

Note from the Field

Mediation in Bosnia and Herzegovina: A Second Application

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A nation born out of mediation turns to mediation again, this time to rescue its judiciary and promote the rule of law. The country known as Bosnia and Herzegovina was created out of U.S. mediation efforts in 1995. Ten years later, the peace has held but a new set of challenges has emerged. The nation now plans to use mediation to improve judicial efficiency, and promote democracy and the rule of law. This article reviews the nation's new mediation laws and their potential impact on the judiciary and society generally. Drawing on his mediation experiences in private practice and his work managing rule of law projects in Bosnia and Herzegovina, the author concludes that the new mediation laws are an excellent start but need to be amended. The author further concludes that if given sufficient time and proper implementation, mediation can improve judicial efficiency and democracy in Bosnia and Herzegovina.

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INTRODUCTION

This article discusses the new Bosnia and Herzegovina (BiH) mediation laws and their potential impact on the BiH judiciary and the rule of law. Section One provides a brief historical introduction to this multifaceted country. Section Two discusses BiH's complicated governmental structures that include thirteen constitutions and a heavily decentralized power structure. Section Three reviews the judicial landscape and current issues. While much has already been written about the war in BiH and its implications, little has been written about the more mundane judicial issues that now affect its citizens. Section Four discusses how mediation can improve the BiH justice system. While mediation is usually prescribed for judicial inefficiency it may also help promote democracy by helping to build a culture of compromise. Section Five reviews the new laws that regulate mediation in BiH courts and concludes that despite some needed amendments, the laws should help promote out-of-court settlements. Section Six sets forth recommendations that include changes to the current laws and important implementation parameters. The article concludes that mediation has the potential to make a significant contribution to judicial efficiency and democracy in Bosnia and Herzegovina.

I. HISTORICAL CONTEXT

BiH has a variegated ethnic and religious composition that is made up of three main groups—Serbs, Croats, and Bosniaks. Although the groups share many cultural traits, such as language, cuisine, music, etc., they are divided along religious lines.² The Serbs are largely Orthodox Christians, the Croats Catholics, and the Bosniaks Muslims.³ When Yugoslavia started to dissolve in the early 1990s, people tended to turn to their ethnic groups for protection. Bosnia and Herzegovina was one of the six autonomous republics that made up Yugoslavia.⁴ In 1992, following two other republics' declarations of independence, the Yugoslav Republic of Bosnia and Herzegovina declared independence and the unfortunate consequence was war.

2. Historical inter-ethnic strife also serves to reinforce ethnic divisions. Katherine G. Southwick, Note, *Srebrenica as Genocide? The Krstić Decision and the Language of the Unspeakable*, 8 YALE HUM. RTS. & DEV. L.J. 188, 192 (2005).

3. The last census was in 1991, prior to the war. Bosniaks accounted for 43.5% of the BiH population, Serbs 31.2%, and Croats 17.4%. High Judicial and Prosecutorial Council of BiH, *Godišnji Izvještaj Visokog Sudskog i Tužilačkog Vijeća Bosne i Hercegovine za 2004. Godinu* [Annual Report of the High Judicial and Prosecutorial Council of BiH for 2004], ch. 2 (May 4, 2005) [hereinafter HJPC], available at <http://www.hjpc.ba/intro/gizvjestaj/pdf/AnnualReport2004.pdf>. However, there was substantial intermarriage among these groups before the war and many people did not fit neatly into any ethnic category.

4. The six Yugoslav republics were: Bosnia and Herzegovina, Slovenia, Croatia, Serbia, Montenegro, and Macedonia.

In 1995, the United States sponsored high-level, mediated peace talks that brought about a cease-fire and ultimately, a peace agreement. The mediation process involved representatives from Serbia, Croatia, and BiH traveling to a U.S. Air Force Base in Dayton, Ohio to negotiate an end to the war and a post-war solution.⁵ Assistant Secretary of State Richard Holbrooke mediated.⁶ For three weeks, the parties remained on the base while the United States attempted to broker a settlement.⁷ Through this mediation process, the parties agreed to establish a new state with a unique constitutional structure. The agreements, signed in December 1995 and known as the Dayton Accords, established present-day Bosnia and Herzegovina.⁸

The mediation was successful thanks to a number of exogenous factors, including the international application of military force, the explicit threat of future use, and the significant reversal of Serb military victories on the ground in the fall of 1995.⁹ However, the parties themselves all compromised at Dayton. The Bosnian Serbs and Croats gave up their respective goals of union with Serbia and Croatia, or, alternatively, independence. The Bosnian Muslims gave up their goal of a unified, sovereign state, in favor of a confederal state, with minimum central authority and highly autonomous, ethnically-dominated regions.¹⁰ While many lament the difficulties that the Dayton Accords present to BiH's future, the war-time leaders' mediation-induced compromises made this peace possible. Perhaps in BiH, mediation will eventually be associated with the imperfect, but peaceful resolution of conflict.

II. THE GOVERNMENTS OF BOSNIA AND HERZEGOVINA

Under the Dayton Accords, BiH is essentially divided into two "Entities", the Republica Srpska (RS) and the Federation of Bosnia and Herzegovina (Federation).¹¹ The RS is the predominantly ethnic Serbian half of the country that occupies the north, east, and south-east portions of BiH in the shape of a reverse crescent. The Federation, established in 1994, before Dayton, comprises mainly ethnic Bosniaks and Croats, and occupies the central and western parts of the country. In addition, there is the autonomous Brčko District, a small area of land in and around the city of

5. NOEL MALCOLM, *BOSNIA, A SHORT HISTORY* 267-68 (Pan Books ed., 2002).

6. See RICHARD HOLBROOKE, *TO END A WAR* (Random House ed., 1998).

7. Jonathan D. Greenberg, *Does Power Trump Law?*, 55 *STAN. L. REV.* 1789, n. 102 (2003). (citing HOLBROOKE, *supra* note 5) One historian claimed that sleep deprivation was one of the U.S. mediation tactics. MALCOLM, *supra* note 5, at 268.

8. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, *Bosn. & Herz.-Croat.-Yugo.*, 35 *I.L.M.* 75 [hereinafter *Dayton Accords*].

9. Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 *CORNELL INT'L L.J.* 789, 792-97 (1997); *accord*, Greenberg, *supra* note 7, at 1811.

10. See discussion *infra* Part II.

11. Dayton Accords, *supra* note 8, annex 2, at 112.

Brčko, in the northeast corner of the country.¹²

The Dayton Accords established the general governmental structure of the new BiH state. In Annex 4 to the Accords, the parties agreed to a federal constitution.¹³ The Accords have worked in the sense that ten years on, the parties have kept the peace and have slowly begun to build a BiH state. On the other hand, the Constitution and some of the other Dayton annexes have created an impossibly complicated and cumbersome governmental structure. One scholar has written: “[t]his new Bosnian constitution makes the American Articles of Confederation of two centuries ago look like a centralized, unitary form of government.”¹⁴ Indeed, BiH now has thirteen constitutions—one for the BiH State, as provided in Annex 4, one for each Entity and ten cantonal constitutions within the Federation.¹⁵ The State Constitution¹⁶ devolves most governmental authority to the Entities. While the current political trend is for greater centralization in governmental power, as long as the Dayton Accords remain the supreme law of the land, this de-centralized structure will remain.¹⁷

The complex governmental structure was necessary to guarantee local autonomy for the three main ethnic groups. When the Federation was created in 1994, as part of the peace agreement between ethnic Bosniaks and Croats, it divided the areas under their control into autonomous cantons, along ethnic lines.¹⁸ Each Canton had its own executive, legislative, and judicial bodies.¹⁹ This was necessary given the high level of

12. Brčko was a strategically located city that both sides claimed during the Dayton mediation. The parties agreed to delay the final status of Brčko and submit it to international arbitration. Dayton Accords, *supra* note 8, annex 2, art. V, at 113. Eventually, the arbitration panel ruled that it was to become the autonomous Brčko District and not part of either Entity. *Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area: The Federation of Bosnia and Herzegovina v. The Republika Srpska*, (Final Award), 38 I.L.M. 534 (1999), available at http://www.state.gov/www/regions/eur/bosnia/990305_arbiter_brcko.html.

13. Dayton Accords, *supra* note 8, annex 4, at 117.

14. Fred L. Morrison, *The Constitution of Bosnia-Herzegovina*, 13 CONST. COM. 145, 145 (1996).

15. These Byzantine structures look even more inappropriate given the fact that BiH has fewer than 3.5 million people and a smaller land mass than West Virginia.

16. Under the Dayton Accords, BiH has adopted a peculiar political nomenclature. The term “State” is used in BiH to describe something national or federal. For instance, the “State Court,” the “State Constitution,” and the “State Presidency” all refer to the national BiH institutions. In contrast, the Republika Srpska and the Federation of Bosnia and Herzegovina institutions represent the constituent entities, which in U.S. parlance might be called “states.”

17. In 2003, the international community helped BiH establish a State-level Ministry of Justice (MOJ). However, to date, the State MOJ has yet to gain much authority and the two Entity MOJs run most of the courts, *see infra* Part III. Centralization is a slow and difficult political process because the RS population and leadership are uncomfortable losing power in a majority Bosniak country. Generally, they prefer a weak, de-centralized structure with extensive Entity autonomy.

18. USTAV BOSNE I HERCEGOVINE [CONSTITUTION OF BOSNIA AND HERZEGOVINA] (1994) preamble, translated in 33 I.L.M. 740 (1994) [hereinafter BOSN. & HERZ. CONST.]; Morrison, *supra* note 14, at 147.

19. BOSN. & HERZ. CONST. art. V.

mistrust between the parties.²⁰ This cantonal framework was then incorporated into the Dayton Accords regime after the 1995 peace agreement was signed.²¹ Mistrust between the RS and Federation negotiators led to a similarly decentralized State-level constitution for the two entities.²²

Moreover, the Accords also provide for a UN-sanctioned institution, known as the Office of the High Representative (OHR), to serve as a sort of super-government to manage the implementation of the civilian aspects of the Dayton Accords.²³ OHR has final authority to interpret the Dayton Accords.²⁴ It has evolved into a large, internationally-run institution that coordinates international assistance efforts, re-organizes governmental structures, imposes new laws, amends pre-existing laws, and even terminates BiH government employees who are deemed obstructive.²⁵ These conditions have allowed for a massive output of new laws and changes in the judiciary. However, what has been gained in efficiency has been lost in local contribution and acceptance. Many laws are passed without a great deal of local participation or input. The result is decent laws on paper, but poor implementation and observance.

III. THE COURTS OF BOSNIA AND HERZEGOVINA

The BiH judiciary is heavily influenced by both the Austro-Hungarian Empire's²⁶ and communist Yugoslavia's legal traditions.²⁷ However, its

20. Morrison, *supra* note 14, at 146.

21. Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, Nov. 10, 1995, 35 I.L.M. 170 (1996).

