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CONTRACTING AUTHORITY

Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina

Final Report

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TABLE OF CONTENTS

Chapter 1

DESCRIPTION OF TASKS AND MAIN TERMS TO BE USED

Following the Terms of Reference (ToR), this Report contains:

-analysis of regulatory framework for mediation and drafted amendments to the Law on Mediation Procedure of BiH;

-analysis of regulatory framework for court-based mediation and drafted Alternative Dispute Resolution Act in Judicial Matters;

-analysis of regulation for arbitration, court settlement and mediation in criminal matters;

-analysis of code of conduct for mediators;

-set of policy recommendations;

-action plan for further political and operational support for the development of ADR in BiH.

The findings of facts in this Report are based upon:

- Laws, regulations and other written documents, which were submitted by the beneficiary and ADR stakeholders and are referred to in a report on summary of consultations from 15.5.2015;
- Information and opinions gathered during consultation process with stakeholders;

The conclusions and proposals are based upon:

- Comparison of fact findings with model rules, guidelines, desk books and similar papers, related to design and implementation of court-related and out of court ADR;
- Best practice examples of regulatory and best practice approaches from EU and CoE Member States and from USA;
- Recent research papers on court-annexed mediation schemes,
- Experts' individual evaluation and opinion as regards necessity and feasibility of proposed improvements.

For the purposes of this report:

Alternative dispute resolution covers an agglomeration of dispute resolution procedures, different from adjudication, provided by courts.

Mediation means any proceedings by which the parties attempt to reach through a neutral third person (mediator) the amicable settlement of a dispute arising out of or in relation to contractual or other legal relationship, irrespective of whether for these proceedings the term mediation, conciliation, reconciliation or similar term is used.

Court-annexed mediation means mediation program or scheme, authorized and used within a court system, controlled by the court in which cases a referred to mediation only by the court.

Court-connected mediation means program or scheme, linked to the court system but not being part of it in which cases are either referred by the courts or from out of the courts.

Accreditation means a process of formal and public recognition and verification that an individual, or organization or program meets defined criteria or professional standards.

Certification (also referred as recognition, licensing, credentialing, registration) means that accrediting body is responsible for the validation of an assessment process, for verifying the ongoing compliance with the criteria and standards set through monitoring and review, and for providing processes for the removal of accreditation, where criteria or standards are no longer met.

INTRODUCTION AND OVERVIEW

Having reviewed much commentary on the shortcomings of the civil justice system in many European countries, the Report has focused on the challenge of providing a dispute resolution service that is:

- **affordable** - for all citizens, regardless of their means;
- **accessible** - without undue restraint;
- i**ntelligible** - to the non-lawyer, so that citizens can feel comfortable in representing themselves and will be at no disadvantage in doing so;
- **appropriate** - in a way that the dispute resolution process matches to a dispute;
- **speedy** - so that the period of uncertainty of an unresolved problem is minimized;
- **consistent** - providing some degree of predictability;
- **trustworthy** - a forum in whose honesty and reliability users can have confidence;
- **focused** - so that neutrals are called upon to resolve disputes that genuinely require their experience and knowledge;
- **avoidable** - with alternative services in place, so that involving a judge is a last resort;
- **proportionate** - which means that the costs of pursuing a claim are sensible by reference to the amount at issue.

In this report I strongly advocate for the introduction of comprehensive alternative dispute resolution policy as an important part of access to justice reform in BiH as well as I call for radical change in the way, courts handle civil cases in order to educate and encourage litigants to consider mediation.. Mediation hasn't gained yet appropriate attention and acceptance neither by policy makers nor by professional and general public. To overcome this problem, my main recommendation is directed at four Ministries of Justice (MoJ) in BiH as a “legislative engines for justice reforms” and at courts as a “laboratory for reforms”. I present in my findings that mediation, as significant part of ADR movement in BiH, clearly demonstrates it’s potential. I argue that to improve access to justice by ensuring balanced relationship between mediation and litigation, dispute system design should rely on the concept of early dispute avoidance and resolution (EDR). Proposed three mediation referral tracks within pilot projects at courts (presumptive voluntary, quasi- mandatory with opt-out and, if feasible, compulsory) may be seen as disruptive for some judges and lawyers but two major benefits would flow from this approach: significant reduction of judicial waiting time and backlogs on one side, and savings of time, money and increased satisfaction of litigants with a “justice with human face” on another side. Recommendations are drafted on the

assumption that courts are rather service than place that is why I suggest increasing the capacity of court systems also through specific public-private partnership between courts and private institutional ADR providers.

BiH has a great potential for comprehensive and coherent dispute system design. Certain adaptations and improvements of existing court-related mediation programs or adoption of new ones are needed in order to make mediation presumptive dispute resolution option for litigants.

An aggressive goal for efficiency and integrity of court-annexed mediation program shall be established. For example, in a first year of implementation of pilot court-annexed mediation programs, at least 5% of inflow in civil cases should be referred to mediation, 50 % of referred cases should settle in mediation and 80% of disputants should be satisfied with the mediation process, outcome and mediator's performance.

A pre-condition for a success is, that judges and lawyers accept changes as to the way, how to handle disputes, as their own and not as being imposed on them. The main task of chief judges and leaders of the bar is therefore to introduce participatory case management, encourage discussion among judges and lawyers and prevent excessive skepticism and reluctance at implementation of reforms. Implementation of recommended changes of court-annexed mediation program should be based on assumption, that the success or failure of changes depend less on the reasons for or against these changes and more on how they were introduced and managed (see more in A. Zalar: Management of change in the judiciary; Case study of court-annexed mediation at Ljubljana District Court; Five challenges for European courts: The experiences of German and Slovenian courts; Slovenian Association of Judges and Supreme Court of the Republic of Slovenia,2004,Ljubljana).

On the assumption that recommendations in this Report, directed to the courts, HJPC and bar associations, are approved by them, they should be considered as short-term, because they could be implemented through Rules of court-annexed mediation program, adopted by courts (partially in cooperation with bar associations).

Courts' endeavors to promote the use of mediation shall not stand alone. Key judicial policy players - MoJ, HJPC and supreme courts - should publicly endorse development of mediation programs, encourage disputants to consider mediation seriously, promote savings of time and money of disputants and of courts as well as other benefits of mediation, provide appropriate funding to mediation schemes and contribute to consistent regulatory framework. Ongoing information exchange and enhanced institutional cooperation regarding dispute system design are of key importance for implementation of recommendations from this Report.

Scope of recommendations and their complexity, directed to MoJ's and courts, obviously require further technical and expert assistance. Without such assistance, it is not likely, that BiH could achieve significant progress with the efforts to establish an efficient, nationwide system of alternative dispute resolution in reasonable short period of time. It is therefore strongly recommended in the last chapter of this Report to increase the financial investments in future development of dispute system in BiH by implementation of an action plan as described in this chapter.

As regards the need for the development and use of mediation in private sector by having recourse to market-based solutions, key players should support initiatives, aimed at ensuring quality of mediator's performance through self-regulatory instruments, developed and adopted by non-governmental and uniform association of mediators. It is recommended

that mediation profession itself speaks with one voice and ensures public trust and confidence in this new profession.

Mechanisms, which could, as a first step, stimulate further development of mediation, are in particular related to possible agreements between courts and mediation centers of the Association of mediators, where they already exist,(Sarajevo, Banja Luka) on organizing mediation information sessions for litigants**.** This, so called "Italian model" of specific public-private partnership between courts and mediation centers, could after some time evolve into court-connected mediation approach at courts, which couldn't develop capacities for court-annexed mediation programs.

Another opportunity for increased demand for pre-filling out of court mediation by individuals is in setting up a (pilot) consumer disputes ADR and ODR schemes. Extensive EU regulatory framework concerning consensual resolution of consumer disputes might drive interest of the EU to sponsor initiatives which would follow the best practice examples (see consumer ADR at the European Center for Dispute Resolution (ECDR) at (www.ecdr.si). Study visit to such an institution in the EU member State might be very helpful in order to provide participants with lessons learnt.

Since International Finance Corporation (IFC) developed an Alternative Dispute resolution Manual: A Guide for Practitioners on Establishing and Managing ADR Centers, it could be useful tool for interested founders of such institutional mediation provider, whether free standing or chamber- related. Nevertheless, endeavors to establish a mediation center in an environment presenting systemic barriers to its success, would be futile. Rather, consideration should be given to whether such barriers can be addressed through broader justice reform, embarked upon as a parallel process. It seems that bar association would be a perfect place where such a center could operate.

Last but not least, robust public awareness campaign concerning mediation, implemented upon a strategic document, should also target commercial businesses by explaining how can mediation reduce business risks and contribute to good corporate governance (see https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/alternativedispute-resolution/special-areas/upload/Focus4_Mediation_12.pdf).

To conclude, we could all agree that a future is an unfinished business but after evaluating current state of play regarding ADR in BiH, I believe that the future of dispute resolution in BiH belongs to mediation and other forms of ADR..

Chapter 2

GOALS AND BENEFITS OF MEDIATION

Benefits of mediation could be described as individual, private sector and institutional benefits. *(Alternative Dispute Resolution Center Manual; A Guide for practitioners on Establishing and managing ADR Centers; The World Bank Group 2011, Washington)*

Type of benefit	Benefit
Individual benefit	• Cheaper redress • Resolution of dispute more quickly than mainstream court processes • In recommendation- and facilitation- based processes, retention of decision making with the parties rather than referral to a third party • In recommendation – and facilitation- based processes, a reduction of the need to enforce proceedings to ensure that parties will comply with an agreement, since the parties enter into their agreements consensually.
Private sector	• Enhance private sector development by creating a better business environment • Lower direct and indirect costs of enforcing contracts and resolving disputes • Lower transactional costs so that resources are not diverted from the business • Reinforce negotiation-based methods of doing business, depending on the process.
Institutional benefit	• Enhance good public sector governance by reducing the backlog of disputes before the courts and improving the efficiency of the court system • Provide better access to justice through a greater choice of dispute resolution methods • In particular jurisdictions, improve the reputation of the court system in providing effective resolution of disputes.

ASSESSMENT OF NEEDS AND DEVELOPMENT OF GOALS

This part of the Report firstly outlines some basic policy approaches as regards assessment of needs and development of goals, referring to the most advanced ADR policy document of California`s courts *(Superior Court of San Mateo County/Family Law ADR Program/mrandspreuss@sanmateocourt.org/650-599-1070)*.

NEEDS

Program planners suggest that courts or others planning a court-related ADR program attempt to identify the needs or problems which they would like to address prior to designing an ADR program. This process can be broken down into three steps:

- Isolate the problems or conditions which program planners would like to address;
- Identify the specific sources or causes of these problems or conditions;
- Tailor program components so they are responsive to the identified needs and objectives.

Courts in general have approached the needs assessment process in a variety of ways. For example, in some jurisdictions, the court appears to have collapsed the first two steps and identified the following variables in establishing its ADR program: diminishing judicial resources; the demands of fast track; court administrators' recognition of the value of ADR; and the high cost of litigation. In others, the development of the settlement program stemmed directly from a belief that the bench and the bar needed to do something about the backlog of cases in the court.

GOALS

It is important to develop clear goals for a court-related ADR program prior to its implementation. Program goals and their prioritization can dramatically affect: (1) how the program is designed and (2) what criteria are used to monitor and evaluate its success. Additionally, clarity about program goals can help to ensure that cases are referred to an appropriate ADR process.

a. Goal Development/Prioritization

Commentators suggest program planners consider several issues in developing program goals:

- **Relationship Between Program Goals and the Needs/Problems Program is Intended to Address:** The National Standards for Court-Connected Mediation Programs in USA recommend that program goals relate directly to the courts' identified needs;
- **Individualized Selection of Goals:** Even though, as discussed above, courts should look to existing programs for models and ideas, it is most important that those planning a court-related ADR program examine the individual needs of the court for which the program is being planned when establishing the goals for that

program. This means taking into account available resources, existing problems, existing ways of approaching those problems, etc.;

- **Goal Prioritization:** It is important that goals are prioritized. There can be considerable tension between and among ADR program goals. For example, an ADR program that provides greater public access to dispute resolution processes will not necessarily reduce the court's costs or caseloads. For this reason, it has been suggested that, even if all program goals appear consistent, courts should clarify and prioritize goals for any ADR programs they design and adopt. Furthermore, goal prioritization can assist program planners in clearly identifying the direction of a particular ADR program. Finally, the National Standards for Court-Connected Mediation Programs suggest that the prioritization of goals can be a crucial element in evaluating program effectiveness.

b. Goal Options

There are many different goal options for court-related ADR programs. However, these goals generally fall into two categories: goals relating to the interests of litigants and goals relating to the interests of courts. Ideally, these two types of goals will be congruent.

(1) Court-Oriented Goals

Court-oriented goals include:

- to increase the court's ability to resolve cases within given resources;
- to assist in decreasing backlog;
- to provide dispute resolution processes that are most appropriate for resolving specific types of disputes; and
- to encourage earlier and better case analysis and preparation by litigants.

Traditionally, the goal of reducing backlog has been viewed as a primary advantage of court related ADR. A central goal of the ADR/early settlement program implemented was to reduce the court's caseload or backlog.

(2) User-Oriented Goals

User-oriented goals are those directed to improving services delivered to users of the courts. Some of the most commonly cited user-oriented goals include:

- to provide disputing parties with a lower-cost, semi-formal, quasi-adjudicatory alternative to full blown trial;
- to reduce party alienation from the dispute resolution process;
- to help forge better relations between parties;
- to improve communication between parties and their lawyers;
- to bring the parties together before they have made a major economic and emotional investment in the case;
- to improve case analysis, reduce discovery costs and produce better focused discovery and motion practice plans; and
- to enhance the parties' capacity to protect their privacy interests.

(3) Hybrid

Some goals do not fall easily into one or other of these categories, but rather appear to have advantages for both the court and the parties. For example:

- to shorten the time to disposition;
- to improve communication between parties and the court;
- to reduce the expense of resolving disputes;
- to encourage earlier settlement; and
- to encourage the future voluntary use of ADR through education and familiarization with the processes.

Chapter 3

KEY REGULATORY ISSUES, TRENDS AND PRACTICES REGARDING MEDIATION

KEY ISSUES CHECK LIST FOR POLICY MAKERS WHEN CONSIDERING MEDIATION

This check list was adopted and published by the National Australian ADR Commission (hereinafter: NADRAC) in November 2006. It aims to provide guidance to government policy makers and drafters who are involved in developing or amending legislative provisions concerning ADR, so to assist in achieving appropriate standards and consistency in the legislative framework for ADR, especially in relation to the rights and obligations of the parties.

The check list is adapted by expert to the needs of the civil law country in order to be useful for policy makers in BiH.

1. IS THERE A NEED FOR LEGISLATION?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
ARGUMENTS AGAINST LEGISLATION Is legislation necessary or are other mechanisms likely to be more effective?	**NO LEGISLATION** If not enacting new legislation, policy-makers could rely on the use of ADR mechanisms in the case law, contractual arrangements between the parties and codes of practice or other self-regulatory mechanisms applying to ADR practitioners.
ARGUMENTS SUPPORTING LEGISLATION • When introducing ADR for the first time, there may be a need for some element of compulsion or legislative control • Government policy is to encourage ADR to foster a more conciliatory approach to dispute resolution. It can also be important that parties have a choice to use an effective ADR process. This may necessitate legislative change.	**LEGISLATION** • ADR mechanisms could be introduced through the principal Act, regulations or rules of court. • Another legislative approach might be to deem that ADR clauses are part of private contracts.

2. WHAT TYPE OF ADR IS MOST APPROPRIATE?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
• Consider the nature of the ADR processes - facilitative, advisory, determinative or, in some cases, a combination of these • Examples of facilitative processes are mediation, facilitation and facilitated negotiation. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation. Determinative processes include arbitration, expert determination and private judging. • Various ADR processes may also be described according to their objectives, the specific strategies used or the type of dispute. For example, transformative mediation, evaluative mediation or co-mediation.	• Leaving arbitration aside, mediation and conciliation are the most common processes referred to in legislation, followed by negotiation and conferencing. Adjudication, case appraisal and neutral evaluation are also occasionally referred to. • ADR definitions should not be provided in legislation except in limited situations. Policy-makers may wish to consider distinguishing between the types of ADR processes to be used rather than setting out prescriptive definitions. • ADR may be used for different categories of dispute, for example family dispute resolution, community mediation, victim-offender mediation, equal opportunity conciliation, workers' compensation conciliation, tenancy conciliation or commercial arbitration. Multi-party mediation may involve several parties or groups of parties.

3. HOW SHOULD DISPUTES BE REFERRED TO ADR?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
• The state should encourage its agencies to resolve disputes at the lowest appropriate level and to proactively avoid unnecessary escalation of conflict. • Except where judgment has been reserved in a judicial process, parties can attempt an ADR process at any stage in their dispute. • If legislation is to provide for referral to ADR, the nature and extent of any referral criteria or negative criteria, as well as whether to include these in legislation or regulations, needs to be decided. • It is important where legislation compulsorily refers parties to ADR that appropriate professional standards are maintained and enforced.	• In some countries' courts and tribunals have a power to refer a matter to ADR. In some circumstances, this can be done without the consent of the parties (compulsory referral). The referring body will generally have a discretion to refer the dispute to ADR. • Legislation or court rules may require disputing parties to access community-based ADR before commencing proceedings. Grievance and complaints procedures governed by law may also require that an ADR attempt has been made. • Legislation should only require a dispute to be referred to ADR without the consent of the parties where an assessment of suitability for referral has been made. However, any assessment criteria do not need to be contained in legislation. It may be more useful for legislation to specify negative criteria, for example when not to refer a dispute.

4. SHOULD PARTICIPATION COMPULSORY FOR THE PARTIES N?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
SHOULD PARTICIPATION IN ADR BE MADE COMPULSORY? When a dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, this provides an opportunity for participation in a process from which cooperation and consent might come.	**COMPULSORY** • Parties may be referred to ADR with or without their consent. • The referrer may have the discretion to refer matters to ADR or may be compelled to refer matters to ADR. • Parties engaged in ADR are required to participate in good faith by a variety of laws and rules. The consequences of not participating in good faith vary. • Contractual agreements containing ADR clauses are common in commercial and employment agreements.

5. SHOULD PARTICIPATION IN ADR BE VOLUNTARY?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
SHOULD PARTICIPATION IN ADR BE VOLUNTARY? • Generally, settlement during ADR is more likely to occur if the parties participate voluntarily in ADR rather than being compelled to do so. • Compulsory participation may also be inappropriate in certain types of disputes, for example where there is a history of violence. • Where participation is compulsory, ADR may be used as a case management tool by courts and tribunals, rather than as a mechanism for considered and deliberative ADR.	**VOLUNTARY** • Parties may agree to attempt to resolve their dispute through ADR at any stage before or during legal proceedings. • Parties may agree to participate in ADR through a private contractual agreement. • Where legislation allows a court/tribunal to refer parties to ADR, the obligation to participate in ADR can be voluntary for the parties. • Wherever a dispute is referred to ADR, the advantages of compulsory participation can only be realized if there is careful assessment of whether the dispute is suitable for ADR and if there are appropriate exceptions for unsuitable cases. Compulsory participation and referral is only appropriate where professional practitioner standards are maintained and enforced.

6. WHAT ARE THE DUTIES AND STANDARDS EXPECTED OF ADR PRACTITIONERS? HOW IS THE ADR PRACTITI NER SELECTED?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
• There is no national, single organization that accredits mediators and other ADR practitioners, but efforts are being made to develop common national standards for mediator accreditation. • Important issues to consider are: 1) whether the duties and standards of ADR practitioners should be a legislative requirement or left to 'good practice', 2) how the ADR practitioner should be selected, and 3) whether the ADR practitioner should face sanctions if there is a complaint against him or her. • Issues to consider when setting out the duties and standards of ADR practitioners include: how the practitioner is to be selected, the role of the practitioner, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the ADR process, recording settlement, publicity, advertising and fees.	• Legislation and regulations can specify the level of training and education required in order to conduct mediation and other forms of ADR. • Codes of conduct and professional rules can also provide guidance about the duties of ADR practitioners, so consideration needs to I be given to whether or not legislative guidance is needed. • The National Mediation Accreditation System and the National Mediation Standard aim to achieve a national uniform system of mediator accreditation.

