, which at the time of publication was subject to comments and revision, contains model law provisions somewhat similar to the UNCITRAL Model. [back]

139. The UNCITRAL Model uses the term “conciliation” but this is to be understood to encompass all types of proceedings wherein a neutral person or persons assists parties reach an amicable settlement, including mediation proceedings. UNCITRAL Model Guide ¶ 7; Diaz & Oretskin, supra note 138, at 797. [back]

140. UNIFORM MEDIATION ACT (amended 2003), available at http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.pdf [hereinafter UMA]. This was the result of collaboration between the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and a drafting committee of the American Bar Association. See Diaz & Oretskin, supra note 138, at 793. It was completed and approved in 2001. The purpose of the UMA is to provide uniformity in the mediation laws throughout the United States. The UMA Prefatory Note indicates that legal rules affecting mediation in the United States can be found in more than 2,500 statutes, many of which could be replaced by this Act. UMA, at Prefatory Note, § 3. Uniformity has four main benefits. First, uniformity is a necessary predicate...
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to predictability if there is a potential that a statement made in mediation in one U.S. state may be sought in litigation in another U.S. state. Second, uniformity makes it clear which rules apply in cross-jurisdictional procedures such as conference calls or Internet-based fora. Without this, there is a conflict of state laws. Third, uniformity provides up-front certainty about important issues like confidentially in those cases where the mediation location is yet to be determined or changeable. And finally, uniformity contributes to simplicity in rules. Since the costs of learning one set of uniform rules are lower, parties are more likely to learn them and this encourages mediation usage and candor during participation. Id. The UMA has been adopted in six states (Illinois, Iowa, Nebraska, New Jersey, Ohio, and Washington) and the District of Columbia, and has been introduced as legislation in six others. See NCCUSL website at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited Mar. 11, 2006). It should be noted that in 2003, the UMA was amended to incorporate by reference the UNCITRAL Model for international proceedings. See 2003 AMENDMENT TO THE UNIFORM MEDIATION ACT, § 11.

141. UMA, supra note 140, § 2(4) cmt. 4. back
142. BiH Mediation Law, supra note 140, art. 4. back
143. Id. back
144. Revised CCPs, supra note 124, arts. 86, 112. back
145. BiH Mediation Law, supra note 136, art. 3. back
146. Id. art. 4. back
147. Id. art. 5. back
148. ZAKON O PRIJENOSU POSLOVA MEDIJACIJE NA UDRUGU MEDIJATORA BOSNE I HERZEGOVINE [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 136, art. 31. back
149. BiH Mediation Law, supra note 136, art. 30. Parties are to split mediation costs that are payable to the Association in equal parts, unless otherwise agreed. Id. back
150. Id. arts. 5, 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. art. 11. back
151. UNCITRAL Model, supra note 138, art. 10(1)(a). back
152. UNCITRAL Model Guide, supra note 138, ¶ 64. back
153. UMA, supra note 140, § 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. § 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.” Id. § 2(2). back
154. Klaus Reichert, Confidentiality in International Mediation, 59 DISP. RESOL. J. 60,
155. BiH Mediation Law, supra note 136, art. 7. back

156. Id. 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 138, art. 3. back

157. UNCITRAL Model, supra note 138, art. 10(1)(b); UMA, supra note 140, § 4. back

158. UNCITRAL Model, supra note 138, arts. 9-10(d); UMA, supra note 140, § 4(b)(2). back

159. UMA, supra note 140, § 4(b) cmt. 4(a)(3). back

160. BiH Mediation Law, supra note 136, art. 16. back

161. Id. art. 7. back

162. UNCITRAL Model, supra note 138, 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 Comments, ¶ 59. back

163. BiH Mediation Law, supra note 136, art. 8. back

164. Id. art. 9. back

165. Id. art. 20. back

166. Id. art. 15. back

167. Id. art. 18. back

168. Id. art. 21. This is the “yes-talk” provision. Lius 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. H0-00P0, 2004). back

169. BiH Mediation Law, supra note 136, art. 19. back

170. Id. art. 27. back

171. Id. arts. 28-29. back

172. Id. art. 23. In contrast, in the United States, mediators often propose settlement ideas, sua sponte. back

173. Id. art. 19. back

174. 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 140, § 7 and related comments. back

175. BiH Mediation Law, supra note 136, art. 24. back

176. Id. art. 26; Revised CCPs, supra note 124, art. 90. This might limit mediators to
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those who are capable of drafting or at least understanding settlement agreements. back

177. ABE/CEELI JRI, supra note 27, at 29. back

178. Id. back 179. BiH Mediation Law, supra note 136, art. 25. back

180. 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. back

181. 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 underway. back


183. A strong argument can be made that article 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 HERCEGOVINA [LAW ON ENFORCEMENT PROCEDURE OF THE FEDERATION OF BOSNIA AND HERCEGOVINA], 32 Službene Novine Federacije Bosne i Hercegovina (2003) [hereinafter collectively referred to as the Law on Enforcement]. back

184. 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. back


189. See ZAKON O PARNICNOM POSTUPKU BRCKO DISTRIKTA BOSNE I HERCEGOVINE [Code of Civil Procedure of Brcko District of Bosnia and Herzegovina], 6 Službeni Glasnik Brcko, art. 220-221, 225 (2002). back