22. Morrison, *supra* note 14, at 145-51. Morrison states, "the constitution and its accompanying documents confirm the fragility of the [then] situation and the difficulties that confronted the negotiators . . ." *Id.* at 155.

23. Annex 10 to the Dayton Accords, *supra* note 8, at 147.

24. *Id.* at 148.

25. OHR was given sweeping powers at the Bonn Peace Implementation Conference in 1997. See Bonn Peace Implementation Conference 1997, Bosnia and Herzegovina 1998: Self Sustaining Structures, conclusions (Dec. 10, 1997), http://www.ohr.int/pic/default.asp?content_id=5182.

26. The Austro-Hungarian Empire took administrative control over the country in 1878. As an example, the Bosnian Criminal Code of 1879 was modeled on the Empire's Habsburg military code. Steven W. Sowards, Twenty-Five Lectures on Modern Balkan History: Lecture No. 12, Bosnia-Herzegovina and the Failure of Reform in Austria-Hungary, Michigan State University (1996), <http://www.lib.msu.edu/sowards/balkan/lect12.htm>. Austro-Hungary annexed BiH in 1908. The empire then broke apart at the end of World War I and BiH became part of the new "Kingdom of Serbs, Slovenes and Croats," later renamed "Kingdom of Yugoslavia." See generally MALCOLM, *supra* note 5.

27. AMERICAN BAR ASSOCIATION/CENTRAL AND EAST EUROPEAN LAW INITIATIVE, JUDICIAL REFORM INDEX, BOSNIA AND HERZEGOVINA, 1 (2001) [hereinafter ABA/CEELI JRI]. ABA/CEELI 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 in Central and Eastern Europe, Eurasia, and the Middle East. ABA/CEELI has had an office in BiH since 1995. More information about ABA/CEELI is available at <http://www.abanet.org/ceeli/home.html> (last visited Mar. 1, 2006). After BiH independence, the default laws in place were those from

complicated and decentralized structure is a creature of the Dayton Accords. Each Entity has its own judicial court system. At the first level, the municipal courts in the Federation and the basic courts in the RS hear most first instance civil and criminal cases.²⁸ At the intermediate level, the cantonal courts in the Federation and the district courts in the RS hear the appeals.²⁹ The Federation and RS Supreme Courts hear appeals from the cantonal and district courts and serve as the highest courts of appeals for cases involving Entity law.³⁰ Each Entity also has a Constitutional Court.³¹ The Brčko District has its own parallel court system.

At the State (i.e. national) level, the BiH State Court was first established in 2000.³² In addition to its administrative and appellate jurisdiction, the court has criminal jurisdiction to decide issues relating to economic corruption and war crimes, as well as certain matters brought under the limited state laws.³³ BiH also has a state Constitutional Court that has exclusive jurisdiction to hear constitutional disputes between the Entities, between the state and an Entity, and between state institutions.³⁴ The Court can also hear appeals from any other court when there are issues relating to the BiH Constitution.³⁵ Finally, it is empowered to review any law's compatibility with the BiH Constitution and the European Convention on Human Rights and Fundamental Freedoms.³⁶

The BiH judiciary faces myriad problems. Education and training of judges is substandard.³⁷ Court contempt, subpoena, and enforcement powers are underutilized or insufficient.³⁸ Outside of Sarajevo and Brčko, funding levels are "woefully inadequate."³⁹ Courtrooms and other

Yugoslavia. Over the following ten years, some of these laws have been amended or repealed but the communist Yugoslav influence remains. See *infra* note 98 and Part V.

28. ABA/CEELI JRI, *supra* note 27, at 2.

29. *Id.* These Cantonal and District Courts can also hear certain first instance criminal cases.

30. *Id.*

31. *Id.*

32. ZAKON O SUDU BOSNE I HERCEGOVINE [LAW ON THE COURT OF BOSNIA AND HERZEGOVINA], 29 Službeni Glasnik Bosne i Hercegovine (2000), amended by Službeni Glasnik, Nos. 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04.

33. *Id.* arts. 13-15.

34. ABA/CEELI JRI, *supra* note 27, at 1.

35. *Id.*

36. *Id.*

37. *Id.* at 6, 9. However, the Judicial and Prosecutorial Training Centers recently 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.

38. *Id.* at 15.

39. *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,

facilities are “dilapidated and in need of repair.”⁴⁰ Many of the courts carry substantial debts.⁴¹ But, perhaps the two most significant issues are inefficiency and corruption.

The BiH court system simply moves too slowly.⁴² A recent World Bank study⁴³ 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.”⁴⁴ These scores were lower than for many neighboring transition countries like Macedonia.⁴⁵ One commentator noted that the courts are generally distrusted by business leaders.⁴⁶ One reason for court inefficiency is that judges have to work within an environment where substantive and procedural laws are constantly changing.⁴⁷ Because they cannot access new legislation easily

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/MoJ_report_PDF/Justicereview.pdf [hereinafter European Commission].

40. ABA/CEELI JRI, *supra* note 27, at 18. At the trial level courts, “most judges hold hearings in their cramped offices. . . [i]t is not uncommon for two or three judges to share a single office.” *Id.* The High Judicial and Prosecutorial Council of BiH stated that “most courts and prosecutors’ offices are in quite a bad state of disrepair, with no investment having been made in them since their construction some 20 to 30 years ago.” HJPC, *supra* note 3, ch. 1.3. Moreover, the courts are funded in a very unequal fashion. The European Commission observed that “[b]y travelling only a few kilometres, a citizen of BiH can go from a (relatively) modern and adequately maintained court, where cases are able to be processed in a reasonable amount of time, to a court without heat or electricity, where cases can wait years to be heard and where there are no funds to pay for delivery of documents or for court appointed defense counsel or expert witnesses.” European Commission, *supra* note 39, at 73.