7. SHOULD LEGISLATION PROVIDE IMMUNITY FROM SUIT TO ADR PRACTITIONERS?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
• The main issues for policy-makers to consider are whether immunity should be provided and, if so, the extent of immunity and how to ensure parties receive appropriate standards of ADR. • The arguments for and against immunity relate to the need to provide some protection to ADR practitioners and at the same time ensure an acceptable degree of accountability for ADR practice. • Any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy. There is almost no profession which is granted the privilege of immunity from civil liability. • Traditionally, the general policy supporting immunity for ADR practitioners has been that the performance of their functions and duties, and the quality of ADR outcomes, might be threatened if there is a risk of legal action.	• There is no general immunity from legal action for ADR practitioners. However, immunity can be provided by the practitioner's individual contract for service (if it is consistent with other legal principles about fair contracts) or by statute in particular areas of ADR work. • Statutory protection for ADR practitioners can either be provided as an absolute immunity (similar to that afforded to judges) for work done in relation to ADR associated with that legislation, or as a qualified immunity limited to acts done in good faith. • Where a court refers a matter to an ADR process, and the ADR is part of a continuum of case management strategies which aim to resolve litigation between the parties, safeguards should exist to protect the ADR practitioner from suit because of the proximity of ADR to judicial processes. In these circumstances, ADR is seen as an extension of court processes. • However, it is very difficult to justify the immunity of ADR practitioners wherever the ADR is community based rather than part of a court's case management process.

8. CONFIDENTIALITY AND DISCLOSURE OF COMMUNICATIONS MADE DURING ADR PROCESSES?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
• It is widely expected that communications made during ADR will be kept confidential. The key issue to consider is whether legislation should impose these confidentiality obligations and what sanctions should apply for breaches of any confidentiality requirements. This is affected by a consideration of whether any common law or contractual obligations are sufficient. • The policy reasons for confidentiality obligations are based on maintaining public confidence in ADR processes and enabling open and honest communication within the process to produce a workable outcome. The arguments for restricting those confidentiality obligations are based on the need for some judicial or public control over the private resolution of disputes and the need for third parties who may be affected by the outcomes of an ADR process to have access to information to assert their rights.	• In some countries legislation generally does not prevent the parties from disclosing communications made during ADR. • The duty of confidentiality on the part of the ADR practitioner is primarily an ethical obligation and generally is best dealt with by reference to professional standards and codes of conduct, rather than legislation. Although there is an obligation on participating parties to keep matters discussed during an ADR process confidential, that obligation should not be imposed by legislation.

9. IS THERE A NEED FOR LEGISLATION?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
• Legislation sometimes provides that evidence of anything said or done, or any admission made during an ADR process (including meetings with counsellors), is not admissible in court. This is done to facilitate frank discussions and meaningful negotiations, so that parties can negotiate more freely in an ADR session and express their differences openly without fearing that their words and actions will be used against them at a later date. • On the other hand, there may be compelling reasons for admitting some matters into evidence, for example where that evidence could help protect a child, vulnerable person or the public. • The key question for policy-makers is whether the circumstances justify including inadmissibility provisions in ADR legislation and if so, whether specific exceptions need to be added.	• Most legislation dealing with ADR provides that evidence of communications made during an ADR session is inadmissible in later proceedings. A court is usually not permitted to see documents related to the ADR process without the parties' consent if they could not otherwise be obtained from other sources. This rule is designed to encourage the settlement of disputes. • Some legislation containing inadmissibility provisions also specifies the circumstances under which there are exceptions to that admissibility. It is important that inadmissibility provisions are not unfairly used to prevent enforcement of agreements reached through an ADR process. • Disclosures made during an ADR process should not generally be admitted into evidence in subsequent court proceedings. Protecting the communications made in an ADR session provides greater certainty about the status of those communications and avoids secondary litigation.

10. HOW SHOULD A JREEMENTS REACHED AT ADR BECOME ENFORCEABLE?	
RELEVANT CONSIDERATIONS	**POSSIBLE APPROACH**
• The issue facing policy-makers in relation to the enforcement of ADR agreements is a question of balancing competing needs. • Settlement negotiations and other ADR processes need to be encouraged and their confidentiality protected through inadmissibility rules. This priority needs to be balanced against the need to encourage finality of disputes and to allow ADR agreements to be submitted as evidence of an agreement reached. • The main difficulty in relation to the enforcement of ADR agreements occurs where one party wishes to rely on the agreement and the other party wishes to withdraw from it. In such cases, one party will usually claim that the agreement was not final, but an interim document created during ADR. Such interim documents would usually be inadmissible, and therefore not enforceable. • The intended enforcement of ADR outcomes needs to be clearly stated in the agreement as uncertainty may undermine efforts to later enforce the agreement.	• Where a court/tribunal has referred a matter to ADR, legislation may authorize that body to accept an agreement reached through an ADR process as evidence of settlement and make orders accordingly. • ADR processes should, where possible, assist parties to avoid litigation. For this reason, it is important that agreements reached at mediation and other ADR processes should be able to be enforced, subject to other statutory protections in relation to misleading and deceptive conduct and the protection available in cases of unfair contracts. • Where a court or tribunal has the legislative power to refer a matter to an ADR process, it should be able to make any orders within its power relating to any settlement agreement reached. Any agreements that go beyond the court or tribunal's power should be enforced through the law of contract.

WHAT GOVERNMENTAL POLICIES MAY SUPPORT THE GROWTH OF MEDIATION?

It would be interesting to explore, what makes politicians supportive to mediation. Are they convinced that mediation is superior instrument for conflict resolution? Do they subscribe it only because it is a fashionable, innovative step in a field full of tradition? Do they hope it will serve their own interests? What can governments do (more) in order to promote mediation?

REGULATORY FRAMEWORK FOR MEDIATION

With regard to different ways in which governments can promote mediation, it is important to note that governments of two leading European countries with well-developed mediation policy, England and Wales and Netherlands, do not favor regulatory approach. On the other side, the majority of new European democracies or countries in transition (including BiH), first passed statutory mediation law and only subsequently tried to practice mediation.

WHAT IS EXISTING REGULATION OF MEDIATION?

Mediation regulatory framework exists in various forms like:

General statutory legislation on mediation and mediators (e.g. Law on Mediation);

Court procedural laws (e.g. article 309 a of Slovenian ZPP, article 15a of Germany's EGZPO and article 278 of Germany's ZPO);

Judicial case law, emerging from disputes involving agreements to mediate, mediation clauses, settlements (see judgment in case Halsey v. Milton Keynes General NHS Trust (2004) EWCA Civ 576 (UK))[1];

Regulation of mediator's fees;

Professional Codes (Professional code for German lawyers BORA, European Code of Conduct for Mediators);

Court rules or programs (Backlog Reduction Court Annexed Mediation Program at Ljubljana District Court, Slovenia);

Private providers rules of mediation (UNCITRAL Rules of Commercial Conciliation, American
Arbitration Association Rules of Mediation, ICC Rules of Conciliation);

Model laws (UNCITRAL Model Law on International Commercial Conciliation);

Policy papers (Green paper of the European Commission on alternative dispute resolution in civil and commercial law)[2];

Recommendations (Council of Europe Commission recommendations on mediation in civil and in family matters)[3].

[1] Lord Philips: Why mediation works and the role of mediation in civil court system in the UK: Mediation Conference Warsaw, 14th June 2006.

[2] Commission of the European Communities, COM (2002)196, Brussels

The ability of courts in common law countries to adopt and change their court rules is in stark contrast to the legislative monopoly over the court rules in most (but not all) civil law countries.[4] This feature has enabled common law courts to integrate mediation into the litigation process while a strict regulatory control over court rules in civil law countries put the brakes on change and experimentation until the legislator sees fit to allow and encourage mediation.

WHAT ARE ADVANTAGES AND DISADVANTAGES OF LEGISLATION ON MEDIATION?

Despite rapid mediation development in terms of market driven developments or as policy initiatives from governments and courts, European countries kept widely diffusing views as to exactly how to further stimulate the use of mediation. This concerned especially the possibility of legislation at the national and European (supranational) level of the mediation process as such and of the role, training, accreditation and accountability of mediators. Some cautious against any legislative initiative on this issue considering that it could threaten some of the distinguishing features of mediation like flexibility and scope for private autonomy. Where private mediation grows one does not need extensive regulation because the law should not be an obstacle for the efficient market developments. Another concern is that when mediation becomes legislated, attorneys would take over the process, not mediators. Some legal scholars believe that the more highly regulated mediation industry, the more likely mediation objectives will compete rather than complement one another and the greater the proliferation of schemes promoting efficiency and access to justice as their primary objective instead of self-determination of the parties.[5] It also seems that especially funding shortages in some countries frustrate attempts to establish regulatory framework that would encourage mediation.

Concerning the advantages of regulatory framework for mediation many argue that the law might have an educational effect on neutrals, judges, lawyers and community at large and consequently could increase public trust and confidence in the use of mediation. Regulatory framework also ensures minimum quality standards for performance and could represent an incentive for public funding of mediation schemes. As regards the rules of mediation process, the law could resolve the situation where disputants can not agree about the way how mediation should be implemented and what law should be applied. Many believe that mediation law could always provide enough flexibility when regulation is conditional, namely, when the law contains a term "unless the parties agree otherwise".

PILOT SCHEMES

What conclusions could be drawn from the advantages and disadvantages of regulatory framework for mediation? Council of Europe member states are free to decide, according to their national legal tradition and practice, whether mediation should be regulated by legislative measures or not. However, if one evaluates the mediation development in

[3] Family Mediation (Recommendation No. R (98)1 and explanatory memorandum), Mediation in Civil Matters (Recommendation Rec (2002)10 and explanatory memorandum).

[4] When district courts in Slovenia introduced court annexed mediation, there was no existing law on mediation, however courts interpreted the general provision of article 307 of the Civil Procedural Act, which prescribes the duty of the court throughout the procedure to assist the disputants to reach an amicable settlement, as a legal ground for offering court annexed mediation. Courts therefore adopted the rules of mediation in a form of backlog reduction program with binding effect for the parties and their lawyers.

[5] See N. Alexander: Global trends in Mediation: Ridding the Third Wave, page 2.

countries which started to promote the use of mediation without previous regulation (Netherlands, Slovenia, England and Wales) and compare it with difficulties in countries, which passed the laws on mediation before any mediation has occurred in practice, it seems that there is a risk of overregulated mediation in its infancy stage. In all three above mentioned European countries mediation gained momentum through experiments, pilot court-annexed schemes, designed by courts themselves. Mediation rules and practice could be adjusted to the needs of the users and legal community at large within learning organization. Through pilot projects the attitude and response of the disputants could be tested, without guaranteeing any success of the outcome of such an experiment. It is much more easy for the parliaments as well to follow the pilot project implementation reports and regulate this field since the parliaments, in principle, are not interested only in adopting the laws, but also in real implementation of such laws. Best examples of court annexed (pilot) mediation schemes are:

- Ljubljana District Court Annexed Mediation Programs in civil, family and commercial cases, awarded with the special recognition of the Council of Europe and European Commission in a year 2005 (the European Prize — Crystal Scale of Justice);

- Courts in England and Wales designed variety of court annexed mediation models from completely voluntary (London 1996-1999), selective court direction (Commercial Court ADR orders Guiltford scheme), voluntary program with background pressure (London 2001-2005, Birmingham), court referred model (Court of Appeal scheme, Exeter) to quasi compulsion court annexed mediation scheme (ARM London 2004-2005, Exeter);

- Trondheim District Court initiated court mediation of civil disputes in 1998 and reached settlement rate of 92 % in a year 2006 (Trondheim District Court Annual Report, 2006, Norway);

- The Netherlands Court — Annexed Mediation Schemes (effective nation-wide from 1st of April 2005).

WHAT COULD BE REGULATED?

The overriding goal of regulation in the field of mediation could be:

- To encourage the use of mediation;
- To regulate the process;
- To regulate the mediation profession.

During international mediation expert meeting in Hague on 29th and 30th June 2006, sponsored by Dutch government, one of the conclusions of the workshops on whether (statutory) regulation in the field of mediation is a good incentive, was that regulation can encourage the use but the mediation process and profession should not be regulated.[6] "As had been similarly exploited in the panel discussion, the participants in the workshop showed that the regulations on mediation and the reasons to opt for regulation differ a lot of country to country. Some countries like Spain, Malta and Finland have legislation on mediation for specific sectors, for example in family law. Some (Poland, Finland, Belgium) have legislation on court annexed mediation whereas other like the UK encourage the mediation through provisions in their civil procedure rules. Most eastern European countries have recently developed a specific Law on Mediation. It was stressed that cultural aspects

[6] Report on facts and figures of Ljubljana District Court Annexed Mediation Programs is attached to this paper.

should be taken into account in order to make a comparison between the choices of the different countries for regulation or against".

LEGAL INCENTIVES FOR MEDIATION DEMAND

There are two incentives for mediation demand:

- Duty of disputants to consider mediation;
- Duty of courts to pay attention to mediation;

Lawyers should, where applicable, have an obligation to consider mediation even before going to court and give relevant information and advice to their clients.[7] This could be achieved either by statutory provision or through professional code of national bar association or lawyers association.

Mediation information session may foster the trust of attorneys and their clients in the mediation especially where mediation is considerable or even complete novelty and may ensure informed consent, provided by the parties.

Judges as gatekeepers of mediation should have the power to arrange information session on mediation, and, where applicable, have the obligation to invite the parties to the dispute to go to mediation. Judges should therefore assume the role of seducers by assisting disputants to evaluate the risks of the case and to opt for mediation. Selective pressure mechanisms or sometimes even smart sanctions will be needed in order to make the case management powers of judges to require the parties to attend information session on mediation, enforceable. Statutory legislation might include sanctions like imposition of costs, award of attorney's fees or under egregious circumstances, dismissal of the case. Selection of appropriate sanctions should be left to the judge's discretion. However, some suggest that sanctions would result in judicial inefficiency, as valuable court time could be consumed by litigating the sanction's issues.

As regards existing national regulation of Council of Europe member states on duty to consider mediation, two different approaches could be identified. Slovenian model provides the example of bottom up policy approach in terms of regulatory development while the opposite approach is top down policy approach of the government in England and Wales.

DUTY TO CONSIDER MEDIATION; THE SLOVENIAN MODEL

Until year 2000 there was no tradition of mediation in Slovenia. Providers of these services on the open market barely existed.[8] There was no explicit regulatory framework, providing a legal basis for mediation. Mediation was therefore not regulated either by the law or by implementing regulations.

Lack of initiative from the private sector to develop and use participative dispute resolution procedures was the reason for the initiative in this regard being temporary assumed by the state courts. District courts as courts of first instance launched court-annexed mediation

[7] CEPEI: Draft Guidelines for implementation of the existing recommendation concerning family and civil mediation; interim report — CEPE3 GT-MED (2007)1 prov1.

[8] Permanent Arbitration at the Slovenian Chamber of Commerce has been offering mediation to disputants, however not as a separate ADR procedure, but as a process within arbitration (arb-med). Parties to the dispute have rarely taken up such option.

schemes. Courts interpreted general provision of article 307 of the Civil Procedural Act which prescribes the duty of the court to assist parties to settle at all times during trial, as a sufficient procedural legal basis for offering voluntary mediation.[9] As a substantive law basis for setting up court annexed mediation program courts interpreted article 62 of the Court Act and article 171 of the Court Rules as an implementing regulation. [10] Both cited provisions prescribe the duty of the court to adopt a program to reduce case backlogs when statistics shows a backlog at the court over the last twelve months. A program is formally adopted by the president of the court. Court annexed mediation was therefore introduced as a special program to reduce the excessive case backlogs at respective district courts. Basic principles, rules and ethical standards of mediation were prescribed by this program.

The main legal characteristics of court annexed mediation in Slovenia as prescribed with the programs of the courts are the following:

- Mediation is a voluntary process for the plaintiff and for the defendant;
- The court suggests the parties to attempt mediation with a standard letter of invitation and attached brochure which describes the procedure and its advantages;
- Invitation to mediation occurs at an early stage of litigation procedure after lawsuit and defence paper have been exchanged; a judge may also refer a case to mediation at any subsequent time during litigation if the parties request so;
- Mediators (judges, retired judges, practicing lawyers, family therapeuts, social workers in family mediation) are trained, monitored and accredited by the court;
- Mediation operates within the court, is staffed and funded by the court;
- Court provides mediation free of charge for the parties;
- In case of settlement the parties choose the form of the agreement (contract or binding and enforceable court settlement order) and, are entitled to 50 % reduction of filing fees.

In the year 2002 Civil Procedure Act was supplemented regarding alternative dispute resolution. This statutory law authorized the court to suspend the procedure at the request of the both parties in order to attempt (any) alternative dispute resolution process.[11] Slovenian experience shows that it is not always necessary to establish mediation system by statutory law. Legal action, taken by public authorities, based on ad hoc amendments to the existing legislation, may be premature. The society in a country without mediation tradition has first to understand and recognize the advantage of mediation, adjust the perceptions and aspirations about the mediation before any firm regulative framework allows for mediation is adopted.

On the other hand, lack of legislation might bring with it certain risk. The principle of the confidentiality as a fundamental principle of mediation is particularly relevant with regard to the judicial procedure. It is linked with the standard of inadmissible evidence and it is so important that it should be included in the procedural rules. One can tackle this by having parties, who agree with mediation, to sign a declaration on protection of the principle of confidentiality and on respect for the rules on inadmissible evidence. But there remains a

[9] Civil Procedure Act, Official Gazette no. 26/99 as amended.

[10] Court Act, Official Gazette no. 19/94 as amended; Court Rules, Official Gazette no. 17/95 as amended.

[11] Article 305b of the Civil Procedure Act, Official Gazette no. 110/2002.

question as to how the court will take into account the principle of confidentiality in the event of a dispute over an infringement of this principle or of the rules on admissible evidence.

Another risk exists with regard the accountability of mediators. While for example the court can prescribe the basic ethical principles, that mediators are bound by, it can not give mediators the immunity it provides to judges. Furthermore when public resources are used in mediation system, certain statutory authority is almost inevitable. This speaks in favour of minimum rules, necessary to guarantee process integrity.

DUTY TO CONSIDER MEDIATION; THE ENGLISH MODEL

In England and Wales interest in mediation for civil and family disputes has increased steadily since the early 1990's. Major reforms in English civil procedure took place in 1999 following the publication of Lord Woolf s Access to Justice Report in 1996. This report was watershed in the development of mediation for non-family civil disputes. It was not proposed that ADR should be compulsory either as an alternative or as a preliminary to litigation, but Lord Woolf felt that the courts should play an important part in providing information about the availability of ADR and encouraging its use in appropriate cases.[12]

This encouragement is underpinned by the court's power to "punish" unreasonable behaviour in litigation by denying parties their legal costs or other financial penalties:

"The court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR".

Under new civil procedure rules, implemented in April 1999, the courts have substantial case management powers, including the power to order parties to attempt mediation or another form of ADR and to interrupt ("stay") proceedings for this to occur. Judicial case management includes encouraging the parties to use an alternative dispute resolution procedure if court considers that appropriate, and facilitating the use of such procedure. Failure to cooperate with a judge's suggestion regarding ADR can result in cost penalties being imposed on the recalcitrant party.[13]

The emphases on ADR in court rules has been strengthened by the publication of 6 pre-action protocols, each of which encourage attempts at settlements, including consideration of ADR, before beginning court proceedings. The most recent update of the civil procedure rules includes the requirement that parties to any dispute should follow a reasonable pre-action procedure intended to avoid litigation, before making any application to court. This should include negotiations with a view to settling the claim and cost penalties can be applied to those who do not comply.[14]

[12] *The Hon. Lord Woolf, Interim report to the Lord Chancellor* on the Civil Justice System in England and Wales, June 1995, Lord Chancellor's department, Chapter 18, Para. 4, p. 136.

[13] Factors to be taken into account when deciding cost issues include »the efforts made, if any before and during the proceedings in order to try and resolve the disputes« (Parts 1 and 44 Civil Procedure Rules).