41. HJPC, *supra* note 3, ch. 6.2.1. The HJPC calculated a total of over twenty-two million KM (fifteen million dollars) in accumulated court debts 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 39, at 63.

42. The official case filing and tracking systems are not very useful. ABA/CEELI JRI, *supra* note 27, 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).

43. JAMES ANDERSON ET AL., JUDICIAL SYSTEMS IN TRANSITION ECONOMIES, ASSESSING THE PAST, LOOKING TO THE FUTURE, World Bank (2005), available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000090341_20050711102518 [hereinafter World Bank Survey]. The survey draws upon various sources, including a joint EBRD-World Bank *Business Environment and Enterprise Performance Survey*, the ABA/CEELI *Judicial Reform Index* surveys, an EBRD *Legal Indicator Survey*, the World Bank *Doing Business* database, the World Economic Forum’s *Executive Opinion Survey*, a *World Values Survey*, and the Centre for the Study of Public Policy’s *Public Opinion* surveys.

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

45. *Id.*

46. Natalie Rougeux, Comment, *Legal Legitimacy and the Promotion of Small Business in Sarajevo*, 37 TEX. INT’L. L.J. 177, 179 (2002).

47. 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,

and there is no effective system for identifying and organizing changes,⁴⁸ judges are understandably overwhelmed. Another reason for the inefficiency is that courts have no effective case filing and tracking systems.⁴⁹ And finally, the system allows for excessive postponements of hearings.⁵⁰ As a result of these inefficiencies, the BiH High Judicial and Prosecutorial Council (HJPC) recently reported that significant case backlogs have accumulated in many courts.⁵¹

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.”⁵² In addition, while ethics codes are in place, they are not “widely understood or followed.”⁵³ 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.⁵⁴ 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.⁵⁵ This was in spite of the fact that BiH had tripled the wages of judges.⁵⁶ Transparency International found that BiH citizens rank the judiciary as the fourth most corrupt institution in the country (ahead of, *inter alia*, the customs, medical, and education systems)⁵⁷ and an alarming fifty-four percent think most or almost all of the judges are involved in corruption.⁵⁸

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-info/ohr-mip/default.asp?content_id=34144.

48. 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 27, at 32-33.

49. *Id.* at 31-32.

50. See Rougeux, *supra* note 46, at 185-87.

51. HJPC, *supra* note 3, ch. 1.1.

52. ABA/CEELI JRI, *supra* note 27, at 24.

53. *Id.* at 25.

54. World Bank Survey, *supra* note 43, at 37-38.

55. *Id.* at 41.

56. 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 46, at 185-89.

57. Transparency International, *Global Corruption Barometer 2005*, annex 1, tbl. 9 (2005), available at http://www.transparency.org/policy_and_research/surveys_indices/gcb.

58. Transparency International, *Corruption Perception Study, Bosnia And Herzegovina*, at 73-77 (2004), available at http://www.transparency.org/policy_and_research/surveys_indices/cpi/2004.

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.⁵⁹ In BiH, the perception and reality of weak enforcement of property and other rights has hurt economic development.⁶⁰ The World Bank survey ranked the BiH judiciary second in the Europe and Eurasia region for being an impediment to doing business.⁶¹

In addition, a dysfunctional court system can also prevent individuals from enforcing human rights they have been granted in their laws.⁶² 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."⁶³ 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.⁶⁴ 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* . . ." ⁶⁵ It is likely that the slow administration of justice in BiH is violating citizens' human rights under this provision.

IV. MEDIATION AS A PRESCRIPTION

Mediation may be useful in addressing some of these problems.⁶⁶ Like

59. Katharina Pistor et al., *Law and Finance in Transition Economies*, 8 *ECON. TRANSITION* 325, 326 (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=214648.

60. See, e.g., Rougeux, *supra* note 46, 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).

61. World Bank Survey, *supra* note 43, at 48-49.

62. See Dakolias, *supra* note 42, at 88.

63. BOSN. & HERZ. CONST., *supra* note 18, art. II, § 2.

64. Morrison, *supra* note 14, at 152.

65. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 221. An updated version of the treaty and protocols is available from the European Court of Human Rights, <http://www.echr.coe.int/echr>.

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

other forms of ADR, mediation is an alternative method of resolving disputes, outside of the traditional, adversarial, litigation-centered model.⁶⁷ 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.”⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.⁷² After six years of this mediation program, the Sri Lanka court backlog was reduced by fifty percent.⁷³ 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.⁷⁴

Another issue that might be mitigated by mediation in BiH is excessive dispute resolution costs. In BiH, lawsuits are expensive relative to local

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).

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.

68. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (1st ed. Matthew Bender 2001), cited in Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, J. DISP. RES., 327, 350, n. 140 (2002).

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.

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.

71. *E.g.*, SCOTT BROWN ET AL., *ALTERNATIVE DISPUTE RESOLUTION PRACTITIONER’S GUIDE 7-8* (Ctr. for Democracy and Governance, USAID 1998), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf [hereinafter ADR Guide].

72. *Id.* at 15.