[14] Hazel Genn: Contemporary experience of mediation in England and Wales; European Commission for the Efficiency of Justice: Mediation, CEPEJ (2003)25 (d1), Strasbourg, 3rd October 2003.

REGULATORY ISSUES OF MEDIATION PROCESS

Besides access to mediation the statutory law might, unless defined by court rules or contractual agreements, regulate at least the following basic issues:

- Definition of mediation;
- Voluntary or compulsory nature of mediation;
- Confidentiality;
- Admissibility of evidence;
- Limitation periods;
- Mediation clause;
- Enforcement of mediated settlements.

DEFINITION OF MEDIATION

Mediation refers to a process, in which an impartial third party facilitates a negotiation between two or more disputing parties. Conciliation can be similar in many ways to mediation yet it differs in one important respect. Conciliation refers to a mediation like process in which the impartial third party, the conciliator, is able to provide the parties with legal information and (or) suggests solutions to the parties.

Conciliators can be much more directive and interventionist than interest based mediators. The following definition of mediation shall apply:

Mediation shall mean any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the national law.

It shall not include attempts made by the judge to settle a dispute within the course of judicial proceedings concerning that dispute.

Occasionally, the external mediators are judges, other than those handling the case (Norway, Finland and Belgium experiments). This variation in particular seems to indicate a growing awareness of the restrictions inherent in judges sitting on a case, acting as settlement directors simultaneously. Indeed, these judges are not allowed to resort to caucus, and time constraints will usually prevent them from digging deeper, tabling underlying interests for an allencompassing dispute resolution agenda.[15]

VOLUNTARY V. COMPULSORY MEDIATION

Council of Europe recommendations on mediation in family and civil matters as well as EU Directive do consider mediation as, in principle, voluntary process. In most Central and East European countries mediation is in fact voluntary, mainly due to its early developmental stage. Mandatory court related mediation is not widespread. On Malta family mediation was compulsory due to specific social interest because Maltese law did not allow a divorce of a

[15] A. de Roo and R. Jagtenberg: Comparative European research on court — encouraged mediation, Conference paper, Hague 2006, p. 3-4

married couple but just separate living. Mandatory schemes in Norway or in Germany under article 15a of German EGZPO in small claims and neighbourhood disputes are underway. The so called "get your mediation ticket punched first" approach in order to make the courts a place of last, rather than first resort, is exceptional in Europe. Courts have not yet developed multi-door concept. A complete menu of dispute resolution processes would be needed before the law would compel disputants to opt for any alternative dispute resolution process.

The research, conducted by Hazel Genn, has shown that if the country makes mediation mandatory, parties will of course use it. Especially if they face a penalty when they bring a case to trial without having tried mediation first. So the first effect of compulsory mediation is that it gets a higher uptake than voluntary mediation. There is a second effect however. That is a declining success rate. Apparently, if parties are forced to engage in mediation, that does not in itself provide them with the right mind-set to work towards negotiated and mutually satisfactory settlements. The question then becomes — what is the right mixture on a scale that runs from an invitational approach, via seduction to full coercion.[16]

De Roo and Jagtenberg have found out that referral schemes in a number of European countries revealed that, next to voluntary schemes, mandatory referral exists, and, perhaps more importantly, that various shades of grey can be identified between the white of complete voluntaries and the black of absolute compulsion.

They have found that six (sub) variations of referral can be distinguished:

1. The parties themselves propose the idea for mediation as an option;

2a. The judge proposes the idea in a non — committal fashion;

2b. The judge (or mediator) proposes the idea, but accompanied of some professional explanation (often tailored to the parties);

3a. The judge initiates the referral; the parties can refuse without a sanction being imposed;

3b. The judge initiates, but a sanction may be imposed upon refusal;

4. Access to court is denied, as long as mediation has not first being attempted.

Only in the case of variation 1 there is full voluntary (self) referral, while only in variation 4 there is complete mandatory referral. Variation 2 is more widespread. It is clear that variation 2b is less voluntary than variation 2a. Here parties shall have to come forward with well founded arguments, if they do not intend to consider the professional overview (usually supplied by the judge) of the possibilities that mediation may offer in the dispute at hand.[17]

Legal debates on the issue of voluntary versus compulsory mediation point to signs that voluntary court related mediation is attempting a comeback as a much more powerful tool than mandatory mediation to change disputing cultures. Alexander, Gottwald and Trenzcek discuss the bold experiment in Germany's Lower Saxony to change the disputing culture through a comprehensive voluntary court related mediation scheme.[18]

[16] H. Genn: I would love to see a country make mediation compulsory — An interview, The state of affairs of mediation in Europe, What can governments do more?; Conflicthuntering, The Hague 29th and 30th June 2006

[17] A. de Roo, R. Jagtenberg: Comparative European research on courts encouraged mediation; Conference paper, see page 13.

[18] N. Alexander, W. Gottwald and T. Trenzcek, "Mediation in Germany:The Long and Winding road", part 2a VIII.

Conversely Ross argues that after unsuccessful attempts to change the disputing culture, mandatory mediation may, in fact, be the key to increasing awareness and changing the dispute management culture in Scotland.[19]

The question remains whether we could expect that mandatory mediation schemes will grow in Europe. The answer could be conditionally affirmative. But there is a danger that the tendency to mandate mediation directly (for example, through court referrals) and indirectly (for example, through legal aid) could lead to a scenario where litigation becomes an option only for the haves, that is repeat players and the affluent, and not for the have-nots. It is also important to note that the more compel participation in mediation is the more appropriate is regulation of this field.

CONFIDENTIALITY

"Member States should provide for legal guarantees of confidentiality in mediation"[20] Confidentiality is implied feature of mediation but unsettled area of the law. In countries where principle of confidentiality is not being statutory protected, further development of application of this principle depends on judicial case law. If judges don't know much about mediation particularities there would be a danger of harmful effect of mediation case law.

Principle of confidentiality is generally defined as follows: Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required by the law or for the purposes of implementation or enforcement of a settlement agreement.

Confidentiality is intended to protect mediation communications from disclosure in court and in extra judicial proceedings. It applies not only to oral and written communications but also to the demeanor or body language. Confidentiality is a binding principle for all participants in mediation, including mediator.

Duty of confidentiality may arise:

- From the agreement to enter into process between the parties and mediation provider;
- From the code of mediation practice;
- From the statutory law;
- From the court rules.

In order to provide confidentiality in practice the rules may arrange with the parties that, unless specifically asked not to do so, mediators will assume that they are authorized to disclose what has been discussed. Exceptions of confidentiality apply in case of action between the mediator and the parties for damages, arising out of mediation, mediator's testimony, when disclosure is required by the law, when it is necessary to avoid criminal charges or when confidentiality is subject to public policy based exception (child abuse, public safety or public health). Terms of confidentiality are maters of fact to be established in each individual situation. If there is no specific rule in the law or in the contract between the parties on when confidentiality shall not apply, then only the test of proportionality shall apply, that is whether the public interest justifies and overrides the disclosure notwithstanding what would otherwise be a duty of confidence.

[19] N. Alexander, Global trends in mediation: Riding the Third Wave, see page 2.

[20] CEPEJ, Working Group on mediation: Interim Report, p.19, see page 7.

ADMISSIBILITY OF EVIDENCES IN JUDICIAL PROCEEDINGS

In order to ensure the rule of inadmissibility of evidences, two goals shall be pursued:

- An obligation of the parties not to rely on certain type of evidence;
- An obligation of the courts to treat such evidence as inadmissible.

A party to the mediation, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in such proceedings;
b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;
c) Statements or admittance made by a party in the course of the mediation proceedings;
d) Proposals made by the mediator;
e) The fact that a party had indicated its willingness to accept a proposal for a settlement made by the mediator;
f) A document prepared solely for the purposes of the mediation proceedings.[21]

LIMITATION PERIODS

Recourse to mediation is likely to affect access to justice in so far as such recourse does not end the limitation periods. At the end of the mediation in the event of the failure of the procedure, the action of the parties could then be extinguished or the limitation period open to them might be unjustifiably reduced.

Certain EU member states have stipulated in their legislation that the recourse to certain approved ADR bodies entails the suspension of the limitation period relating to the request made according to ADR procedure. In order to promote mediation, it may therefore be necessary to amend the civil procedure rules with regard to limitation periods, whereby the period could be interrupted, when mediation procedure begins and subsequently resume when the procedure ends, without a settlement having been reached.

Article 8 par. 1 of the Directive provides that Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation prescription periods during the mediation process.: The running of any period of prescription or limitation regarding the claim that is the subject matter of the mediation could

[21] See article 10 of the UNCITRAL Model Law on International Commercial Conciliation: http://www.uncitral.org/frindex.htm;

be suspended as of when, after the dispute has arisen: a. The parties agree to use mediation;

b. The use of mediation is ordered by a court, or

c. An obligation to use mediation arises under the national law of a member state.

When the mediation has ended without a settlement agreement, the period resumes running from the time the mediation ended without settlement agreement, counting from the date when one of both of the parties or the mediator declares that the mediation is terminated or effectively withdraws from it. The period shall, in any event, extent for at least one month from the date when it resumes running, except when it concerns a period within which an action must be brought to prevent that a provisional or similar measure ceases to have effect or is revoked.

THE MEDIATION CLAUSE

The Council of Europe Recommendation No. (2002)10 on Mediation in civil matters invites the states to consider the extent to which agreement to submit a dispute to mediation may restrict the party's rights. This is the question of the so-called mediation clause. In arbitration law there is an arbitration clause which exclude access to the court if the parties agree that any dispute shall be attempted to be solved through arbitration. Such a clause in an agreement might also refer to mediation but the Council of Europe Recommendation indicates that such regulation is possible only if the national law prescribes so and that it becomes relevant especially in commercial disputes but not really in other types of civil disputes. From the aspect of lightening the burden of court commercial disputes, the mediation act might in this way promote the use of a mediation clause in agreements between commercial entities.

ENFORCEMENT OF MEDIATED SETTLEMENTS

Council of Europe Recommendation number R (98-1) on family mediation provides that states should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law.

Article 15 of the Model Law on the International Commercial Conciliation adopted by the UNCTITRAL on 35th session in New York on 28 June 2002 provides: If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable.

The question of the enforceability of agreements reached in mediation is dealt with differently in Council of Europe member states. In some states, it is for the court to approve these agreements while in others such agreements receive their enforceability from a body which is not a court (for example: an act by a Notary).

Some states have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. In some national legislation, parties who have settled a dispute, are empowered to appoint an arbitrator specifically to issue an award based on the agreement of the parties. Other legal systems provide for enforcement in a summary fashion if the parties and their attorneys sign the

settlement agreement and it contained a statement that the parties may seek summary enforcement of the agreement.[22]

SELF-REGULATORY FRAMEWORK

Mediation is a flexible procedure therefore the basic principle of this process is the autonomy of the parties. This could become excessively restricted in so far as the law tries to regulate in great detail all open issues of procedural situations. Over standardization is the greatest hazard of any normative arrangement of process of mediation. The law should regulate only the basic principles of mediation such as the autonomy of the parties or their contractual freedom, the voluntary nature of mediation, principle of confidentiality, impartiality and integrity of the process and enforcement of settlement agreements. Other questions that are connected with the professional ethics of the mediator must in particular be left to self-regulation by means of a code of ethics of mediators, based on the model of the document recently submitted by the European Commission.[23]

Empirical research about the attitude of the policy makers towards quality standards for mediation and mediators in Belgium, UK, Germany, Norway, Sweden, Denmark, France, Spain, Italy, Switzerland and Austria indicates that safeguarding of quality standards is a primary responsibility of the mediation providers themselves — hence self regulation.[24] It is also indicated though, that self-regulation would have to be complemented by a supervisory task for the government. The multitude of organizations and disciplines involved in mediation services today hamper as yet as speedy conclusion on the quality standards discussion. Mediation profession in common law countries feels extremely reluctant towards any attempt to regulate the mediation profession by statutory law. Nevertheless, in Austria, for example, the government decided, upon the request of mediation profession, to regulate the accreditation and establishment of criteria for qualification of mediators.

The recommendation of the Council of Europe REC(2002)10 on mediation in civil matters provides that states should consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues, in particular in case of compulsory mediation. In many European countries association of mediators has been established and assumed the responsibility for quality control in mediation (Slovakia, Slovenia, Bosnia and Herzegovine, The Former Yugoslav Republic of Macedonia, Montenegro and others). It is necessary for each state to strike a balance between minimum quality standards and maximum process flexibility. Mediation providers also seek to divert mediators from liability for breaches of contract, negligence or other tortuous conduct. Those mediators, who use contract terms with the effect of minimum risk of claims, are likely to face lower premium at professional indemnity insurance. However, if contractual or statutory immunity for mediator's liability exists, then it is necessary to provide consistency in training and accreditation of mediators.

The best practice example in Europe of institutional mediation quality provider is Netherlands Mediation Institute (hereinafter NMI). It operates within a strictly independent position and provides an independent quality framework in the shape of accreditation and registration of mediators as well as rules of conduct for mediators, a complaint procedure

[22] See more on this issue in Guide to enactment and use of the UNCITRAL Model Law on International Commercial Conciliation

[23] European Code of conduct for Mediators regulates competence and appointment of mediators, independence and impartiality, the mediation agreement, process, settlement fees and confidentiality.

[24] De Roo and R. Jagtenberg: Comparative European Research on Court Encouraged Mediation.

and independent disciplinary rules. It also provides a transparent quality assurance system for mediation and mediators through accreditation and independent personal certification in conformity with the uniform European standard EN45013. NMI among others provides:

- A uniform infrastructure for mediation (mediation rules, models and agreements);
- A transparent and dynamic quality system for mediation and mediators;
- Advancement of mediation training facilities;
- Accreditation of mediation training institutes;
- Accreditation registration and certification of mediators;
- A complaints procedure;
- Independent disciplinary rules for mediators;
- Contacts with organizations, companies and public bodies;
- Development and dissemination of documentation and information;
- Independent selections from the NMI register of mediators to parties;
- Development and management of a web site on mediation for the public;
- Access to the public NMI register of mediators;
- Maintaining national and international contacts relating to mediation.

To ensure a reliable and transparent structure for mediation in Netherlands at a national level, NMI provides, among other things:

- The NMI mediation rules;
- The NMI complaints procedure;
- Rules of conduct for NMI — registered mediators;
- A model mediation clause;
- A model mediation agreement;
- Independent information and documentation on mediation;
- Independent disciplinary rules for NMI — registered mediators;
- A protocol for the assessment and recognition training institute;
- Protection and licensing of the title NMI mediator and NMI certified mediator;
- A public register of mediators listing the NMI accredited mediators.

The purpose of the Quality Assurance System, developed by NMI, is to provide a transparent, objectionable, dynamic, testable and independent system for mediation and mediator quality assurance nation vide.[25]

Another example of self-regulation policy is Civil Mediation Council in England and Wales. It was established in order to protect end users of mediation services without having any mandate to impose quality criteria for mediators. Civil Mediation Council serves as single forum for many mediation organizations and is responsible for accreditation of organizations, not individual mediators. It was established in a year 2006 and it is composed of many

[25] Mediation in the Netherlands: Netherlands Mediation Institute NMI, January 2005.

mediation providers representatives and of the representatives of Ministry for the Constitutional Affairs.

Chapter 4

ASSESMENT OF THE OPERATIONAL CAPACITIES FOR ADR IN BIH

GENERAL STATE OF PLAY

Taking into account two main goals of the ADR, namely to facilitate access to justice through judicial and extra-judicial ADR and to ensure balanced relationship between ADR (in particular mediation) and judicial proceedings, this part of the Report evaluates current state of play with particular reference to pre-filling ADR (prior lodging a court action) and post-filling ADR (after a case is registered with a court) and operational capacities of ADR providers in BiH.

BiH is facing with two serious difficulties as regards access to justice and justice delivery in a reasonable time for everyone. The first one is related to significant poverty of the society as such, which prevents large percentage of population to afford any available procedure for their dispute resolution due to high court fees, litigation costs and also costs of mediation. In the field of mediation BiH is facing similar difficulties as other countries in the region of Western Balkans such as: low demand for mediation, weak institutional capacities of mediation providers, regulatory framework for mediation without sufficient incentives or smart sanctions for non-considering mediation, weak relationships between courts and mediation centers in terms of referrals and last but not least, poor demand for sustainable training system of mediators, judges and lawyers.

The second reason for difficult access to justice lies in fact that court system in BiH is seriously backlogged. According to last statistical report provided by High Judicial and Prosecutorial Council of BiH ("HJPC"), the number of pending cases at courts in BiH amounts to 2.112.622 cases out of which 1.664.328 represent small claims cases. The biggest first instance courts in Sarajevo and Banja Luka are seriously backlogged. According to the statistical data the Municipality Court of Sarajevo had on 30th September 2014 85.961 pending cases. An average disposal time of the case at that court amounted to 694 days. The Basic Court of Banja Luka had on the same date 46.500 pending cases. An average disposal time of the case at that court amounted to 824 days.

BiH participates in so-called "mediation movement" since it adopted the legislation on mediation, established two mediation centers at courts in Sarajevo and Banja Luka and organize mediation profession in a form of Association of mediators. Despite this movement the goals of the mediation legislation has not been achieved neither in term of facilitating access to mediation, promotion of mediation, encouraging the use of mediation nor at ensuring a balanced relationship between mediation and judicial proceedings. The main challenge represents very low mediation demand and referrals from courts. This trend includes both, individuals and businesses. According to the last statistical report provided by HJPC in a period from 2007 until 20013 judges referred only 152 cases to mediation, while in a year 2014 they referred only 15 cases to mediation.

Low demand for mediation is a challenge also for EU member states, where the percentage of disputes referred to mediation by businesses is between 0,5% in 2% and where cross border mediation stand for less than 0,05% of B2B conflicts (see Lessons learned from the implementation of the EU mediation directive: The business perspective, 2011, European Parliament), Moreover, approximately 25% of disputes are left unsolved by SMEs because they refuse to litigate, taking into account available research papers (Quantifying the cost of non-using mediation – a data analysis, 2011, European Parliament; Study on rebooting the Mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU, 2014, European Parliament).

PRE FILLING ADR

ADR clauses

The regulatory and operational framework for both, mediation and arbitration in principle provides disputants with their voluntary discretion to opt for these two forms of ADR. Disputants could use mediation and arbitration clauses in contracts before a dispute has arisen but in practice they almost never do so. There are several reasons for this, among other: lack of regulatory support to enforceability of such clauses (see assessment of the Law on mediation procedure), low level of awareness of business people and practicing lawyers about benefits of such clauses regarding business risk management and time and cost savings, weak promotional policies of institutional ADR providers such as arbitration courts or Association of mediators which haven't developed model dispute resolution clauses for certain industries or categories of disputes, uncertain support of the judicial case law to exclude the jurisdiction of courts in case of disregarded ADR clauses by disputants, lacking of initiative by repeat players and justice policy makers to launch ADR first pledge aimed at promoting litigation as a last resort.

ADR agreements

Even in countries with well-developed ADR culture mediation and/or arbitration agreements after a dispute has arisen are much rarely used because disputants cannot agree anymore on anything or at least, no one wants to be the first who blink therefore it is not surprisingly that there is no available statistics on performed arbitrations, based upon arbitration agreement and that 352 mediation agreements, concluded in Banja Luka between electricity provider, Association of mediators and consumers, are rather a rare exception.

Consumers in the whole country have little protection with respect to their low- value high - volume claims since authorities do not provide them with no cost or low cost user-friendly ADR schemes. Such schemes could significantly reduce courts backlogs and waiting times, having regard the fact that more than 80% of all pending cases at courts represent small claims in utility cases. Since in the EU mediation, arbitration or other ADR agreements are allowed only after a consumer dispute has arisen, it would be of utmost importance for increased access to justice, to design and implement consumer ADR schemes, among which some could evolve into ODR schemes as required by the EU regulatory framework.

Duty to consider ADR

Both, mediation and arbitration are voluntary processes in the whole country. Litigants are not required by the law to consider any form of ADR before starting litigation. A positive example of pre-filling ADR is the med-arb scheme at the Agency for peaceful resolution of labor disputes in Republic Srpska. Disputants who voluntary opt for this alternative dispute

resolution service get it for free and funding for neutral's fee is provided by the entity's budget.