73. However, the report authors caution that a “direct empirical link has not been established.” *Id.*

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.*

wages.⁷⁵ Mediation has shown to be less costly than litigation.⁷⁶ 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.⁷⁷ 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.⁷⁸ In addition, mediation can sometimes allow parties to resolve their disputes while maintaining their relationship.⁷⁹ Finally, the voluntary nature of a mediated settlement makes participants less vulnerable to corruption and allows parties to circumvent potentially compromised courts.⁸⁰

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.⁸¹ Mediation can take place in rural areas or areas not served by a courthouse.⁸² 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.⁸³

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.

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.

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.

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.

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

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

81. ADR Guide, *supra* note 71, at 13, app. B. *Sri Lanka Case Study, Bangladesh Case Study.*

82. FRED E. JANDT & PAUL B. PEDERSEN, CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA PACIFIC CASES (Thousand Oaks, 1996), *cited in* ADR Guide, *supra* note 71, at 14. Note the interesting example of the over one million voluntary, village-based People's Mediation Committees in China, created by the 1982 constitution.

83. *See* Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, COM(2004)718

Mediation's generally informal nature may also appear less intimidating to people who view the government with suspicion or fear.⁸⁴

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.⁸⁵ 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.⁸⁶ 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.⁸⁷ There, an NGO called the Independent Mediation Services of South Africa began mediating labor disputes in the 1980s.⁸⁸ 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.⁸⁹ It is reported that "their mediation training and experiences helped develop skills in consensual approaches to problem-solving and policy development."⁹⁰ 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."⁹¹ Reports also indicate that mediation programs in the Philippines and Ukraine are helping to build an ethic of civil engagement.⁹²

Perhaps, mediation can strengthen democracy in BiH. Under the

final - 2004/0251 (COD), available at http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0718en01.pdf [hereinafter Proposed EU Directive]. For additional discussion see *infra* note 138.

84. Alkon, *supra* note 68, at 354.

85. See World Bank Survey, *supra* note 43, at 49.

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.

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

88. *Id.*

89. *Id.* at 18.

90. *Id.*

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

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."

control of communism, BiH citizens were not accustomed to taking personal responsibility for decisions.⁹³ Furthermore, they were not experienced in the art of compromise. Citizens had the choice of acquiescence in governmental action or protest.⁹⁴ In the event that one decided to protest, one usually became a dissident and had to be an “uncompromising absolutist.”⁹⁵ 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.⁹⁶ The use of mediation (with appropriate training) might help build a needed culture of compromise.⁹⁷ Both parties and representatives might begin to explore non-confrontational ways to address conflicts and begin to take personal responsibility for resolving them.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ The three main criticisms are (1) there is a

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

94. Emily Stewart Haynes, *Mediation as an Alternative to Emerging Post-Socialist Legal Institutions in Central and Eastern Europe*, 15 OHIO ST. J. DISP. RESOL. 257, 275-76 (1999).

95. Michael T. Kauffman, *From Dissidence to Dissonance*, TRANSITION 5 (Feb. 21, 1997), quoted in *id.* at 276. See also, Raymond Shonholtz, *A General Theory on Disputes and Conflicts*, 2003 J. DISP. RESOL. 403, 408-09 (2003).

96. Haynes, *supra* note 94.

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

98. 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 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.

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*.

100. One commentator has labeled international assistance providers “arbitration

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.¹⁰¹ 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.¹⁰²

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.¹⁰³ This is a significant concern, given the BiH judiciary's inefficiencies.¹⁰⁴ However, mediated settlements will now receive priority treatment under the new law and will be enforceable like a judgment.¹⁰⁵ 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 breachers. Finally, there are international programs currently working on improving the effectiveness of the enforcement divisions of the BiH courts.¹⁰⁶ 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

conquistadores" for their ADR zeal. James M. Cooper, *Essay: Access to Justice 1.1*, 30 CAL. W. INT'L L.J. 429, 432 (2000).

101. Haynes, *supra* note 94, at 258.

102. ADR Guide, *supra* note 71, at 10 (referring to programs in South Africa, Bangladesh, and elsewhere).

103. Alkon, *supra* note 68, at 346-47.

104. See ABA/CEELI JRI, *supra* note 27, at 15; World Bank Survey, *supra* note 43, at 43.

105. See *infra* Part IV.B.3.

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={99C1BB7D-8EAD-40B1-A025-DA14A45A7AB9} (last visited Mar. 1, 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.

compliance rates without national court assistance¹⁰⁷ and there is no reason to believe that local BiH-mediated settlements would be significantly different.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ And mediation appears to be spreading throughout Central and Eastern Europe.¹¹¹ Even the European Commission recommends the development of mediation mechanisms for BiH.¹¹² 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.¹¹³

107. See, e.g., Betty Southard Murphy, *ADR’s Impact on International Commerce*, 48 DISP. RESOL. J. 68, 73 (1993) (referencing ninety percent compliance rates); ADR Guide, *supra* note 71, app. B, *Sri Lanka Case Study*, *South Africa Case Study*.

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.

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.

110. Hans Dolinar, *New Perspectives of International Commercial Arbitration in Europe*, 10 GA. ST. U. L. REV. 519, 524-27 (1994). Dolinar cites interesting historical examples of successful wholesale adoptions of foreign legal systems, including the Japanese adoption of the German Civil Code, the South American adoptions of the French Civil Code and the Turkish adoption of the Swiss Civil Code. See also, Jonathon M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 840 n.5 (2003) (citing extensive literature on international legal transplants). But see Wade Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries* (Carnegie Papers, Rule of Law Series No. 57, 2005), available at <http://www.carnegieendowment.org/files/CP57.Channell.FINAL.pdf>. Channell argues that international legal assistance often fails because it usually involves the “hasty transplant syndrome” whereby foreign laws are used as a model without sufficient local legal culture adaptation.