Lawyers, members of the Bar Association are not compelled to raise the option of ADR with their clients and their remuneration system doesn't provide them with any financial incentive with respect to ADR in comparison with litigation.

Mediation information session is not envisaged by the law before lodging a court action.

Duty to participate in ADR

The Law on mediation procedure doesn't authorize the legislator to introduce pre-filling mandatory participation in mediation in selected disputes. This option seems for many stakeholders as one of the most effective but it must be stressed here that unless such a mandatory participation would be free of charge for disputants, it could be likely considered as disproportionate ban to free access to justice and consequently in non-compliance with article 6 of the European Convention of Human Rights.

Post-filling ADR

Courts in BiH practice referrals to mediation upon provided consent of the parties to a dispute. Since the regulatory framework doesn't impose upon the parties and their lawyers any duty to consider mediation, they don't do so until preparatory hearing. At this point it is already rather late for them to engage themselves in mediation even if a judge raises with them this option. Either they are prepared for settlement negotiations, facilitated by a judge or they expect to litigate at full trial. It was also reported by judges that business people are often afraid of making compromises in order to avoid criticism that they settled due to corrupt motives. Key weakness of referral system is therefore too late, instead of early court intervention, which is not supported by effective incentives for the parties and their lawyers to consider mediation (see more about weaknesses concerning post-filling mediation in a Chapter 6).

Another lesson learnt from previous initiative named "mediation week" is that free of charge mediation alone is not sufficient incentive for litigants although important one.

Nevertheless, first instance court in District Brčko practiced judicial mediation in a period from 2002-2009. Judges had a power to compel litigants to mediation and judges acted as mediators. Since this referral model was abandoned in a year 2009, no single case was referred to mediation any more. The positive lesson learnt from this approach is that judges may and should have a discretionary power to refer litigants to mediation even against the will of litigants and that both, sitting and retired judges should act as mediators (if previously trained), as it is recommended also in the Opinion No. 6 of the CCJE.

Capacity of institutional ADR providers

The only institutional mediation provider in BiH is the Association of mediators (AoM). AoM was in the past engaged in many mediation initiatives, including but not limited to, public awareness campaign. In order to support court-related mediation AoM established two mediation centers within the premises of Basic court in Banja Luka and Municipality court in Sarajevo. These two centers provide their services for all the courts in the country. 152 mediators actively serve within AoM. One of the capacity shortcomings is that judges are not accredited as mediators and only few advocates perform the task of a mediator. This might be one of the reasons for weak support from the bench and the bar to mediation and for lower trust and confidence of disputants to mediation providers.

Closer cooperation between Bar Associations and AoM as regards initial mediation training, mediation advocacy and possible setting up of mediation center at Bar Associations could significantly encourage demand for mediation. Present capacities of AoM are sufficient to support further pilot projects but should be increased if mediation is aimed to be a presumptive option for litigants at all courts in the country.

Arbitration field is from the institutional point of view well-covered in Republic Srpska and Federation BiH but not in District Brčko. Arbitration Court is operating at Chamber of commerce in Federation BiH and in Republic Srpska. At state level there is Arbitration court at Foreign chamber of commerce and it's counterpart exists also in Republic Srpska. Unfortunately, no statistics was available as to the number of cases, being referred to these arbitrations but it was reported that only few disputes were resolved through described institutional arbitrations.

Taking into account expressed interest of chambers of commerce to foster institutional capacities of arbitrations, inter alia, through drafted model dispute resolution clauses and agreements, established mediation schemes and launched business awareness campaigns, it seems that there is a great potential for arbitration development in BiH. This process should be further supported by improving legislative framework for arbitration, including system of recognition and enforcement of arbitral awards by the courts (see detailed assessment of regulatory framework for arbitration in Chapter 8).

Chapter 5

ASSESSMENT OF THE REGULATORY FRAMEWORK FOR MEDIATION IN BIH

INTRODUCTORY REMARKS

This part of the Report contains the analysis of the regulatory framework for **mediation process** in light of optimal implementation of the EU Mediation Directive and taking into account best regulatory practices.

It is drafted in a way that only those regulatory issues are addressed, which are considered as problematic, incomplete, inappropriate or incompatible with the Directive.

Instead of drafted amendments to the applicable laws, the assessment of each relevant mediation process issue is followed either by proposed wording of model article or by proposed deletion of the applicable article. Such an approach was necessary due to the common expressed views of mediation stakeholders during consultation process, that because of political reality, it is not likely that any amendment to the existing Law on mediation procedure, which was adopted by the Parliamentary Assembly of BiH, could be adopted. Model articles could therefore serve to any legislator in the territory of BiH to be considered and, if feasible, adopted.

The assessment of the regulatory framework for court-based mediation is, for the sake of transparency and due to its complexity, provided in a separate chapter of this Report.

The following laws and regulations were analyzed for the purpose of this chapter of the Report:

-The Law on mediation procedure (OG BiH 37/04);

-The law on transfer of mediation business on the association of mediators (OG BiH 52/05);

-Rules on fees and compensation of mediation costs (OG BiH 21/06);

-Rules on referral to mediation (OG BiH 21/06);

-Rules on the list of mediators (OG BiH 21/06);

-Rules on the training curriculum for the mediators (OG BiH 21/06);

-Rules on disciplinary liability of mediators (OG BiH 21/06);

-Rules on liability of a mediator for damages, inflicted during performance of mediation (OG BiH 21/06);

-Rules on the registry of mediators (OG BiH 21/06)

SCOPE OF APPLICATION

Article 4 par.1 of the Law on mediation procedure provides that »the parties in a dispute may agree, either before or after institution of the court procedure, until conclusion of the main trial, to resolve the dispute in the mediation procedure.«

This provision is of key importance as to the use of mediation as a private dispute resolution proceedings. First strength of this provision is that private mediation could run either alone or in parallel with the court proceedings (mediation shadow). The weakness however is that the law doesn't regulate relationship between mediation and arbitration proceedings and that it determines procedural event after which mediation could not be attempted any more, namely until conclusion of main trial. In such a way mediation could not be used later during appellate stage of litigation or even after final court decision. Best practice examples from various EU Member states (e.g. Netherlands, Slovenia) highlight the efficiency of mediation during appellate proceedings therefore it is suggested to improve the wording of the Article 4 par.1.

In addition, the law should encourage the use of out of court mediation by making specific reference to mediation clauses and mediation rules of institutional providers such as arbitration and mediation centers or Associations of mediators. It is an established practice that institutional providers put in place their mediation (and other ADR) rules, to which parties make a reference in their dispute resolution contractual clauses.

In order to promote mediation in all possible fields of law it is also suggested to clearly define what kind of disputes are eligible for considerations of being referred to mediation. Such a policy approach may further stimulate development of mediation schemes in tax, bankruptcy and other cases.

Since the Law on mediation procedure provides that mediation could be pursued exclusively on a voluntary basis and taking into account that EU Mediation Directive is without prejudice to national legislation making the use of mediation compulsory (article 5 par.2), it is advised to envisage possibility that the law prescribes mandatory pre-filling mediation for certain kind of disputes and that a court may order a mandatory referral to mediation upon the law or discretionary power of a judge.

The following new article should be adopted:

Model article

(Scope of application)

This Act shall regulate mediation in disputes arising out of civil, commercial, labor, family, administrative and other relationship with regard to claims, which may be freely disposed of and settled by the parties, unless otherwise stipulated for individual disputes by a special law.

This act shall apply irrespective of the basis upon which the mediation is carried out, including agreement between the parties, reached before or after a dispute has arisen, a law, or order, direction or recommendation by a court, arbitral tribunal or competent governmental entity.

When reference is made in this Act to the agreement between the parties to mediate, this also refers to written mediation clause in contract and to the rules of the institution which conducts mediation, under condition that the parties have agreed to apply these rules.

TRANSFER OF MEDIATION TASKS

Article 1 paragraph 2 of the Law on mediation procedure requires special attention since it contains a unique approach because the law provides that “mediation tasks shall be by a separate law transferred to the association or associations by the procedure set forth in that law.” The law is silent as to what kind of tasks should be put in hands of associations. The law should delineate the scope of tasks (businesses) to be transferred to associations. Such a vague term leaves wide space for various interpretations of this provision. It could be understood in a more narrow way, namely that only performance of mediators is a matter which is left to self-regulatory powers of associations. Taking into account several regulations, issued by the Association of Mediators (hereinafter AoM), it seems that an opposite understanding of paragraph 2 prevailed. The AoM issued Rules on disciplinary proceedings against mediators which is usually a statutory provision, in particular when severe sanctions could be imposed. It is also unprecedented practice that AoM set the binding remuneration scheme for all mediators, regardless whether they serve in public

mediation schemes (including at courts) or if they act as private providers. The executive and legislative authorities have therefore much less power and accountability for mediation development as it is the case in other European countries.

It is suggested to consider clear and precise determination of tasks, which may be transferred to AoM, in particular because it cannot be excluded that another association of mediators might be formed in the future and if such an association, upon previous transfer of mediation business, would adopt its own rules, this could cause a lot of confusion on a mediation market, including diffusive regulatory regime within the same entity.

Model article

(Implementing rules and transfer of mediation tasks)

Ministry of justice shall issue implementing rules and regulations concerning the legislation on mediation.

Ministry of justice could authorize associations of mediators to establish and maintain the registry of mediators, to perform initial and advanced training programs for mediators, programs on mediation advocacy and on referrals to mediation or any other appropriate tasks, related to mediation.

MEDIATION CLAUSE AND AGREEMENT REGARDING FUTURE DISPUTES

The Law on mediation procedure contains no provision regarding mediation clauses in contracts or separate mediation agreements, aimed at referring future disputes, arising out of or relating to the contract or any civil relationship, to mediation.

This is an obvious weakness of the regulatory framework since mediation clauses represent one of the most effective incentives for businesses to refer future disputes to mediation as part of their risk management policies.

Taking into account the voluntary nature of mediation, nothing prevents parties to a contract, to draft appropriate mediation clause. Nevertheless, it is of utmost importance that the law supports the validity and, in particular, enforceability of mediation clauses.EU regulatory framework doesn't prevent Member States to envisage possibility to allow application of mediation clauses in relation to all civil and commercial disputes, except in consumer disputes where agreements to mediate are allowed only after a dispute has arisen.

Mediation clauses should be considered to be independent from the contract which embodied them and therefore separable. In particular in cross-border contracts it is wise to

determine the applicable law which governs the mediation clause and which could not necessarily be the governing law of the main contract.

Mediation clauses are binding upon the parties. Nevertheless, their enforceability is rather weak when mediation clauses are drafted merely as boilerplate clauses. That is why some minimum substance of mediation clause could be recommended by institutional mediation providers, for example: to identify the parties, how and when mediation to be initiated, the scope of mediation and its duration, applicable procedural and substantive law, the venue, language and selection method of mediator.

Multi-step or escalation dispute resolution clauses are often practiced in cross-border or /and international contracts. Bilateral negotiations, followed by mediation and, if not completed until certain period of days, followed by arbitration may be further encouraged in commercial disputes by drafting model dispute resolution clauses for various industries. Best practice examples such as guidelines, checklists and model clauses of AAA, ICC, CEDR, ICDR, ECDR, JAMS and other institutional providers of ADR could serve as a legal source for drafters of such clauses.

The following paragraph may be considered to be inserted:

Model article

(Mediation clause or agreement regarding future disputes)

"The parties may agree in writing to refer their future disputes, arising out of or relating to their contractual or other legal relationship with regard to the claim, which may be freely disposed of and settled, to mediation.

The parties may determine applicable law governing the mediation clause or agreement.

Mediation clause or agreement from the first paragraph is binding upon the parties and enforceable irrespective of whether the main contract is considered as null or void.

Previous paragraphs do not apply for future consumer disputes."

MEDIATION AGREEMENT REGARDING EXISTING DISPUTE

Mediation agreement on existing dispute is regulated by articles 10 and 11 of the Law on mediation procedure. The law provides that this agreement must be concluded in writing and must be signed by the parties and mediator(s). It therefore constitutes the effect on the parties and on the mediator.

The law also prescribes mandatory substance of mediation agreement.

Obvious weakness of the provision of article 10 is that it assumes that mediation always begins on the day of signing of mediation agreement. The law does not differentiate between mediation, which starts upon a mediation clause in a contract or upon direction of a court and mediation, which starts upon mediation agreement after a dispute has arisen. The legislator should take into account recommended approach from UNCITRAL's Model Law on International Commercial Conciliation (article 4) and clearly define the commencement of mediation, depending on whether the parties were contractually compelled, required by the law or just invited to mediation. It is suggested therefore to delete the wording of article 10 in part where it deals with commencement of mediation and insert a provision as follows:

Model article

(Mediation agreement regarding existing disputes)

"The parties and the mediator(s) may agree in writing to refer parties' existing dispute, arising out of or relating to their contractual relationship with regard to the claim, which may be freely disposed of and settled, to mediation.

Mediation agreement from previous paragraph is binding upon the parties and mediator and is enforceable."

REQUIREMENTS FOR CONDUCTING MEDIATION AND APPOINTMENT OF MEDIATORS

Article 31 regulates conditions to be met by mediators to perform mediation.
Referring to the comments on article 1 par 2 regarding the transfer of mediation tasks to Association of mediators, policy makers should consider the possibility to introduce the authority of ministry of justice to recognize training programs for mediators (in addition to existing authority of Association), in particular in public mediation schemes (See model provisions of Alternative dispute resolution act in judicial matters).

Article 32 of the Law on mediation procedure stipulates very complicated procedure and conditions for foreign mediators, who may wish to perform their duties in BiH. Reciprocity and cumulative approval by the ministry of justice and Association of mediators represent an

excessive hurdle which in fact prevents foreign mediators to be appointed in cross-border or international disputes on a case by case basis in due time. It is a common feature that in cross-border and international disputes parties often wish to appoint co-mediators of the same nationality as the parties. It is suggested therefore to limit applicability of this article to foreign mediators who serve in public (courts) mediation schemes and to leave disputants to freely appoint a foreign mediator in private, out of court mediation.

The law on mediation procedure regulates the appointment of mediators in article 5. Only those mediators, who are registered in a list of mediators, established by the Association of mediators, may serve as mediators. Such an approach limits the autonomy of the parties, who may wish to appoint a mediator, who is either an expert or a recognized and respected person, not necessarily being registered as mediator, for example a retired judge. Dichotomy of registered and nor-registered mediators is an established practice in many EU member states and is aimed at promoting mediation demand. The main difference between mediation, being performed by a registered or non-registered mediation is in different effect on enforceability of a mediated settlement. If mediation is conducted by non-registered mediator, such a settlement couldn't have a direct enforceability effect. Nevertheless, the parties still have an option to enter such a settlement into a form of a directly enforceable notarial deed or court settlement order in many countries (e.g. Slovenia)

Mediation market should open its doors (without current restrictions) also to private mediation centers, similar institutions at chambers of commerce and to foreign mediators, who may be appointed by the parties in cross-border and international mediation.

It should be also pointed out that the Rules on the registry of mediators, beyond any authorization in the statutory legislation, introduce additional conditions for entry into that registry as a precondition to perform the task of a mediator, namely, satisfactory interview rating and membership of the Association of mediators. These additional conditions from article 5 of the Rules on the registry of mediators contradicts to the paragraph 3 article 31 of the Law on mediation procedure, where it is clearly stated, that »the person who is successful in completing the training for mediators shall be issued appropriate certificate serving as a basis for entry into the registry of mediators."Thus, not only members of Association of mediators should be allowed to perform the task of a mediator.

It is therefore suggested to introduce grater flexibility and autonomy of the parties as to selection and appointment of a mediator.

Model article

(Appointment of mediators)

The parties shall reach an agreement on the appointment of mediator, unless a different procedure for the appointment has been agreed upon.

The parties may seek an assistance of a third person or institution or association of mediators in connection with the appointment of mediators, in particular:

-a party may request a person or institution or association of mediators to recommend suitable persons to act as mediators, or

-the parties may agree that the appointment of mediator be made directly by such a person or institution or association of mediators.

COMMENCEMENT OF MEDIATION

The law should be improved by defining the commencement of mediation. Precise definition is needed in particular because of the effect of commencement of mediation on limitation and prescription periods (see more on this issue below). The law on mediation should be therefore supplemented with a following new article:

Model article

(Commencement of mediation)

"Where the parties have agreed in advance to resolve mutual disputes that might arise out of particular legal relationship through mediation or where mediation is prescribed by the law for the resolution of a particular type of dispute, mediation shall commence on the day on which a party receives a proposal for commencement of mediation from opposing party.

In cases which are not included in the preceding paragraph, mediation referring to a dispute which has already arisen, shall commence on the day, the parties to the dispute agree to pursue mediation. If one party proposes mediation to the other party, but does not receive an acceptance of the proposal from the other party within 30 days from the day on which the proposal was sent, it may treat this as a rejection of the proposal for mediation."

TERMINATION OF MEDIATION

From the same reason as stated above (to define the effect of mediation on running, suspension or interruption of limitation and prescription periods), it is of key importance to define the moment when mediation proceedings is considered as terminated. The Law on mediation regulates termination of mediation in the article 19 but in a not enough precise way. The parties could have a different understanding as to when exactly mediation ends therefore the following new article is suggested to be inserted:

Model article

(Termination of mediation)

"Mediation proceedings shall be terminated:

-by the conclusion of a mediated settlement, on the date of the settlement:

-by the expiry of a time limit for the appointment of a mediator, if the parties do not agree on the appointment of a mediator within 30 days from commencement of mediation, on the date of expiry:

-by a written declaration of a mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration:

-by a written declaration of the parties addressed to the mediator, to the effect that the proceedings are terminated, on the date of declaration:

-by a written declaration of a party to the other party or parties and the mediator, to the effect that the mediation proceedings are terminated, on the date of declaration. If in the proceedings several parties participate who are willing to proceed with the mediation among themselves, the mediation shall be terminated only for the party that has submitted a declaration."

EFFECT OF MEDIATION ON LITIGATION AND ARBITRATION

The enforceability of mediation clauses and agreements could be further strengthened if the law would address the issue of relationship between mediation on one side and arbitration and litigation, on the other. Parties may wish to agree not to initiate judicial or arbitral proceeding until expiry of certain period of time or until a specified event has occurred therefore the law should support their willingness to refer their dispute to mediation first. Since the parties could agree so even after a dispute has arisen, it is suggested here that the law should regulate this issue in a separate article.

The law should also regulate the situation when mediation would be prescribed as a procedural pre-condition by the law.

It should prescribe as follows:

Model article

(Introduction of judicial or arbitral proceedings)

"Where the parties have agreed upon mediation and have expressly undertaken not to initiate, until the expiry of a certain period of time or until a specified event has occurred, arbitral or judicial proceedings with respect to an existing or future dispute, the arbitral tribunal or the court, must, upon an objection by the defendant, dismiss such action, unless the plaintiff demonstrates, that otherwise harmful and irreparable consequences would occur. The defendant must submit this objection in the defense plea at latest.

The court shall dismiss an action even if before bringing the action obligatory mediation proceedings are prescribed by the law.

*Initiation of arbitral or judicial proceedings shall not of itself be regarded as a waiver of the agreement to mediate or as the termination of mediation proceedings.***"**

EFFECT OF MEDIATION ON LIMITATION AND PRESCRIPTION PERIODS

One of the key weaknesses of the Law on mediation procedure is that it is silent as regards effect of mediation on limitation and prescription periods. The protection of the parties' right to refer their disputes to the courts has a direct effect on the limitation and prescription periods. The EU Mediation Directive compels the Member States to ensure that parties who choose mediation in an attempt to settle a dispute are not consequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process (article 8 of the Mediation Directive).The Mediation Directive makes no reference to the effect on that periods therefore this effect could be prescribed either in a way that time elapsed so far disappears and the period should start anew once mediation is terminated or it entails suspension, which would imply that a time already elapsed remains and it is from the instant from which the period should resume once the mediation fails.

The EU Mediation Directive in article 8 provides that states shall ensure that parties shall not be prevented from initiating judicial proceedings by the expiry of limitation and prescription periods during mediation process. Since the Directive does not harmonize national legal rules on limitation and prescription periods, EU Member States have taken different policy approaches. In most jurisdictions the limitation period is considered as being interrupted, while regarding prescription period regulatory regimes differ.

In Netherlands the agreement to mediate delays court's process.

Prescription periods can't be interrupted or suspended in Slovenia but can't neither expire (extension up to 15 days is allowed by the law).

In Spain prescription and limitation period is suspended from the beginning of mediation until its end.

The parties may agree to suspend time limits in Austria.

In England and Wales amended Prescription Act applies also for court-related mediation.

The weakness of regulating the impact of mediation on limitation and prescription periods is that it requires necessary disclosure of start and end of mediation in order to stop running limitation period. Clear definition of when mediation commences and terminates is therefore needed. This might disregards flexible and informal nature of mediation. On the other side, private agreements to extend limitation periods could be allowed. Nevertheless, advantages of regulating this issue prevail. Namely, courts should always be available to the parties despite engagement in mediation. Attractiveness of mediation is ensured when interruption or suspension of limitation and prescription periods is prescribed. Last but not least, unless prescribed otherwise, courts might treat commencement of mediation as interrupting limitation period which means they start running from day one.

It is suggested to take the following approach in a new article, which provides both, stimulation of defendants to opt for mediation and protection of plaintiff's right to pursue the claim in parallel or subsequent litigation at court:

Model article

(Effect of mediation on limitation and prescription periods)

"The limitation period for a claim subject to mediation shall cease to run during mediation.

If mediation proceedings are terminated without settlement, the limitation period shall continue to run from the moment the mediation proceedings are terminated without a

settlement. The time that expired prior to the initiation of mediation shall be included in the limitation period, laid down by law.

If a deadline for bringing an action is set by a special regulation in respect of a claim subject to mediation, the deadline shall not expire earlier than 15 days after the termination of mediation.

DISCLOSURE AND CONFIDENTIALITY

The Law on mediation procedure regulates confidentiality as a core principle of mediation in article 7. It partly addresses both aspects of confidentiality, that is, protection of information conveyed by one party to the mediator from disclosure to another party and protection of discussions of the parties in mediation from disclosure to outside world.

As to the mediator's duty not to disclose the information, conveyed by one party in a separate meeting with a mediator to another party, the Law on mediation took a rather conservative approach since a mediator is allowed to disclose information to another party only upon prior consent of the parties. The same approach could be found in the article 4 of the European Code of conduct for mediators which has been heavily criticized by the practitioners as inconsistent and as a potential ground for satellite litigations due to misunderstood expectations and practices regarding caucusing. It is therefore suggested to introduce a rule, which is recommended by the UNCITRAL Model Law on International Commercial Conciliation from article 8 which provides for mediator's discretionary disclosure of information, received during caucusing unless parties' specific condition to keep information confidential. Article 12 of the Mediator's Code of Ethics already provides for described recommended approach which could lead to allegations that mediators violated the law and entail their civil liability.

As to the protection of discussions and information from disclosure to outside world, it could be stated that this legal protection is very weak. Since confidentiality is a key distinction between mediation and litigation and therefore important incentive, in particular for commercial entities, to opt for mediation, it seems that lacking of this competitive advantage of mediation influences on low demand for mediation. Despite the possibility that mediation agreement could foster that protection, it is important that the law clearly demonstrates the strongest possible protection of confidentiality.

Core weaknesses of paragraph 1 of article 7 are the following:

-only discussions and not also any information, related to mediation, is protected:

-protection from disclosure is limited only to testimonies of the parties and not of other participants in mediation;

-protection is limited only to the usage of testimonies as evidence in any other procedure (litigation, arbitration) and not outside of them;

-the law doesn't allow any exceptions regarding confidentiality rule (see paragraph1 a and b of the article 7 of the EU Mediation Directive)

It is therefore necessary to change article 7 of the Law on mediation procedure and here is suggested wording of a new article.

Model article

(Disclosure and confidentiality)

"When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of information to any other party to mediation, unless a party has disclosed information to the mediator subject to a specific condition that it should be kept confidential.

All information originating from mediation or relating to it is confidential unless otherwise agreed by the parties, or unless its disclosure is required by law or for the purpose of implementation or enforcement of mediated settlement."

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

The Law on Mediation Procedure regulates the issue of (in)admissibility in very narrow way since it provides in paragraph 1 article 7 that the testimonies of the parties made in the mediation procedure may not without approval of the parties be used as evidence in any other procedures.

Article 10 of the UNCITRAL Model law should be a guiding provision for legislators when considering how to regulate this important issue which could make mediation as an effective dispute resolution process and which could at the same time prevent disputants to embark only on fishing expedition for information, aimed to be relied on in subsequent litigation.

The law should regulate two aspects of (in) admissibility: It should introduce an obligation upon the parties, mediator and any third person, not to rely on the type of evidence, specified by the law and it should introduce obligation of the courts and arbitral tribunals to treat such evidence as inadmissible.

Public policy exceptions to disclosure and inadmissibility are also needed to be prescribed by the law.

The following new article is suggested:

Model article

(Admissibility of evidence in other proceedings)

(1) *The parties, mediators or third persons who participated in mediation shall not in arbitral, judicial or other similar proceedings rely on, introduce as evidence or give testimony regarding any of the following:*

a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

c) Statements or admissions made by parties in the course of mediation;

d) Proposals made by the mediator;

e) The fact that a party had indicated its willingness to accept the mediator's proposal for amicable dispute settlement;

f) Documents drawn up solely for purposes of the mediation proceedings.

(2) *The provision from the preceding paragraph shall apply irrespective of the form of the information and evidence.*

(3) *Information referred to in the preceding paragraph of this Article may only be disclosed or used in proceedings before an arbitral tribunal, court or other competent government authority for the purpose of evidence under conditions and to the extent required by law, in particular on grounds of public policy (e.g. protection of the interests of children or prevention of interference with a person's physical or mental integrity) or insofar as necessary for the implementation or enforcement of an agreement on the settlement of a dispute; otherwise such information shall be treated as an inadmissible fact or evidence.*

(4) *The provisions referred to in the first, second and third paragraph of this Article shall apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that was or is the subject of the mediation proceedings.*

(5) *With the exception of cases referred to in the first paragraph of this Article, evidence that is otherwise admissible in arbitral, judicial or similar proceedings does not become inadmissible as a consequence of having been used in the mediation proceedings.*

ENFORCEMENT OF MEDIATED SETTLEMENT

Article 24 provides that mediated settlement shall be always written and signed by the parties. The law aims at stimulating parties to sign the agreement off immediately after its conclusion which is not appropriate requirement, taking into account that autonomy and the free will of the parties are a key principle of mediation as voluntary process. It is often a case that parties conclude an agreement upon certain condition (e.g. approval of company managing board) or they specifically wish to re-think the terms of agreement therefore the requirement regarding signature should be much more flexible.

It is unclear why the law excludes the possibility to enter an oral mediated settlement, for example, an oral apology in neighbor disputes is often enough for the parties to settle their dispute. That's why in Netherlands, Austria, Slovenia and Bulgaria parties are free to conclude a mediated settlement also in an unwritten form.

One of key strengths of the Law on mediation procedure is the provision of article 25 that mediated settlement, concluded and signed by the parties, is final and enforceable document. Such a provision is rather rare in Europe (Hungary, Croatia, Portugal) and puts mediated settlements on an equal footing with court's judgement. Nevertheless, obvious weakness of this article is that it limits the autonomy of the parties, who may wish, to conclude their agreement only in a form of a contract or who may wish to check the legality of terms of agreement in a way to enter their agreement in a form of a notarial deed or court settlement order. The EU Mediation Directive in article 6 explicitly envisages the possibility to make content of mediated agreement enforceable by a court or other competent authority. In particular in court-related mediation schemes it is an established practice that judges approve the content of mediated agreement even when mediators were their peers.

On the other hand, any agreement that goes beyond court's power should be enforced through contractual law.

It is also important that mediated settlement could take a form of consent arbitral award, when during arbitration procedure parties agree to attempt mediation (mediation window), settle their dispute and ask arbitrators to issue consent arbitral award. This is in particular useful method in cross-border or international arbitration because parties in such a way ensure applicability of the New York Convention on recognition and enforcement of international arbitral awards.

There is no special legal remedy against mediated settlement. The form of that settlement in fact determines (limited) possibilities for appeal according to the general rules and principles

of civil law. Although is enforceability of mediated settlement's an implied feature of every regulatory framework for mediation, it could be refused by courts if the content of such a settlement is contrary to domestic or private international law or if the obligation specified in the agreement is unenforceable by its nature.

Model article

Enforcement of mediated settlement

The parties may agree that the mediated settlement shall take a form of a written and signed binding and directly enforceable document, a court settlement, a consent arbitral award, a directly enforceable notarial deed or a written or oral contract.

PAYMENT OF COSTS OF MEDIATION PROCEDURE

Key weakness of article 30 of the Law on mediation procedure is that it ensures monopoly of the Association of mediators regarding setting the prices of mediation, regardless whether in private or in public mediation schemes. Such an approach entails difficulties at designing court-related mediation schemes, low-cost-high volume disputes (e.g. utility cases, consumer disputes) and other programs (e.g. community mediation schemes) where there is a strong public policy interest to provide disputants with low or no cost mediation options.

On the other hand, fixed prices, as determined by the Rules on fees and compensation of mediation costs, which encompass four categories of payment: fee for mediation request, administrative costs, mediator's fee and mediator's costs, may discourage many disputants from a free market to refer their dispute to mediation. It should be left to disputants and mediators themselves to agree on the remuneration and reimbursement, different from regime as determined by the Association of mediators or any other institutional provider.

Since the costs of mediation represent key incentive for mediation demand the following model provision is suggested:

Model article

Fees and costs of mediation

Unless otherwise prescribed by the law or agreed in a written way by the parties and a mediator in a mediation agreement, the fee and compensation of mediator's costs shall be determined by the rules of the institution, where mediation is conducted.

Chapter 6

ASSESSMENT OF THE REGULATORY FRAMEWORK FOR COURT-RELATED MEDIATION IN BIH

One of the challenging objectives of the EU Mediation Directive is to facilitate access to alternative dispute resolution by ensuring a balanced relationship betwen mediation and judicial proceedings (par 1 article 2). A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system (article 5).

Two set of laws are regulating court-related mediation in BiH: The Law on mediation procedure (OG BiH) and Civil Procedural Codes (CPC) of Federation BiH(OG 53/03,19/06), of Republic Srpska (OG 58/03, 67/13) and of District Brčko (OG 8/09, 27/14).

Law on mediation procedure regulates interaction between mediation and judicial proceedings in articles 4.,5.,7.,13.,14.and 26.

Besides statutory law Rules on referring to mediation apply with regard to court-related mediation *(OG BiH 21/06).*

The following strengths and weaknesses of regulatory framework for court-related mediation could be stated:

As to the **strengths** of the regulatory framework for court –related mediation:

- both, court-annexed and court –connected (outsourced) mediation models are allowed;
- courts have a power to invite litigants to consider mediation;
- litigants may, upon their consent, request mediation at any time of the judicial process before termination of a main hearing;
- some mediation incentives, after a case is registered with a court, are inserted in regulatory framework (e.g. partly reimbursement of the filling fee);
- the law provides a discretion of courts to order a stay of litigation procedure for certain period in order to allow parties, upon their consent, to refer their dispute to private mediation provider;
- duration of court-related mediation is indirectly defined through the rule that a judge may postpone a hearing for maximum 30 days if the parties agree to refer their dispute to mediation;
- judges may refer cases to mediation upon consent of the parties in all disputes;
- judges may act as mediators;

There are several **weaknesses** concerning regulation of court-related mediation:

- The Law on mediation procedure is not fully compatible with internationally recognized standards, enshrined in the EU Mediation Directive or/and UNCITRAL Model Law on International Commercial Conciliation (no provisions on effect of mediation on limitation and prescription periods);
- no dispute is prima facie considered as eligible for mediation (e.g. small claims in utility cases, family disputes);
- mandatory mediation, ordered upon judge's discretion, is not allowed;
- courts are not required by law to design and implement mediation schemes;
- the law doesn't envisage that courts with mediation program should adopt local rules of mediation program;
- the law does not ensure funding of court-annexed mediation schemes;
  -judges may not invite litigants to consider mediation after preparatory hearing;
- mediation information session is not explicitly envisaged;
- duty of lawyers to meet and confer regarding mediation is not prescribed;
- mediation in the appellate procedure is not allowed;
- duration of court-related mediation is too short and suspension of litigation during pending court-related mediation is not envisaged;
- neither common criteria on accreditation of mediators in court-related schemes exist nor there is any provision, aimed at providing sustainability of training for court-approved mediators and judges on mediation referrals;
- there are no financial incentives for mediation demand for lawyers.
- smart sanctions for non-attendance at mediation session are not defined;

Some (but not all) of described weaknesses could be avoided by a better mediation program design and stronger integration of mediation in case management, while others obviously need to be addressed by improved legislative rules.

As to the court-related mediation program design it is clear that court-related mediation in BiH was, and still is (with rare past experiment in District Brčko), practiced as court-connected model. In court-connected mediation scheme, the service is outsourced. Litigants are referred to private providers which must be members of Association of mediators. Only few mediators are practicing lawyers, none of them is a judge. The quality control over mediation service is weak and outside authority of judges. This in return causes lower level of trust of judges to mediation providers and lower referral rate since judges do not act as mediators in court-connected programs. Judge's referral to mediation is only partially recognized performance target in case of mediated settlement. In addition, litigants have to pay mediation service. The mediator's fee and other costs do not differ from market rate as determined by the Association of mediators. If mediation is not terminated with settlement, it contributes to higher overall litigation costs. Besides that, mediation is not affordable to all. Indigenous litigants, who are not eligible for getting legal aid, could be left out from mediation doors.

Instead of court-connected mediation model court-annexed mediation could serve much better to the needs of litigants. Such a program should be authorized, administered and operated by the court. Court's premises are used for mediation sessions and litigants are provided with "a day in court«. Court-annexed mediation program is partially or completely funded by the court, therefore mediation is either free of charge for litigants or they pay reduced mediator's fee. It enables court leaders with better integration of mediation into case management system and backlog reduction. Due to established monitoring and control of performance of mediators court-annexed mediation model ensures greater trust and confidence of judges, lawyers and litigants to provided services, in particular if judges-mediators serve as neutrals in court sponsored programs.

Mediation is not about being better than litigation but it is about being addition to litigation. Court-related mediation provides disputants with two different kinds of promises: promise of opportunity and promise of process integrity. International best practice lesson learnt regarding court-related mediation is that addition of ADR (and in particular mediation) to pretrial process, as early as feasible, is the most effective way of administration of justice because it reduces the time to disposition and transaction costs on one side and increases perception of fairness on the other. Invitation to litigants by a judge to consider mediation option occurs too late in the litigation process that is on a preparatory hearing. In fact, the whole judicial referral system rests on assumption that judges should have an interest to discuss with litigants the option of mediation. This assumption is unrealistic no matter how backlogged a particular court is. Mediation information session, performed by a judge is time consuming. In addition, judges are more focused on settlement discussions, performed by themselves than on referrals to mediation. Career stimulations for judges in terms of number of cases, disposed of, concerning settlement reached during litigation, is greater than those, reached during mediation are. Despite long waiting times for scheduling the preparatory hearing in many courts exceed several months, courts (with rare exceptions) do not practice sending out notice to litigants about expected timing of the preparatory hearing and information on how this waiting time could be effectively used if mediation is to be attempted. Courts in BiH also do not practice automatic invitation to litigants to consider mediation immediately after case filling. Any court-related mediation program should be designed in a way that mediation is considered as presumed no matter that it is formally not mandatory. No changes in regulatory framework are needed for described change of case management practice.

Mediation brings the value to the parties even when it enables them knowing that a case cannot settle. That is why in many jurisdictions (e.g. UK, Slovenia, Norway, USA, Canada etc.) it is considered as appropriate for a judge to order the parties to participate in non-binding ADR process over a party's objection. Despite voluntary nature of mediation, regulatory framework does not prevent courts to introduce quasi-mandatory mediation with the right of litigants to opt-out. Such an approach could be introduced either automatically for certain categories of cases (e.g. utility cases) or upon discretionary decision of a judge in individual cases. Nevertheless, courts would probably wish to have a clear mandate for adopting case management rules of the mediation program, which could be determined at least by the Rules on court operations ("sudski poslovnik"). Ideally, the law should envisage possibility that a judge may compel litigants to mediation, however, in such a case, courts must offer ADR services for free or very low costs. State should provide funding for court-related ADR programs as it does provide it for other judicial processes. Only in such a way the concept of multi-door courthouse, envisaged by prof. F.Sander in his address at the National Pound Conference on the cases of popular dissatisfaction with administration of justice from the year 1976, could be implemented. Multi-door courthouse model is based upon the belief that courts should operate as centralized intake and conflict diagnostic centers, which provide litigants with an advice on most suitable dispute resolution proceedings, taking into account characteristics of a case and of the parties. An array of dispute resolution options should be available. Advisory (early neutral evaluation), facilitative (mediation, conciliation,) adjudicative (binding or non-binding arbitration) to the litigants who should make an informed choice of appropriate process, depending on assessment of costs, time, access, fairness, enforceability of outcome and duration of resolution. Litigants should be compelled to choose one item from a "dispute resolution menu" on which mediation represents almost "standard appetizer".

Key components of court-related mediation program advice are therefore the followings:

-effective mechanisms to enforce parties' and lawyer's duty to consider mediation;

-provided financial incentives for litigants and lawyers for voluntary referral;

-screening and consultation of the court with the parties and their lawyers;

-early soft mandatory referral (automatic in selected categories of cases or upon judge's discretion in individual cases);

-allowed opt-out to litigants from referral to mediation;

-ensured smart litigation cost sanctions for unreasonable opt-out from mediation

In order to ensure that court-related mediation and ADR in general become a movement and to prevent them keeping the status of uneven and fragile penetration in legal and political culture, it is of utmost importance that governments and legislators in BiH address sources of peril regarding further development of court-related ADR. They must provide courts with authority to design and implement ADR programs. They must provide funding for such programs without which they can not function. They must provide incentives to give real considerations concerning ADR by disputants and their lawyers in each civil case as well as smart sanctions for non-compliance and legal protection to parties and processes. Last but not least, regulatory framework, established by policy makers should ensure tight quality control mechanisms (see more on this in W.Brazil: Court ADR 25 years after Pound: Have we Found a Better Way?;Berkely Law Scholarsip Repository, 1-1-2002).

It is therefore suggested that authorities in BiH overcome the weaknesses of the regulatory framework for court-related mediation as described above in a way that they adopt an ADR Act in Judicial Matters and/or a separate chapter of Civil Procedural Codes and insert the provisions, which are presented below in a Model ADR Act in Judicial Matters.

Since legislative process might take some time, it is suggested that most of model provisions below could be (temporary) inserted into rules of Mediation Program, which should be adopted by individual courts. Courts should be authorized to adopt Mediation Program by the Rules of courts performance, issued by the Ministry of justice. In such a way an accelerated design and implementation of pilot court-annexed mediation programs could be launched.

MODEL ALTERNATIVE DISPUTE RESOLUTION ACT IN JUDICIAL MATTERS

I. GENERAL PROVISIONS

Article 1

(Content and purpose of the Act)

(1) This Act shall regulate alternative dispute resolution procedures provided to the parties in the judicial matters (hereinafter referred to as: the parties) by the courts on the basis of this Act.

(2) Procedures from the above-mentioned paragraph facilitate wider access of the parties to justice, provide an option to select the most appropriate dispute resolution procedure to the parties, enable fair, expedient and friendly settlements, provide time and cost savings to the parties and courts, and increase the scope of voluntary and mandatory participation of the parties in court-related alternative dispute resolution programs.

Article 2

(Scope)

(1) This Act shall be applied in disputes arising from economic, employment, family and other civil relationships with regard to claims that are at the parties' disposal and that the parties can agree upon, unless otherwise stipulated by a special Act for an individual dispute.

(2) This Act may also meaningfully apply to administrative, tax and other similar disputes.