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.

112. European Commission, *supra* note 39, at 103-04.

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.

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.¹¹⁴ In the 1940s, following the communist consolidation of power in Yugoslavia, arbitration tribunals were formed to deal with foreign trade disputes.¹¹⁵ In the 1950s, as worker self-management became the political goal, these tribunals were replaced by a system of State Economic Courts.¹¹⁶ 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.¹¹⁷ The 1974 Yugoslav Constitution explicitly provided its citizens the right to

114. Informal dispute resolution has been practiced throughout pre-modern history in places as diverse as: Confucian China, rural Albania, 12th Century England, colonial and indigenous North America, and pre-colonial Africa. See, e.g., Murphy, *supra* note 107; Alkon, *supra* note 68, at 341; Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 57 DISP. RESOL. J., July 2002, at 44; Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235, 247-51 (2001).

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. Samuel Pisar, *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1409, 1411 (1959).

116. Loi Sur des Tribunaux Economiques, 3-4 *Le Nouveau Droit Yugoslave*, Bulletin sur le Droit et le Législation de la République Populaire Federative de Yugoslavie 55 (1954), cited in Pisar, *supra* note 115, at 1459 n.155.

117. Croatian Chamber of Economy, http://www.hgk.hr/en/about_cce.asp?izbor=pac (last visited Mar. 1, 2006).

engage in mediation or arbitration.¹¹⁸ This right was further enhanced by civil procedure code provisions that allowed parties to choose their own arbitration rules.¹¹⁹ A 1978 Yugoslav Joint Venture law provided for international arbitration of disputes either in Belgrade or before a foreign arbitration tribunal.¹²⁰ Yugoslavia was also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention).¹²¹ 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.¹²² 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.¹²³

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).¹²⁴ Among many other changes, the Revised Codes introduced

118. USTAV SOCIJALISTIČKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA] (1974), art. 224. For an English version of the 1974 Yugoslav Constitution, see GIBBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD; YUGOSLAVIA (Albert P. Blaustein & Gisbert H. Flanz eds., 1986). For another English version, see THE CONSTITUTIONS OF THE COMMUNIST WORLD, 441-43 (William B. Simons ed., 1980).

119. ZAKON O PARNIČNOM POSTUPKU SA OBJAŠNENJIMA I PRILOZIMA REPUBLIČKIH ZAKONA I DRUGIH PROPISA [ANNOTATED CODE OF CIV. PRO. OF YUGOSLAVIA], art. 478, *translated in* 4 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Yugoslavia, annex I-3 (Jan Paulsson ed., Supp. 3, Jan. 1985).

120. LAW ON INVESTMENT OF RESOURCES OF FOREIGN PERSONS IN DOMESTIC ORGANIZATIONS OF ASSOCIATED LABOR, art. 52, 18 Službeni List (1978), *translated in* 18 I.L.M. 230, *cited in* Mary T. Kaloupek, *Drafting Dispute Resolution Clauses for Western Investment and Ventures in Eastern Europe*, 13 MICH. J. INT'L. L. 981, 990 (1992).

121. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3, *reprinted in* 4 I.L.M. 532 (1965).

122. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. At the time of BiH independence, Yugoslavia had not yet participated in any ICSID arbitration. 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 Feasible?*, 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 PARNIČNOM POSTUPKU BOSNE I HERCEGOVINE [CODE OF CIVIL PROCEDURE OF THE FEDERATION OF BOSNIA AND HERZEGOVINA], 53 Službene Novine Federacije Bosne i

mediation as an explicit option for the first time in BiH history.¹²⁵ During the newly-created Preparatory Hearing (or earlier), judges are given the express mandate to propose mediation to the parties.¹²⁶ The parties may also jointly propose mediation at any time prior to the conclusion of the trial.¹²⁷ The details of mediation proceedings are to be prescribed by a separate law.¹²⁸

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.¹²⁹ 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.¹³⁰ Judicial Settlements are filed with the court¹³¹ and are enforceable like a judgment.¹³²

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.¹³³ This represents an effective abandonment

Hercegovina (2003); ZAKON O PARNIČNOM 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 PARNIČNOM 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.

of the communist legal tradition of “material truth,” 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.¹³⁴ 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.¹³⁵ After minor revisions, BiH’s first mediation law was passed in late 2004.¹³⁶ 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.¹³⁷

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,¹³⁸ which served as

134. *Id.* art. 144.

135. *Drafting of the Mediation Law Completed*, MEDIJATOR, Jul.-Aug. 2003, at 4, available at <http://www.umbih.co.ba/eng/publications/publications.htm>.

136. ZAKON O POSTUPKU MEDIJACIJE BOSNE I HERCEGOVINE [BiH LAW ON MEDIATION PROCEDURE], 37 Službeni Glasnik Bosne i Hercegovine (2004) [hereinafter 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,

an important model during the drafting process, has a similar ambiguity.¹³⁹ On the other hand, the U.S.-based Uniform Mediation Act (UMA),¹⁴⁰ 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 participate¹⁴¹) 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.¹⁴² Thus, it seems that parties are free to engage in mediation before or during court litigation.

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.

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.

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 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 confidentiality 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.