Article 3

(Definition of alternative dispute resolution)

According to this Act, an alternative dispute resolution shall be a procedure which differs from litigation and in which one or more neutral third parties intervene in the dispute resolution as described in Article 2 of this Act using the procedures of mediation, binding or non-binding arbitration, early neutral evaluation, hybrid or other similar procedures.

II. ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

Article 4

(Court obligations and entitlements)

(1) Courts of first and second instance shall make the use of alternative dispute resolution procedures possible by adopting and implementing the alternative dispute resolution program.

(2) In the framework of the program mentioned in the above paragraph, the courts shall be obliged to provide the option of mediation to the parties and may also provide other forms of alternative dispute resolution.

Article 5

(Program implementation form and manner)

(1) The court may adopt and implement the alternative dispute resolution program as an activity organized directly in court (court- annexed program) or on the basis of a contract with a suitable out of court public or private provider of alternative dispute resolution(court-connected program).

(2) Furthermore, on the basis of a mutual written agreement, courts can also implement the alternative dispute resolution program as follows:

- An individual first instance court may implement the program for one or more additional first instance courts in the area of the same judicial district,

- An individual second instance court may implement the program for one or more first instance courts in the judicial district of the second instance court.

Article 6

(Program content)

In the alternative dispute resolution program, the court primarily defines which kinds of procedures it provides, and determines, in greater detail, the binding principles, rules and forms for these procedures. If the court implements the program in the manner provided in Article 5, paragraph 2 of this Act, it shall note this in the program.

Article 7

(Mediators in the mediation program)

(1) Mediation procedures within the mediation program, as described in Article 4 of this Act, can be carried out by mediators (hereinafter referred to as: the Mediator) who are listed in the register (hereinafter referred to as: the list) as mediators according to this Act.

(2) In a court-annexed mediation program, the court that carries out the program also manages the list.

(3) In a court-connected mediation program, the alternative dispute resolution service provider who carries out the program on behalf of the court, and who is licensed by the Alternative Dispute Resolution Council to register mediators on the list, also manages the list.

(4) A mediator can mediate in court premises or in the premises of the alternative dispute resolution service provider who has put him or her on the list.

(5)A mediator could be also a judge who is not responsible for any judicial proceedings concerning the dispute in question.

Article 8

(Addition and deletion from the list)

(1) Any person who meets the following criteria may be listed

- They have the capacity to enter a contract:

- They have not been convicted, by final judgement, for a deliberate criminal offence for which they were prosecuted ex officio;

- They have at least the first level of post-secondary education:

- They have undergone mediation training according to the program determined by the Minister of Justice (hereinafter referred to as: the Minister).

(2) The Minister may by a decree or regulations also put down additional criteria for addition to the list with regard to the type of disputes resolved by mediation.

(3) A Mediator shall be deleted from the list:

- Upon request by the Mediator himself;

- If the Mediator fails to meet the criteria from items one, two or five of paragraph one of this article;

- If the Mediator breaches the law, the rules of the program (hereinafter referred to as: the Rules), in the framework of which mediation is carried out, or if the Mediator breaches the rules of mediation ethics;

- If the Mediator conducts the mediation procedures irregularly or unprofessionally;

- If the Mediator does not take part in compulsory forms of training, as determined by the Minister; or

- If the Mediator fails to carry out a minimum number of mediation procedures in a particular period of time, as determined by the Minister.

(4) Any decision on a deletion from the list shall be reached by the court or alternative dispute resolution service provider that listed the Mediator.

(5) In the Decree or Regulations, the Minister shall also define the following:

- The conditions for issuing licenses to alternative dispute resolution service providers for listing mediators, and

- The method of supervising the work of mediators.

Article 9

(Content and public accessibility of the list)

(1) The list shall include the following information:

- Name of the Mediator;

- Date and place of birth;

- Domicile or temporary residence;

- Contact data: telephone number and e-mail;

- Professional or academic title;

- Occupation;

- Employment data;

- The kinds of disputes for which the Mediator provides mediation services;

- Date of listing.

(2) For the purposes of providing effective mediation procedures according to this Act, the list shall be publicly accessible for the following data:

- Name of the Mediator;

- Professional or academic title;

- The kinds of disputes for which the Mediator provides mediation services;

- Date of listing.

(3) Data from the previous paragraph is submitted to the Ministry of Justice (hereinafter referred to as: the Ministry) by the court or alternative dispute resolution service provider. Alternatively, the data may also be published on their websites. The court or the alternative dispute resolution service provider shall also submit information on the deletion of a Mediator from the list to the Ministry.

Article10

(Central mediator database)

(1) For the purpose of informing the public and providing effective mediation procedure services according to this Act, the Ministry shall keep a central database of listed mediators.

(2) The central mediator database shall be published on the Ministry's website and shall include the following data:

- Name of the Mediator;

- Professional or academic title;

- The kinds of disputes for which the Mediator provides mediation services;

- Name and address of the court or alternative dispute resolution service provider where the Mediator is listed, and

- Date of listing.

(3) After receiving data on the deletion of a Mediator from the list, the Ministry shall delete the Mediator from the central mediator database.

(4) In the Decree or Regulations, the Minister shall lay down detailed rules on maintaining the list and the central mediator database.

Article 11

(Program management)

(1) The court offering the alternative dispute resolution program shall nominate a public servant who will manage, regulate, monitor and evaluate the performance of the program (hereinafter referred to as: the Program Manager). In a court-annexed program, the Program Manager shall also organize education and training activities, monitor the work of neutral third persons and designate a neutral third person in individual cases.

(2) The court offering an alternative dispute resolution program shall nominate a judge, within the annual work schedule of judges, who shall co-operate with the Program Manager in monitoring and evaluating the performance of the program, as well as the education and training activities of neutral third persons.

Article 12

(Program funding)

The funds for the programs that are offered by the courts on the basis of Article 4 of this Act shall be provided to the courts by the competent authority.

Article 13

(Program support)

(1) The Ministry shall provide assistance in setting up and implementing the programs, assume responsibility for informing the public of the programs offered by the courts in accordance with Article 4 of this Act, and, in co-operation with the Alternative Dispute Resolution Council, provide appropriate advice and information on suitable good practices in setting up and implementing the programs and providing quality assurance..

(2) The courts shall submit any program they adopt on the basis of Article 4 of this Act to the Ministry and to the High Judicial and Prosecutorial Council.

(3) The Judicial Training Centre in cooperation with the Associations of Mediators provides education and training for neutral third persons who participate in programs in alternative dispute resolution procedures offered by the courts in accordance with Article 4 of this Act.

Article14

(Alternative Dispute Resolution Council)

(1) The Alternative Dispute Resolution Council (hereinafter referred to as: The Council) shall be established for the purpose of providing consultancy services in relation with setting up and implementing programs according to Article 4 of this Act and providing quality assurance and further development of alternative dispute resolution.

(2) The Council will be comprised of at least ten members (hereinafter referred to as: Members). The Minister shall nominate Members among experts in the areas of alternative dispute resolution or civil procedural law for a span of four years. The Council shall be chaired by a chairperson (hereinafter referred to as: the Chairperson) who shall be designated by the Minister.

(3) In a document regarding the establishment of the Council, the Minister shall define the composition, tasks, methods of work, means, and reimbursement of costs for the Chairperson and other Council Members, as well as other administrative and technical aspects required for the Council's work.

III. **COMMON PROCEDURAL CLAUSES**

Article15

(Referral to the alternative dispute resolution procedure by stipulation, motion or order)

(1) The court shall in each case no later than when serving the complaint to the defendant, provide and serve to all the parties in person the information of available alternative dispute resolution procedures and their comparative benefits, answers to frequently asked questions and various forms approved by the court.

(2) Small claims in utility cases and other appropriate cases in which all the parties are represented by their lawyers and, which are determined by the court's alternative dispute resolution program, may automatically be assigned to the court's alternative dispute resolution program by the designated court office. Any party whose case has been assigned automatically to the alternative dispute resolution program may file with an assigned judge, within 8 days from the day the party received a notice on automatic assignment, a reasoned motion for relief from automatic referral. Judge's decision on that motion is not subject to appeal.

(3) On the basis of a stipulation by all the parties who agree that an attempt at alternative dispute resolution should be made, by a notion of one party or on the judge's initiative, the court can suspend the court proceedings for no longer than three months and refer the parties to the alternative dispute resolution procedure.

Article 16

(Duty to consider the alternative dispute resolution process)

(1)In cases automatically assigned to the alternative dispute resolution program, the lawyers who represent their clients in dispute in question must confer to attempt to agree on alternative dispute resolution process as soon as after case filling and no later than until deadline as set by the court.

(2)In cases automatically assigned to the alternative dispute resolution program, lawyers and their clients must sign, serve and file an alternative dispute resolution certification and shall provide a copy to the court, until the date specified by the court.

(3)Lawyer and client must certify that both have read the information booklet of the court on alternative dispute resolution program, discussed available dispute resolution options provided by the court and private providers, considered whether their case might benefit from any available alternative dispute resolution options and compared the costs of alternative dispute resolution processes with litigation costs.

Article 17

(Stipulation to alternative dispute resolution process or notice for information telephone conference)

(1)In cases automatically assigned to the alternative dispute resolution program the lawyers must no later than on the date as specified by the court, file in addition to alternative dispute resolution certification, either a stipulation and proposed order selecting alternative dispute resolution process or a notice for a need for an alternative dispute resolution information phone conference on a form, established by the court.

(2)If any party has filed a need for an alternative dispute resolution phone conference, lawyers representing their clients are required to participate at joint phone conference at a time, designated by a court.

(3)All lawyers, representing their clients in particular case and internal or external dispute resolution expert, previously appointed or approved by the court, must participate at the alternative dispute resolution information phone conference.

Article 18

(Informative alternative dispute resolution hearing)

(1) If the parties have not stipulated to a particular alternative dispute resolution process after alternative dispute resolution phone conference, the assigned judge shall discuss with the parties the selection of an alternative dispute resolution option at the preparatory hearing. If the parties do not agree to the alternative dispute resolution process and the judge deems it appropriate, she or he shall select one of the court alternative dispute resolution processes and issue an order referring the case to that process.

(2) The date and time of the informative hearing shall be determined by the court according to the rules of the civil procedural code.

(3) The invitation to the informative hearing shall be served to the parties in person.

(4) Minutes shall be kept in the informative hearing led by a judge or an law clerk.

(5) If, upon proper notice of invitation, the party fails to participate in the informative hearing and fails to produce justified personal reasons for absence or if there is a lack of generally accepted circumstances (e.g. earthquake, flood, etc.) that would justify the party's absence from the hearing, the absent party shall be obliged to reimburse the other party's expenses that arose from this hearing. In the notification for attending a hearing sent to the party, the court shall include information on the consequences of absence from a hearing. Unjustified

absence of any party from a hearing does not prevent the assigned judge to issue an order of mandatory referral to selected alternative dispute resolution process.

Article19

(Presence at hearings in alternative dispute resolution procedures)

(1) Natural persons as parties in a proceeding are obliged to participate in hearings and meetings in the framework of alternative dispute settlement procedures in person.

(2) Legal persons as parties in a proceeding shall make sure that a person authorized to enter into judicial or extra-judicial settlements is present or reachable during hearings and meetings.

(3) Notifications for hearings and meetings in the framework of alternative dispute resolution procedures according to this Act shall be implemented in accordance with the rules of civil procedures.

(4) If a party who has been properly notified fails to attend the meeting or hearing in the alternative dispute resolution procedure and provides no justified personal reason for absence or if there is a lack of generally accepted circumstances (e.g. earthquake, flood, etc.) that would justify the party's absence from the meeting or hearing, the absent party shall reimburse costs arising from the meeting or hearing to the opposite party, and pay a three hour fee for the time used to prepare for the meeting or hearing to the one or more neutral third persons who prepared the meeting or hearing. The notification for attending a meeting or hearing sent to the party shall include information on the consequences of absence from a hearing.

(5) Persons authorized by the parties may be present in meetings and hearings in the framework of the alternative dispute resolution procedures.

Article20

(Fees for neutral third persons)

In the alternative dispute resolution procedure under the program from Article 4 of this Act, any neutral third person participating in the program shall be entitled to a fee and reimbursement of travel expenses in the amount set by the Minister in the Decree or Regulations.

Ⅳ. SPECIAL PROCEDURAL PROVISIONS IN THE MEDIATION PROGRAM

Article 21

(Mandatory mediation referral)

(1) When it is suitable, given the circumstances of the case, and on the basis of consultation with the parties at the preparatory hearing or in other appropriate way, the court may, any time during pending litigation, decide to suspend the litigation for no longer than three months and refer the parties to mediation provided by the court in the framework of the program from Article 4 of this Act.

(2) The decision on mandatory referral to mediation shall be explained and shall contain a warning on the consequences of a clearly unreasonable rejection of the mediation referral from paragraph 5 of this Article. The decision shall be served to the parties in person.

(3) In eight days from the date the party was served the decision, the party may submit an appeal against the decision on mandatory mediation referral.

(4) Should the party submit an appeal from the previous paragraph, the court that has issued the decision on mandatory referral shall repeal this decision. Once the decision on the annulment of mandatory mediation referral is made, no appeal can be made against that decision.

(5) Regardless of the litigation outcome, the court may, upon request by the other party, order the party that has submitted a clearly unreasonable objection to the mediation referral, to reimburse the other party for all or part of the necessary spent litigation expenses that arose from the clearly unreasonable objection.

(6) In deciding whether the objection to the mediation referral was clearly unreasonable, the circumstances of each case shall be taken into account, especially the following:

- Nature of the dispute,

- The merits of the case,

- Whether or not the parties strived to settle the dispute in a friendly manner through negotiations or other settlement methods,

- Whether the costs that would arise from mediation would be disproportionately high,

- The possibility that a three-month suspension of the procedure due to mediation could affect the result of the trial,

- Whether mediation would have had reasonable prospects of a successful dispute settlement.

Article22

(Execution of the first mediation meeting)

If the court refers the parties to mediation in the framework of the court's program, the first mediation meeting shall take place no later than thirty days after the referral decision has been adopted.

Article23

(Disputes with the state entity or state BiH)

(1) In all judicial disputes where this Act is applied and where the state entity or a state of Bosnia and Herzegovina is a party, its' legal representative shall give consent for dispute settlement through mediation when such a decision is appropriate, given the circumstances of the case.

(2) If the legal representative from previous paragraph deems dispute settlement through mediation to be unsuitable, he/she shall submit an explanation and a proposal to the authorized Government and ask for a decision.

(3) If, in a large number of disputes of the same kind, the legal representative deems dispute settlement through mediation to be unsuitable, he/she can submit a single proposal to the Government asking for a decision on the application of mediation for all disputes of that kind. Should there be a possibility that disputes to which the proposal by the legal representative proposal relates will arise in the future, he/she may propose that the Government simultaneously reach a decision on settling all expected future disputes of the same kind through mediation.

Article 24

(Reimbursement of fees and travel expenses for the mediator by the court)

(1) In mediation procedures that are carried out in accordance with the program from Article 4 of this Act with regard to disputes in relations between parents and children and labor disputes due to termination of an employment contract, the court shall reimburse the mediator's fee and travel expenses.

(2) In mediation procedures that are carried out in accordance with the program from Article 4 of this Act with regard to any other dispute not mentioned in the previous paragraph, except commercial disputes, the court shall reimburse the mediator's fee for the first three hours of mediation, and travel expenses arising from the first three hours of mediation.

(3) In mediation procedures that are carried out in accordance with the program from Article 4 of this Act with regard to commercial disputes, the parties shall bear the fee and travel expenses of the mediator. The costs shall be shared equally, unless otherwise decided by the parties.

V. TRANSITIONAL AND FINAL PROVISIONS

Article 26

(Adoption and implementation of court programs)

(1) First instance courts shall adopt and implement the program of alternative dispute settlement from Article 4 of this Act no later than by the date this Act enters into force.

(2) Second instance courts hall adopt and implement the program of alternative dispute settlement from Article 4 of this Act by no later than one year after the date this Act enters into force.

Article 27

(Applicable court programs)

If a court already offers a program of alternative dispute resolution at the time this Act enters into force, it shall analyze the program and consolidate it with the provisions of this Act no later than by the date this Act enters into force.

Article 28

(Deadline for publishing the Decree or Regulation)

The Minister shall publish the Decree or Regulation for implementing provisions of this Act no later than three months after this Act enters into force.

Article 29

(Date of entry into force and date of application of the Act)

This Act shall enter into force on the fifteenth day following the day of its publication in the Official Journal and shall begin to apply six months after entry in force.

Chapter 7

ASSESSMENT OF THE MEDIATOR`S CODE OF ETHICS

BACKGROUND

The ToR mandate the expert to assess the Mediator's Code of ethics (hereinafter The Code).Expected output is therefore Assessment Report on the Code.

This Assessment Report in the first part outlines policy considerations and approaches for drafters of the Code and provides Model Guide for drafters of the Code. Second part of the Report provides assessment of the Code, outlines it's basic strengths and weaknesses and article by article remarks.

Any code of ethics for mediators shall be intended to perform three major functions: to serve as a guide for the conduct of mediators, to inform the mediating parties about their reasonable expectations concerning mediator's performance and to promote public confidence in mediation.

The following national or international documents served as a source of reference for this assessment:

- European Code of Conduct for Mediators, prepared by the European Commission, from: Recommendation on the principles for out of court bodies involved in the consensual resolution of consumer disputes of European Commission, from 4th of April 2001(0fficial Gazette L 109/56 ,m 19.4.2001);

- Recommendation on the principles applicable to the bodies responsible for out of court settlement of consumer disputes of European Commission, from 301h March 1998(0fficial Gazette L 115/31, 17.4.1998)
- Code of Conduct for mediators and any third party neutrals of Center for Effective Dispute
- Resolution (CEDR), 2001:
- Code of Practice for Civil/Commercial Mediation of Law Society (UK), from l 0 December 2001;
- ACB Code of Conduct for Mediators, from 9th of April 1998, last amending on 21st
- November 2000;
- UIA (International Association of Advocates) Code of Conduct for Mediators,
- Ethical Guidelines for Mediators of Camera Arbitrale Nazionale E Internazionale Di
- Milano, Conciliation Service from 25 01 2003;
- Code of Conduct for Mediators of Piemont Arbitration Chamber from April 2nct 2002;
- Code of Conduct for NMI registered mediators of Netherlands Mediation Institute (edition01-01-01);
- Model Rule for The Lawyer as Third-Party Neutral of CPR Georgetown Commission on Ethics and Standards in ADR, from November 2002;
- Model Code of Ethics for Mediators of Conflict Resolution Network, Canada;
- Ethical Principles for Mediators of the Slovenian Association of Mediators from May
- 2008;
- Mediators Code of Ethics of the Croatian Association for Mediation, from 4th of July 2008;
- Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs; Report of the Task Force of the Court Administration and Case Management Committee, Federal Judicial Center, December 1997;
- A Framework for ADR Standards, Report to the Commonwealth Attorney General by the National Alternative Dispute Resolution Advisory Council of Australia from April 2001.

The same sources were used by the European Commission when developing the European Code of Conduct for Mediators. That Code is not a particular useful one because it was adopted before the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters and therefore includes many procedural issues which are now governed by the Directive and, also by the Law on Mediation Procedure in BiH. Nevertheless, some parts were taken out of the European Code and were integrated into proposed text (for example principles of impartiality and independence).

Basic ethical principles for mediators are more or less the same worldwide, however in order to determine what is relevant for BiH, the wording of different codes was compared first and then the selection of what is relevant for the minimum lowest acceptable standards was made and, finally, each leading principle was supported by underlying comments. Among these codes it was the Model Code of Ethics for Mediators, adopted by Conflict Resolution Network from Canada, which was used as main source for reference. This code is suggested by the World Bank and International Finance corporation as a model text for Code of

Conduct for Mediators and integrated in the Model Guide on how to establish mediation center. Both leading international financial institutions used the same code when recommending mediation models in the Western Balkans (Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, Albania). One cannot disregard the above mentioned model when drafting similar code for BiH because it is obviously universally acceptable.

In order to provide clear guidance as to what are key issues to be regulated by the Code, a Model Guide on drafting Code of conduct for mediators, as presented below, could be used at further drafting.

PURPOSE OF THE MODEL GUIDE

The purpose of this Model Guide is to promote the development of standards in mediation in BiH. An overwhelming support by the stakeholders for the development of standards in mediation is needed in order to improve and maintain the quality and status of ADR, educate and protect disputants and develop BiH's international profile.

It shall be up to the individual organization or institution providing mediation whether to make a commitment to such set of standard principles under their own responsibility and whether mediators acting under the auspices of such organization would be required to respect them. Individual mediators could voluntary decide to commit, under their own responsibility. Such an approach would enable organizations providing mediation to develop more detailed codes adapted to their specific needs. Adherence to any such Code would be without prejudice to national legislation or rules regulating individual profession.

This Model Guide attempts to balancing two principles. The first is to recognize the diversity of contexts in which mediation is practiced and to facilitate the development of standards within these contexts (the diversity principle).The second is to promote consistency in the practice of mediation by identifying essential standards for mediation service providers(the consistency principle). The principle of diversity influenced the "framework approach" contained in this paper in order to assist service providers to develop appropriate codes of practice. The term standards is used to refer to rules, principles, criteria, or models by which quality, effectiveness and compliance can be measured or evaluated. Standards can be expressed in codes of practice, benchmarks, guidelines, models, service charters, credentials, competencies as well as criteria for approval, certification, selection, endorsement or accreditation. A code of practice is defined as "a set of rules or standards, which are designed to control behavior, products or services within a particular area of activity".

The diverse context, in which mediation is practiced, leads to diffusion of responsibility for standards development and suggests that a single set of standards is unlikely to apply across all mediation sectors. Mediation may function as profession, in some areas resembles an industry or functions more like social movement (community mediation).Mediation practitioners and organizations may be specialized in service provision, or may have mediation as supplementary function or role. They may provide direct service to the parties or they may provide indirect service such as referral, information, training or research. A mediator may be employed by an organization with prescribed procedures and direct supervision. Alternatively, a sole mediator may be engaged directly by the parties, without reference to an intermediate agency and without external supervision. Mediators may operate under auspices of an accrediting agency or professional organization and be supervised and supported by it. Mediators may be also engaged under different conditions;

on a full-time, part-time, pro-bono basis or they work across courts and mediation centers and have a "portfolio" of work. Many belong to several panels, provide training and private consultancy services.

Sole mediators may provide a total service to clients, including professional assistance, physical facilities, administration and follow up. In other situations they may work within the organizational environment provided by referrer or client.

The context of the engagement of the service provider will directly affect the appropriate form of standards. It is common for mediators to have competing or conflicting responsibilities to their employing organizations, the clients who engages their services and the parties involved in their dispute. Comparative research indicates the need to develop models for standards applying to practices, to practitioners and to organizations which are engaged in provision of mediation.

Standards for practice include codes, benchmarks, agreements, models and exemplars. Standards relating to practitioners-mediators include training, education, assessment requirements and processes for selection, supervision, professional development and discipline. Standards for organizations include quality management or quality assurance systems, service charters and various recognition processes.

POLICY ON THE DEVELOPMENT OF STANDARDS FOR MEDIATION PRACTICES

Standards for practices may relate to individual behavior or ethics, to schemes and programs, to organizational policies and procedures or to underpinning processes or methodologies. They may be:

- highly specific or general statements of principles or philosophy;
- minimalist (lowest acceptable) or aspirational (best practice);
- normative (prescribing certain practices) or exemplary (suggesting certain practice);
- expressed in positive terms (what to do) or in negative terms (what not to do);

When standards for practices take a form of a code they offer a degree of consistency in what

disputants may expect from mediation service providers.

Codes set control or boundaries about acceptable or desirable practice.

A code may take a form of an internal written statement applying to the individual service

provider, without any externally imposed sanctions.

A code may also form a part of a contract for the provision of services, in which case a breach of the code becomes a breach of the contract.

A code may be developed and adopted by the profession, and where breaches occur, involve sanctions, such a loss of membership, licensing or recognition.

Compliance with a code may be used as evidence of compliance with legislation.

Regulations and other legislative instruments may refer to, or incorporate directly, codes of practice. Model codes provide consistency in minimum requirements where there is limited authority to prescribe standards centrally. Service providers are free to adopt the model in whole or in part or to develop their own approaches consistent with any regulatory framework. The development of model standards provide useful means for encouraging

greater consistency in standards without involving centralized control .Nevertheless, developing standards of mediation practice shall be an ongoing process and recognize the diversity of ADR.

ELEMENTS OF A CODE OF PRACTICE

This chapter outlines what Australian ADR Commission recommends concerning elements of a code of practice. NADRAC recommends that all ADR service providers adopt and comply with an appropriate code of practice developed by ADR service providers and associations, which takes account of the elements listed below. NADRAC also recommends that:

- Compliance by the service provider with an appropriate code of practice form part of any;
- contract entered into by the organization providing for ADR;
- The stakeholders encourage other government agencies to include an appropriate code of practice as part of any direct provision of ADR services, or within any contracts for externally provided ADR services;
- Government, industry, professional and consumer organizations undertake consumer education activities which aim to encourage the inclusion of an appropriate code of practice in private contracts for ADR services;
- This section describes the elements to be taken into account in an appropriate code of practice. The elements may be used in several ways:
- State agencies and other funders and purchasers of ADR services may use them to assess the appropriateness of a service provider's code of practice;
- ADR service providers and ADR associations may use them to assess the appropriateness of their existing codes of practice;
- Those developing and codifying their standards for the first time may use them as drafting guidelines.

This section is not intended to provide an exhaustive list of matters to be considered for inclusion, nor to prescribe the headings, sequence or wording for a code of practice.

An appropriate code, however, should take account of each element to the extent that it is relevant to the particular context to which the code is to apply.

For the purposes of this section, a code of practice is taken to include any documented standards that control the delivery of ADR services. The elements of a code of practice may be contained within other forms of documented standards, such as service charters, policy and procedure manuals, benchmarks, regulations, professional codes, rules and guidelines. Documented standards need not be called a 'code of practice', but should take account of each of the elements described below.

This section refers to the responsibilities of 'service providers' and of 'practitioners', as these terms are being used in this paper. In organizations, different obligations may apply to individual practitioners and to the organization itself, and different practitioners within the organization may have different roles and responsibilities. A sole practitioner may also be a service provider, and therefore responsible for each element of the code. Particular codes will need to be clear about these respective obligations and responsibilities.

A code of practice applicable to each service provider should describe the following matters:

Process

1. The ADR process or processes to be covered by the code, including the roles of all participants in the process.
2. How and when the ADR process may or should be terminated.
3. The service provider's and practitioners' obligations after the process is concluded.

Informed participation

4. The service provider's and practitioners' obligations to enable parties to make informed choices about the extent and nature of their participation in the process.
5. The service provider's and practitioners' obligations with respect to advertising and promotion of themselves, their service and the ADR process.
6. How and when parties will be informed of the standards that apply to the service provider and to practitioners

Access and fairness

7. The service provider's and practitioners' obligations to determine the appropriateness of the process for the particular dispute and for the parties to the dispute.
8. The service provider's and practitioners' obligations to ensure the accessibility of the service and the process to parties with diverse needs .
9. The service provider's and practitioners' obligations to achieve fairness in procedure, including neutrality and impartiality!
10. The service provider's and practitioners' obligations to maintain confidentiality and to inform the parties of confidentiality requirements.

Service quality

11. The knowledge, skills and ethics that are required by practitioners.
12. The service provider's and practitioners' obligations to ensure the quality of the ADR processes.

Complaints and compliance

13. The service provider's and practitioners' obligations to handle complaints appropriately
14. The service provider's and practitioners' obligations to comply with the code.

MODEL GUIDE TO THE STANDARDS OF MEDIATION PRACTICE

SCOPE OF APPLICATION

The standards set out m this Model Guide are intended to perform the following major functions:

- to serve as a guide for the conduct of mediators;
- to inform the parties in mediation about their reasonable expectations concerning mediator's conduct;
- to promote public confidence in mediation as a process for resolving disputes;
- to provide advice to disciplinary and accreditation bodies, who enforce ethical and disciplinary standards for mediators.

The Model Guide is intended to be applied to the duties and responsibilities of mediators in facilitative and evaluative mediation in civil, family and commercial matters. Accredited and registered mediators who provide mediation services shall be subject to the lowest acceptable standards for mediator's duties and obligations as specified in this Model Guide.

These standards shall not be used as liability standards for ascertaining malpractice or other purposes, directed at determining mediator's civil or criminal liability.

It is recognized, however, that in appropriate cases the application of these standards may be affected by laws, regulations or contractual agreements.

Standards enshrined in this Model Guide are formulated as binding principles and comments.

They reflect minimalist approach in order to be accepted nationwide

Self-determination: A mediator shall recognize that mediation is based on the principle of self-determination.

Comments:

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation any time. The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute.

Parties shall be given the opportunity to consider all proposed options. A mediator can not

personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, when appropriate, to help them make informed decisions.

Quality and integrity of the process: A mediator shall act diligently, fairly, efficiently and promptly, subject to the standard of care owed to the parties as required by applicable law or contract.

Comments:

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties to it, and, that the parties have understood and expressively agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalance and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute.

The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

The mediator, if appropriate, shall inform the parties, and may terminate the mediation, if:

- -a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment;
- -the mediator considers that continuing the mediation is unlikely to result in a settlement.

Other rules or specifications of timeliness and standards of care than those explained above may be specified in the agreements of the parties, in rules provided by relevant organizations or by applicable case law.

If a mediator can not meet the parties' expectations for prompt, fair, diligent and efficient resolution of the dispute, the mediator shall decline to serve or terminate his or her engagement

in mediation. Mediators shall only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator shall not allow a mediation to be unduly delayed by the parties or their representatives.

A mediator shall refrain from providing professional advice but may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalize the agreement and as to the possibilities for making the agreement enforceable. Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

Competence: A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.

Comments:

Mediators shall be competent and knowledgeable in the process of mediation. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator qualifications. Training and experience, however, are often necessary for effective mediation. The mediator shall satisfy him/herself as to his/her background and competence to conduct mediation before accepting the appointment.

The mediator should undergo proper initial training and /or continuous updating of his or her education and practice in mediation skills, having regard to any relevant standards for accreditation and registration schemes.

The mediator shall decline to serve as a mediator in those matters in which a mediator is not competent to serve.

Mediators should have available for the parties information relevant to training, education and experience.

When mediators are appointed by a court or institution, the appointing body shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

Impartiality: The mediator shall at all times act, and endeavor to be seen to act, with impartiality towards the parties, with respect to the issues and to the outcome of the mediation process and shall be committed to serve all parties equally with respect to the process of mediation.

Comments:

The concept of mediator's impartiality is central to the mediation process. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obliged to withdraw.

While neutrality is a question of interest, impartiality is more a matter of behavior. It relates to the confidence of the parties on their perception that they are treated fairly by the mediator throughout the process. Impartiality requires the mediator to:

- conduct the process in a fair and even-handed way;
- generally treat the parties equally;
- not accept advances, offers or gifts from the parties;
- ensure that he or she does not communicate with noticeably different degrees of warmth, friendliness or acceptance, when dealing with individual parties.

The mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. He or she shall guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

Independence and neutrality: The mediator must not act, or, having started to do so, or continue to act, before having disclosed any circumstances, reasonably known to the mediator, that may, or may be seen to, affect his or her independence or conflict of interests.

Comments:

Neutrality is viewed as particular responsibilities on the part of mediator. These responsibilities are to identify and disclose any existing or prior relationship between the mediator and the parties, any interest in the outcome of the dispute, any present or future conflict of interest and any values, experience or knowledge that may prevent a mediator from acting impartially.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination.

The mediator shall disclose to the parties all circumstances, reasonably known to the mediator, why he or she may not be perceived to be impartial. These circumstances include:

- any financial or personal interest in the outcome;
- any existing or past financial, business, professional, family or social relationship with any of the parties, including but not limited to any prior representation of any of the

parties, their counsel or witnesses, or service as a judge or an ADR neutral for any of the parties;

- any other source of bias or prejudice concerning a person or institution which is likely to affect impartiality or which might reasonably create an appearance of partiality or bias;
- any other disclosures, required by the law or contract.

The mediator shall conduct a reasonable inquiry and effort to determine if any interests or biases described above exist and maintain a continuing obligation to disclose any such interests or potential biases that may arise during the proceeding.

If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

The mediator's commitment must be to the parties and the process. Pressures from outside of the mediation, including from the administrators of mediation programs, should never influence the mediator to coerce parties to settle.

Confidentiality: The mediator shall maintain the reasonable expectations of the parties with regard to confidentiality of information, arising out of or in connection with the mediation.

Comments:

The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreement they may make. The mediator shall not disclose any matter that a party expects to be confidential, including the fact that the mediation is to take place or has taken place, unless given permission by all parties or unless required by law or other public policy.

A mediator shall discuss confidentiality rules and requirements with the parties at the beginning of any proceeding and obtain party consent with respect to any ex parte communication or practice.

If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions. Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.

In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a

scheduled mediation.

Fees: When not already provided, a mediator shall fully disclose and explain the basis for compensation, fees and charges to the parties.

Comments:

The mediator shall not accept to mediate before the principles of his/her remuneration have been accepted by all the parties concerned, unless the mediator is serving in a no-fee or pro-bono capacity

If a mediator charges fees, the fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator,

the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement. A mediator shall not enter into a fee arrangement which is contingent upon the result of the mediation or amount of the settlement.

Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

A mediator shall not accept a fee for referral of a matter to another mediator or to any other person.

A mediator who withdraws from a case shall return any unearned fee to the parties.

Advertising and solicitation: A mediator shall be truthful in advertising and solicitation for mediation.

Comments:

Mediators may promote their practice in a professional, truthful and diligent way. Advertising or any other communication with the public concerning service offered or regarding the education, training and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

In an advertisement or other communication to the public, a mediator may make reference to meeting, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

Compliance: Accredited and registered mediators shall be subject to the principles and standards of this Model Guide in accordance with the rules of the respective accreditation scheme and national mediators register.

Comments:

The mediator shall withdraw from the mediation if he or she could be in breach of any standard from this model Guide.

SUMMARY REMARKS CONCERNING THE CODE

Any code of ethics for mediators shall be intended to perform three major functions: to serve as a guide for the conduct of mediators, to inform the mediating parties about their reasonable expectations concerning mediator's performance and to promote public confidence in mediation.

All three mentioned functions are intended to be satisfied by the Code which applies in BiH.

One of the key strengths of the Code is that it addresses all basic ethical principles for mediators from the Model Guide. The Code is a binding instrument for all registered mediators in BiH which, in principle, ensures consistency in application of basic mediation practice standards in the country. Non- compliance with the Code could cause disciplinary

sanctions and even dismissal from mediation profession. The Code allows further development of standards of professional practice in particular fields since it clearly states that it sets minimum standards.

Nevertheless, some obvious shortcomings of the Code could be outlined.

The Law on mediation procedure was adopted in a year 2004 and the adoption of the Code followed two years later. It seems therefore that the Code attempted to fill the gap, caused by legislation, as to certain important aspects of mediation procedure which were not regulated at all (e.g. inadmissibility of evidences, prepared solely for the purpose of mediation; termination of mediation; binding effect of mediated settlement) or, which were regulated in an inappropriate way (e.g. how to conduct separate meetings with the parties during mediation). Such an approach does not contribute to the consistency and transparency of the regulatory framework and could cause confusion and misunderstanding in mediation practice, in particular among disputants and their representatives.

Another major weakness of the Code is that in some parts it mixes ethical principles and basic procedural rules or examples of (in) appropriate conduct. For example, the Code defines mediation, or it includes very general descriptions like, “preservation of confidentiality is crucial to the dispute resolution process”, which could only support basic ethical principles for mediators, if included in a commentary to each ethical principle. Particular articles of the Code are consequently overburdened with either non-exhausting explanations of what a mediator may or may not do in order to comply with respective ethical duty or they include procedural rule which is already inserted in the Law on mediation procedure. In such a way a transparency of overall basic ethical principles is somehow lost.

This shortcoming is further accompanied with a regulatory approach, by which each article of the Code doesn’t have its heading (e.g. impartiality, confidentiality, competence etc.) therefore it is difficult to find out, what is the basic aim of each article. In addition, some issues are covered in different articles and are also overlapping (e.g. mediator’s duty to provide informed consent of the parties to mediate).

Particularly problematic is the part of the Code which clearly contradicts to the Law on mediation procedure (e.g. mediator’s duties before beginning of mediation).

It is therefore recommended here to revise the Code, taking into consideration article by article remarks below and rather prepare a new Code of ethics instead of amending existing one. Such a new code, if supported by extensive commentary, could provide much better guidance to mediators and to disputants. Practical experiences of many mediators in BiH, concerning ethical issues, in recent 11 years since the Law on mediation procedure came into effect, could provide an important source for consideration, what kind of issues need further elaboration and explanation in order to support basic ethical standards for mediation practitioners.

ARTICLE BY ARTICLE REMARKS

Article 1

Although it is stated in this article that the Code contains norms of professional conduct, it is obvious that the Code regulates also mediation procedural rules and principles. Such an approach is neither necessary nor consistent since extensive regulatory framework for mediation already exists. It could cause confusion and various interpretations in practice

therefore it is suggested that the Code should define only professional standards for mediation practitioners.

All-encompassing approach of the Code, namely , its applicability at all occasions, is also overly ambitious because it doesn't allow adoptions of more specific standards for mediators in certain fields such as family mediation, administrative mediation etc.

Article 2

Since only registered mediators are allowed to serve in the country, the Code is mandatory for all of them. Any violation of the Code by a mediator may constitute disciplinary liability (see article 5 and 6 of the Rule on the disciplinary responsibility of mediators and article 4 of the Code) therefore it is important to note that the Code is a legally binding part of regulatory framework of mediation profession. This article in fact provides normative approach because the Code prescribes certain practices. Compliance with the Code may be used as compliance with legislation.

Article 3

The objectives of the Code are clearly set. Nevertheless, it would be recommendable to replace the goal, aimed at providing a method of protection of the parties with a goal, directed at informing the parties about their reasonable expectations concerning mediator's performance.

Article 4

In this article it is confirmed the minimalistic approach to the professional standards of mediators. Such an approach is often practiced but it requires at least explanatory notes or comments to particular ethical norms in order to provide a clear guidance to mediators, how to or how not to perform their role as well as to provide transparent information to the parties, what kind of ethical conduct they could reasonable expect and require from mediators. (see Model Guide to the Standards of Mediation Practice above).

Additional to the commentary to particular principle or rule the Code could also provide instructions to mediators in a form of practice tips (see for example CPR Institute for dispute resolution: Mediator's Deskbook; 1999).

Article 5

Paragraph 1 is not necessary since it only reiterates what is prescribed by paragraph 1 of Article 2 of the Law on mediation procedure.

The sentence which provides that only the parties shall have the right to make decision in mediation might be modified in a way that a mediator shall recognize that mediation is based on the principle of self-determination. (see Model Guide: self-determination).This principle is so important to mediation that it could be inserted in a separate article.

The rest of this article deals with a mediator's role and this should be defined in a title of the article.

As to the performance which is prohibited, it is rather unclear, how to interpret the rule that a mediator shall not offer a legal advice. In particular in evaluative mediation, parties expect

the mediator's assessment of parties' strengths and weaknesses of the case as well as prospects of their claim in litigation at court which could be considered as legal advice therefore it would be more consistent if the Code would introduce this rule in any proceedings out of respective mediation.

As to the positive mediator's duties in the mediation process, the Code should add at least mediator's duty to assist parties in creating and refining settlement options (apart from presenting settlement options which is more conciliatory role) and help parties understand ramifications if they don't reach a settlement.

Article 6

Impartiality as a core feature of mediation requires detailed definition in this article. Impartiality shall be provided in all times of mediator's acting and also appearance of impartiality shall be established by mediator's endeavors. The Code should highlight that impartiality shall be ensured towards the parties, with respect to the issues and outcome of the mediation process.

Besides acting fair and in good faith, a mediator shall act competently. Quality and integrity of the process could be ensured also if a mediator acts promptly and diligently.