142. BiH Mediation Law, *supra* note 140, art. 4.

However, Article 4 does bar the use of mediation *after* the conclusion of the trial.¹⁴³ 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.¹⁴⁴

The law provides for a default of one mediator, although parties can agree to more.¹⁴⁵ Article 4 of the BiH Mediation Law also repeats the provisions in Article 86 of the Revised CCPs that allow a judge to propose mediation to the parties.¹⁴⁶ This is appropriately flexible for BiH parties.

Article 5 limits the available mediators to a list established and maintained by "the Association."¹⁴⁷ 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.¹⁴⁸ The Association will also maintain a fee schedule.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² In contrast, the UMA exempts signed agreements (such as agreements to mediate) from its general privilege against disclosure.¹⁵³

143. *Id.*

144. Revised CCPs, *supra* note 124, arts. 86, 112.

145. BiH Mediation Law, *supra* note 136, art. 3.

146. *Id.* art. 4.

147. *Id.* art. 5.

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.

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.*

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.

151. UNCITRAL Model, *supra* note 138, art. 10(1)(a).

152. UNCITRAL Model Guide, *supra* note 138, ¶ 64.

153. UMA, *supra* note 140, § 6(a)(1). *See also id.* § 6(a)(1) cmt.2. In practice, most settlement

2. Confidentiality Provisions

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.”¹⁵⁴ 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.”¹⁵⁵ 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.¹⁵⁶

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

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).

154. Klaus Reichert, *Confidentiality in International Mediation*, 59 DISP. RESOL. J. 60, 62 (2005).

155. BiH Mediation Law, *supra* note 136, art. 7.

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.

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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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.

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

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

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

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

161. *Id.* art. 7.

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.

3. Procedural Provisions

The BiH Mediation Law also provides a number of procedural provisions that will enhance public acceptance: all parties have equal rights;¹⁶³ the mediator shall proceed in a neutral manner¹⁶⁴ without delay;¹⁶⁵ parties may be represented by lawyers;¹⁶⁶ the mediator shall, at the beginning, provide the parties with a brief explanation of the goals and the procedure;¹⁶⁷ the mediator may caucus with each party separately;¹⁶⁸ and any party may terminate the proceedings at any time.¹⁶⁹ Mediators will be subject to liability if they violate the Mediation Law.¹⁷⁰ The law also provides clear and broad proscriptions against mediator conflicts of interest, which are waivable.¹⁷¹ 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.¹⁷² 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.¹⁷³ 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.¹⁷⁴

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

164. *Id.* art. 9.

165. *Id.* art. 20.

166. *Id.* art. 15.

167. *Id.* art. 18.

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).

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

170. *Id.* art. 27.

171. *Id.* arts. 28-29.

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

173. *Id.* art. 19.

174. In practice, a professional, thoughtful mediator is unlikely to prejudice a party (and

If the mediation is successful, the parties and mediator are required to draft and sign a written settlement agreement *immediately*.¹⁷⁵ They are also required to submit the settlement agreement to the court.¹⁷⁶ 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.¹⁷⁷ Certain categories of cases, such as domestic relations or juvenile matters, are further restricted.¹⁷⁸ 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.”¹⁷⁹ 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.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

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.

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

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

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

178. *Id.*

179. BiH Mediation Law, *supra* note 136, art. 25.

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.

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

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

legal evolutionary process underway.

182. See, e.g., Thomas Lundmark, Book Note, 46 AM. J. COMP. L. 211, 212 (1998) (reviewing D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (1997)).

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 HERZEGOVINA], 32 Službene Novine Federacije Bosne i Hercegovina (2003) [hereinafter collectively referred to as the Law on Enforcement].

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.

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 Brčko 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.

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.¹⁹⁰ 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.¹⁹¹ The confidentiality of documents, not just oral statements, needs to be protected. One way is to rewrite Article 7 and follow the simple UNCITRAL Model language, "all information relating to the conciliation proceedings shall be kept confidential . . ."¹⁹² 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.¹⁹³ While the best interpretation of the current law

185. *Presentations on Mediation in Banja Luka and Sarajevo*, MEDIJATOR, Nov.-Dec. 2005, at 3.

186. VESNA DASOVIC-MARKOVIC & KENDEL RUST, WORLD BANK/IFC SEED PROJECT & CANADIAN INST. FOR CONFLICT RESOL., INTRODUCTION OF MEDIATION IN BANJA LUKA'S 1ST INSTANCE COURT § 7 (Sept. 2004), available at http://www2.ifc.org/seed/PDFs/ADR_BiH_Final_Report.PDF [hereinafter World Bank Evaluation Report].

187. Press Release, World Bank/IFC Southeast Europe Enterprise Development Project, Sarajevo Mediation Center to Open Tomorrow (May 25, 2005) (on file with author).

188. Andrea Strimling, *The Federal Mediation and Conciliation Service: A Partner in International Conflict Prevention*, 2 PEP. DISP. RES. L. J. 417, 431 (2002).

189. See ZAKON O PARNIČNOM POSTUPKU BRČKO DISTRIKTA BOSNE I HERCEGOVINE [Code of Civil Procedure of Brčko District of Bosnia and Hercegovina], 6 Službeni Glasnik Brčko, art. 220-221, 225 (2002).

190. See discussion *supra* Part V.C.1.

191. *Id.* at Part V.C.2.

192. 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>.

193. See discussion *supra* Part V.C.2.

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."¹⁹⁴ 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.¹⁹⁵ In addition, it should more narrowly limit the contents of the mediator's termination submission to the court.¹⁹⁶ This could be accomplished by adding a few words to Article 19 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.¹⁹⁷

More importantly, the law must be amended to allow mediators to offer settlement options, *sua sponte*.¹⁹⁸ 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.¹⁹⁹ An amendment could be made by striking the first part of the sentence in Article 23, 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 it is charged with enforcing

194. UMA, *supra* note 140, § 2(2).

195. This change could be achieved by simply inserting "in writing" into the text of Article 29. See discussion *supra* Part V.C.2

196. *Id.*

197. An alternative would be to adapt the more complicated UMA provisions that limit the contents of mediator disclosures to an authority. See UMA, *supra* note 140, § 7.

198. See discussion *supra* Part V.C.3.

199. BiH Mediation Law, *supra* note 136, art. 23.

a provision that is contrary to public policy.²⁰⁰ The current rule not only allows for potentially awkward results, but it 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.²⁰¹ 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 grant judges the power to strike all or part of those settlements.²⁰²

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.²⁰³ However, as mentioned above, this creates an incentive to sue.²⁰⁴ That could significantly raise the costs of settlement. Since BiH parties face relatively high legal fees,²⁰⁵ 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.²⁰⁶ 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

200. Article 21 of the Entities’ Law on Enforcement recognizes the CCP proscriptions against party dispositions contrary to public policy. Law on Enforcement, *supra* note 183, art. 21.

201. The courts would regain some control if law enforcement subsequently became involved.

202. Revised CCPs, *supra* note 124, art. 89.

203. *See, e.g.*, UNCITRAL Model Guide, *supra* note 138, ¶ 90 (referencing divergent Australian enforcement rules for mediated settlements in connection with a pending case and those settlements without a pending case).

204. *See* discussion *supra* Part V.C.3.

205. *See supra* note 75.

206. *See supra* note 183 and accompanying text.

a final and enforceable document.”²⁰⁷

B. Implementation Strategies

Despite the assumptions built into many legal reform projects, new laws in and of themselves are not the solution.²⁰⁸ 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.²⁰⁹ 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. There are many excellent mediation training modules that have been developed by USAID implementers.

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.

This could be encouraged through a basic mediation course developed by the AoM or others and made part of the judges' initial apprenticeship

207. 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.

208. Channell, *supra* note 110, at 8.

209. The South African mediation training programs might be a useful model for a BiH labor-management program. See ADR Guide, *supra* note 71, app. B, *South Africa Case Study*.

experience. The training could focus on the effectiveness of non-confrontational dispute resolution techniques and how to identify appropriate cases. The course could offer judges, when possible, the opportunity to observe an actual mediation. The judges participating in the successful Slovenian mediation program might be used as trainers since they come from the same legal background. The judges could also be given an incentive by creating internal provisions that favorably count mediated settlements in the statistical tracking mechanisms.²¹⁰

Third, the attorneys will need extensive training on the advantages of mediation and how to participate. In 2004, ABA/CEELI held a number of single day awareness events for attorneys, but this is only a beginning.²¹¹ 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 are 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. These agreements provide attorneys with a stronger financial incentive to settle cases.²¹² At present, such agreements are not allowed. Another way to improve acceptance is to initially recruit mediators from the ranks of the bar associations.²¹³ Once convinced, attorneys need to learn how to participate effectively in mediation (i.e. compromise) and how to advise their clients. This will require specialized training, most likely from U.S. and EU attorneys. Perhaps, international law firms could be encouraged to become involved as a long-term business development activity.

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

210. Unfortunately, BiH judges have an informal quota of cases to resolve each month. See ABA/CEELI JRI, *supra* note 27, 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.

211. Program report of the ABA/CEELI Rule of Law Program in Bosnia and Herzegovina, <http://www.abanet.org/ceeli/countries/bosnia/program.html> (last visited Mar. 3, 2006).

212. Eric Helland & Alexander Tararok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J.L. ECON. & ORG. 517 (2003).

213. 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.

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,²¹⁴ 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 authority²¹⁵ 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.²¹⁶ Mediation has great potential in many different kinds of disputes. The Slovenia mediation program²¹⁷ reports a higher settlement rate with domestic relations cases than with commercial cases²¹⁸ and at least one-half of the mediated cases in the World Bank's pilot program were non-commercial disputes.²¹⁹

Sixth, ethnic divisions will have to be considered. As mentioned above, mediation may be effective in addressing ethnic issues.²²⁰ 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

214. World Bank Evaluation Report, *supra* note 186, § 10.1.

215. *See id.* § 4.2. In many BiH companies, the President or division head makes all of the important decisions, including legal ones.

216. In many post-communist countries, ADR programs focus on commercial disputes, not the entire legal system. Alkon, *supra* note 68, at 329. The BiH World Bank pilot project in Banja Luka is part of a larger commercial law assistance program, although in its pilot phase, it is accepting non-commercial cases. World Bank Evaluation Report, *supra* note 186, § 3.9.

217. *See discussion supra* Part III.

218. Domestic relations cases had a 61.4% success rate and commercial cases had a thirty-nine percent success rate. Slovenia ADR Program, *supra* note 113, at 5.

219. World Bank Evaluation Report, § 3.9.

220. *See discussion supra* Part IV.

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.²²¹

Finally, mediation has to be given sufficient time to develop.²²² 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.

CONCLUSION

Ten years after the end of the war and the mediated settlement that lead to the creation of BiH, mediation may have a second application. The complex BiH court system suffers from serious problems and does not

221. See *supra* note 98 and accompanying text for a discussion on why initially BiH citizens may be uncomfortable with taking greater responsibility for and control of their legal problems.

222. See ADR Guide, *supra* note 71, at 18.

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.