Article 7

This article aims to provide informed consent of the parties about the mediation process as the basis for the mediation agreement. Mediator's duty to inform parties about the basic features of the process and differences to litigation could support the approach by which mediators would perform mediation information sessions in court-related mediation schemes.

Mediator's duty to encourage information exchange during mediation is explicitly already addressed in the article 5 and therefore in this article could be deleted.

Article 8

Paragraph 1 provides that mediator's background information with respect to his/her competence and experience should be made available but it is not clear whether this should be considered as mediator's duty or an obligation of an authority, responsible for maintaining mediator's registry.

In fact, this duty follows the main ethical principle that a mediator shall mediate only when he/she has the necessary qualification and experience to satisfy the reasonable expectations of the parties. Thus, it would be desired to insert this main principle into the Code, while in the explanatory commentary of this principle, all related obligations could be described (see Model Guide: competence)

Paragraph 2 is problematic because it states that a mediator should highlight and verify with the parties so called retention issues before the beginning of mediation. From the legal point of view is therefore a key question when mediation begins. The law on mediation procedure is silent regarding the issue of a date on which mediation begins (see the remarks concerning the beginning of mediation in the report on the Law on mediation procedure). Even more, the Law on mediation procedure in article 18 explicitly regulates mediator's duty to inform the parties about the process characteristics and it provides that a mediator should do this in the beginning and not before beginning of mediation procedure. The Code and the Law on mediation procedure are not in compliance regarding this issue.

In addition, unlike the Code, the Law on mediation does not require from mediator to verify parties' understanding. The Code therefore imposes a new obligation upon mediators which wouldn't be easily implemented and tested in case of alleged breach therefore it is suggested to modify this paragraph accordingly.

Article 9

This article imposes a duty to agree on the rules of procedure also on the parties to the dispute. Even in case that the Code is considered as an integral part of any mediation agreement (article 10 of the Law on mediation procedure), such a regulatory technique is not recommendable because the Code is aimed to determine the conduct of mediators, not the parties.

Determination of ground rules of mediation proceedings is implied feature which derives from the basic rule that a mediator should conduct mediation in a way he/she deems appropriate, taking into account the wishes of the parties unless parties agreed otherwise.

Article 10

First paragraph deals with the main principle of mediation, namely, self-determination of the parties but in a rather descriptive way. The wording of this paragraph should be improved in a way that it would prescribe a duty of a mediator to recognize that mediation is based on the principle of self-determination of the parties.

Second paragraph is merely a repetition of what is already contained in paragraph 2 of the article 8 (which should be changed anyway). From the reason of consistency. It is suggested to insert mediators duty to inform the parties about his/her facilitative and not adjudicative role into revised paragraph 2 of article 8.

Article 11

This article covers one aspect of confidentiality, that is: protection of discussions and information from disclosure to the outside world.

First sentence of the paragraph 1 is a very general description regarding the importance of principle of confidentiality and could be deleted.

Third sentence of paragraph 1 is repeating what is already contained in paragraph 2 of article 8 and should be included in the revised version of this paragraph as it is explained above.

Second and third paragraph are rather prescriptive norms. They cover certain but not all possible situations which need interpretation of mediator's duty to preserve confidentiality. Confidentiality is an unsettled area of law. There are various aspects of confidentiality which might raise questions as to whether the rule of mandatory obtaining of parties consent before any revealing of information to third parties could apply. For example, to what extent this rule may apply with respect to disclosure to courts or how to protect interests of those parties in bankruptcy proceedings that were not referred to mediation. Another important question is should the mediation communications be privileged even when involving threats to inflict bodily harm.

It would be more appropriate to adopt all-encompassing approach with a general principle of the Code that a mediator shall maintain the reasonable expectations of the parties with regard to confidentiality of information, arising out of or in connection with the mediation.

Paragraph 4 is not a provision which should be contained in a Code since it regulates the relationship between mediation and litigation. Such a norm is necessary part of legislation on mediation. It seems that a Code tries to improve regulatory framework for mediation due to its weak regulation of this issue but this is not appropriate legislative technique. The same finding applies regarding paragraph 6 of this article. There is an obvious need to regulate interaction between mediation and litigation regarding inadmissibility of evidences, which were produced solely for the purpose of mediation. Nevertheless, since the Code is binding instrument for mediators and not for the parties, it overregulates the issues concerning inadmissibility of evidences (see also the Report on the Law on mediation procedure).

Article 12

This article regulates the protection of information, conveyed by one party to the mediator, from disclosure to another party. The wording of the second sentence doesn't comply with article 7 paragraph 2 of the Law on mediation procedure since it provides that a mediator has a discretionary power whether and how much of information obtained during caucusing he/she will disclose to another party. The Law on mediation procedure is quite clear on this issue since it prescribes that a mediator shall not disclose such an information to another party unless agreed upon otherwise.

This article should be therefore changed in accordance to the Law on mediation procedure.

Article 13

Article 13 addresses two main principles of meditation: impartiality and neutrality. These two principles are so important that it would be desirable to define mediator's duties with respect to impartiality and neutrality in two separate articles.

Impartiality could be defined in a way that a mediator shall at all times act, and endeavor to be seen to act, with impartiality towards the parties, with respect to the issues and to the outcome of the mediation process and shall be committed to serve all parties equally with respect to the process of mediation. The added value of such definition of mediator's duty to be impartial is that it underpins also the appearance of impartiality and clearly provides that it is a mediator's core duty all times during mediation process.

Such general principle would in any case need further explanations in commentary (see Model Guide: impartiality).

This article should also contain the demand for mediator's withdrawal from the case if a mediator wouldn't be able to ensure his/her impartiality as it is already envisaged in paragraph 2 regarding neutrality.

As regards mediator's neutrality, it should be linked to his/her independence, which is not mentioned in the Code. Independence and neutrality should be defined in a way that a mediator must not act, or, having started to do so, or continue to act, before he /she disclosed any circumstances, reasonably known to the mediator, that may, or may be seen to, affect his/her independence or conflict of interest.

Since a conflict of interest is a dealing or relationship that might create an impression of possible bias, it is recommended here to address the issue of conflict of interest within a provision on neutrality and independence rather than in a separate article.

Detailed explanation of necessary disclosures concerning circumstances which could influence the perception of mediator's neutrality and independence should be provided in the commentary to this article (see the Model Guide: independence and neutrality.

Article 14

See comments to the article 13.

Article 15

This article addresses the issue of substantive expertise, when needed in mediation but only with regard to feasibility to engage expert with required substantive expertise or lawyers when pro se parties wish to draft an agreement. However, this article is silent as to how should mediator act in a dispute in which a specialized subject matter expertize is needed, for example in patent dispute. It is a matter of a quality and integrity of the process, therefore it should be dealt with in an article, concerning mediators' duty to act diligently, fairly, efficiently and promptly, subject to the standard of care, owed to the parties. Implied feature of such a duty is that mediator has to decline to serve in those matters in which he/she is not competent.

Article 16

Declaratory nature of first paragraph should be, if necessary at all, included in the commentary to this article. It is not an issue with ethical nature by itself.

Second paragraph which provides that a mediator shall assist parties in drafting of a written settlement agreement, is extending the mediator's powers as prescribed in article 24 of the Law on mediation procedure because article 24 provides that the parties themselves and not a mediator shall draft the agreement.

Third paragraph is another provision which should be adopted by the legislator since it regulates conditions for binding effect of mediated settlement.

Fourth, fifth and sixth paragraph are also typical legislative provisions since they regulate termination of mediation proceedings. Obvious weaknesses and shortcomings of the Law on mediation procedure could not be replaced by the set of rules in self-regulatory instrument.

Article 17

Mediator's competence is one of the key ethical principles and duties. For the purpose of consistency it is recommended to address this issue in the same article, dealing with this issue (see remarks on article 8).

Article 18

This article is aimed at defining two key ethical issues: advertising and solicitation on one hand and mediator's fees on another hand. Both are quite sensitive and require further comments and explanations (see Model Guide). General definition of advertising and solicitation should be therefore very simple by stating that a mediator should be truthful in advertising and solicitation for mediation while as regards fees, when not already provided, a mediator shall fully disclose and explain the basis for compensation, fees and charges to the parties.

Article 19

This article is intended to promote and ensure respect and cooperation with other fellow mediators or experts and doesn't raise important remarks.

Chapter 8

ASSESSMENT OF THE REGULATORY FRAMEWORK FOR ARBITRATION

INTRODUCTION

Bosnia and Herzegovina consists of the Federation of Bosnia and Herzegovina (hereinafter: FBiH), the Republic of Srpska (hereinafter: RS) and the Brčko District. All three units have authority to legislate on the matters of civil and criminal procedure. Apart from the relevant legislation of BiH and the three entities, this report also applied CMS Guide to Arbitration, Vol I, Arbitration in Bosnia and Herzegovina, written by Emina Saračević, Adis Gazibegović and Indir Osmić; INFOKOM - Glasnik of the Foreign Trade Chamber of Bosnia and Herzegovina no. 54, year V, December 2012, p. 12-13; Overview of Mediation in Bosnia and Herzegovina by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina; The Report about

the Pilot Project “Court Settlement” within the Project of the Improvement of the Efficiency and Effectiveness of the Judiciary by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, January 2014 and ADR National Report for Bosnia and Herzegovina Civil Law Forum, Albania, March 2013, written by Dina Duraković-Morankić and Nevena Jevremović.

Despite the fact that BiH is equipped with more or less modern legal framework for all the above mentioned ADR processes, it seems that the (business) practice has been sceptic about surrendering the jurisdiction of the state courts to ADR mechanisms within legal system of BiH. The purpose of the present report is thus to review and analyse the current regulatory and operational framework for ADR in BiH. A particular attention will be paid to arbitration. Then the report will assess the main issues with regard to ADR processes and consequently identify the potential areas where improvements are needed. Finally, the report will suggest that the current relevant law on ADR should include some additional provisions as well as amendments of certain provisions in light of prevailing international standards and specifically as regards arbitration the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (hereinafter: the UNCITRAL Model Law, U.N. Doc. A/40/17, Annex I (June 21, 1985) as amended (July 7, 2006)). Additionally, it will recommend the promotion of ADR processes by all possible means, all that in order to strengthen the ADR system of BiH and make is a reliable and widely employed means of dispute resolution in *pari materia* with judicial recourse.

ARBITRATION

GENERAL

Arbitration in BiH is regulated by the Civil Code Procedures, namely in articles 434 – 453 of the Civil Code Procedure of the Federation of Bosnia and Herzegovina (hereinafter: The Code, Official Gazette FBiH no. 53/03), articles 434 – 453 of the Civil Code Procedure of the Republic of Srpska (Official Gazette RS no. 58/03) and articles 413 – 432 of the Civil Code Procedure of the Brčko District (Official Gazette of the Brčko District BiH no. 08/09). Since the provisions of all three entities are identical; for the sake of describing the legal framework of arbitration in BiH, the provisions of FBiH legislation will be used. It should be mentioned that the procedure for the recognition and enforcement of foreign arbitral awards is found in the Chapter IV (articles 97 – 101) of the Conflict of Laws Act (Official Gazette SFRJ no. 43/82, 72/82, Official Gazette R BiH no. 2/92, 13/94). In addition, the labour law acts of all three entities provide for the possibility of arbitration in individual and collective labour disputes.

Generally the legislation on arbitration in BiH is compatible with modern arbitration practices and solutions. It follows the principles of the UNCITRAL Model Law and it covers issues relating to the parties and the arbitration agreement, the appointment of an arbitral tribunal and its members, general rules regarding the arbitral proceeding and the involvement of the state courts.

Pursuant to articles 434 and 435 (1) of the Code, the parties may agree to resolve their present or future dispute on the rights that they can freely dispose with by way of arbitration. As for the arbitrability of legal disputes in BiH, the disputes are not arbitrable if they fall inside the exclusive jurisdiction of the state courts. Arbitration is not permitted in matters of criminal law.

Although the Code does not expressly state certain general principles governing arbitration such as party autonomy, equal treatment of the parties, equality of arms and due process, it can be assumed that some general principles governing the civil procedure also apply to arbitral proceedings, absent an agreement to the contrary. However, in order to facilitate the interpretation of the Code, it would be useful to incorporate in the Code at least the reference to internationally accepted principles, the need to promote uniformity of application of the UNCITRAL Model Law and/or the observance of good faith.

BiH offers institutional and ad hoc arbitration. In case of institutional arbitration, e.g. before the Foreign Trade Chamber of Bosnia and Herzegovina Arbitration Court (hereinafter: the Arbitration Court), the rules of procedure of this forum apply. The proceedings are managed and administered by the Arbitration Court. Using the same arbitration rules, institutional arbitration provides uniformity and predictability of the procedure. By using a system of accreditation requirement and responsibilities of the arbitrators, this arbitration institution also guarantees a certain degree of quality control. In case of a foreign element to the agreement or dispute, the parties may also choose a foreign arbitration forum such as the ICC Arbitration Court or the Arbitration Court of the Austrian Chamber of Commerce; however the role of a local arbitral institution like the Arbitration Court should not be underestimated due to knowledge of regional customs, language and geographical proximity. It should be added that there are also permanent arbitral institutions in BiH specialised in specific disputes such as the arbitration institution within the Commission for Concessions of BiH, the Sarajevo Stock Exchange and the Regulatory Commission for Electricity of FBiH.

On the other hand, ad hoc arbitration in BiH is established on a case-to-case basis by way of agreement between the parties and the arbitrators. Ad hoc arbitration provides the parties with flexibility to devise rules and procedures appropriate to their interests and content of the disputes. However, devising and agreeing to a set of ad hoc procedural rules requires time, engagement of experts and negotiations between the parties. Consequently administrative costs of institutional arbitration such as the Arbitration Court could be in fact lower than the costs of ad hoc arbitration.

The benefits of arbitration are numerous. Arbitration procedure is less formal, faster and less expensive than litigation. Arbitrators were previously chosen by the parties themselves and arbitration proceedings are conducted in private. Unless the possibility of contesting the arbitration award before a higher instance arbitral tribunal has been provided by the arbitration agreement, the arbitral award has the force of a binding court judgement and is not a subject to any further review on the merits (article 449 of the Code) which means that no extra costs can be incurred as well as unlike litigation, such solution saves time, possibly measured in years. There is no available data on duration of institutional and/or ad hoc

arbitration in BiH; however an arbitration procedure before the Arbitration Court usually lasts from six to twelve months.

There is no available statistics on arbitration in BiH as well as no available statistics on the use of arbitration clauses in contracts. Although arbitration has many advantages, it is nevertheless deemed as a novelty and is not very popular in BiH. An arbitration clause is not frequently included in contracts in BiH. Typically, only foreign companies opt for foreign arbitration forums. Moreover, some larger companies in the local market which form a part of the international affiliation such as Siemens, Energopetrol or G-Petrol use arbitration clauses in their contracts; however they face a problem of a lack of understanding of an arbitration procedure by their local partners. Nonetheless, in domestic cases, especially in commercial disputes, an arbitration clause should generally be included in the contracts because the parties are then able to nominate one or more arbitrators, who can be trusted for their expertise and experience, thus quickly reaching a final solution of the dispute. An example of such an arbitration clause is found on the website of the Arbitration Court (see http://komorabih.ba/) and on the website of The Foreign Trade Court of Arbitration of the Republic of Srpska Chamber of Commerce and Industry (see http://www.komorars.ba/pkrs/static/92/regulativa_PKRS). In order to promote the use of arbitration clauses, BiH should consider creating various model arbitration clauses by taking into account specific circumstances, different contexts and the complexity of a dispute. Particular attention should be paid to the case when more than two parties are involved and to the so-called multi-tiered clauses that combine several dispute resolution services. The drafting process should follow the guidance of the American Arbitration Association (Drafting Dispute Resolution Clauses, A Practical Guide, https://www.adr.org./). Additionally, the participation of the Bar Associations and Chambers of Commerce of all three entities and of BiH should be enabled so that they would be able to express their needs, ideas and recommendations.

ARBITRATION CLAUSES AND AGREEMENTS

The arbitration agreement and its effects

Arbitration presupposes an agreement of the parties to subject their disputes to either institutional or ad hoc arbitration. Pursuant to article 435 of the Code an arbitration agreement may be concluded with regard to a certain dispute as well as with regard to possible future disputes that could arise out of a certain legal relation (an arbitration clause). An arbitration agreement excludes jurisdiction of national courts to rule in a dispute. As article 438 of the Code states, if the parties agreed to entrust the resolution of a certain dispute to the arbitration, the court which received the claim concerning the same dispute among the same parties proclaims itself incompetent upon defendant's objection as a part of the respondent's answer to the claim, revokes actions commenced in the proceedings and dismisses the lawsuit. In the future it could be added expressly by the law that this happens only if it is not established that the arbitration agreement does not exist, is null, has come out of force or cannot be enforced.

The Code does not contain a provision which would enumerate the elements of an arbitration agreement; however an arbitration agreement should determine the seat of the arbitration,

procedural rules, number of arbitrators, procedure of appointing arbitrators and language of the procedure. The parties are free to choose any model arbitration clauses and agreements.

Even if it is not expressly provided by the Code, an arbitration agreement is usually drafted to include claims arising "out of or in connection with" a particular contract. This wording not only encompass the legal validity and enforceability of the contract but it is also broad enough to cover different kinds of claims, including damages and tort.

The Code does not provide a situation what happens if a contract containing an arbitration clause is to be found null or void. Even if there is no explicit provision regarding this situation, according to the legal theory of BiH an arbitration clause is an independent legal act, which remains valid if any part or provision of the main contract, containing an arbitration clause, is found null or void by a court or an arbitral tribunal. However, it is most likely that the arbitration agreement would also be deemed as null or void as a result of the nullity of the main agreement.

Validity of the arbitration agreement

As for the validity requirements, an arbitration agreement must be in writing and signed by both parties. The arbitration agreement is considered to be concluded in writing also when concluded by means of exchanging letters, telegrams, telexes or other communication means that may provide the written evidence of concluded contract; moreover also when concluded by means of exchanging the claim in which the plaintiff states the existence of that contract and the response to the claim in which the defendant does not dispute it. It may be proven only by documents. Furthermore, an arbitration contract shall be considered legitimately concluded also when the provision on jurisdiction of the arbitral tribunal is embodied in the general requirements for the conclusion of legal business. The formulation in the Code of what is deemed written is quite broad and flexible. However, the UNCITRAL Model Law points out that where the willingness of the parties to arbitrate is not questionable, the validity of the arbitration agreement should be recognized. Therefore it confirms the validity of the contract also when it was concluded orally or by conduct, provided that the content is recorded in writing later. Furthermore, it omits the condition of the signatures of both parties and provides the possibility of the use of electronic communication.

Language

Moreover, the Code does not provide any provisions on the language of the arbitration procedure so this issue basically rests on the parties' will. In principle, parties are free to agree to conduct the arbitration in any language they wish. In practice, parties should consider the languages spoken by the parties, the languages that the agreements and the evidence will likely be in, and the extent to which the choice of language may affect the choice of arbitrators. It is also possible to conduct an arbitration in two languages. However, such an arrangement may increase the costs of arbitration procedure due to the translation of all documents and interpretation of oral hearings. If parties have not agreed on language of arbitration, the arbitral tribunal have the power to decide these matters.

The seat of arbitration

The Code does not include any provisions on the seat of arbitration. In BiH parties are free to choose the seat as well as they can decide that the arbitrators may conduct hearings and other acts of procedure wherever they find it suitable and in compliance with the procedural rules, also outside BiH. If the parties do not specify the seat in the arbitration agreement, the arbitral tribunal itself decide on this matter. It should be noted that it is common for the parties in BiH to decide that the arbitral proceedings shall be held outside BiH.

Applicable substantive law

In relation to the form of an arbitration agreement, pursuant to the BiH conflict of law rules, an agreement will be considered valid if it meets the standards set out either in relevant applicable laws of the country in which it has been concluded or relevant applicable laws of the country that governs the content of the agreement.

As regards the content of an arbitration agreement, parties are free to choose the law to govern their dispute. Choosing Sarajevo as the seat of arbitration does not result in application of substantive law of BiH to the dispute. It is actually common for the parties to choose foreign law as the governing law for their arbitration. The arbitrators can also use *ex aequo et bono* principle if expressly agreed by the parties.

APPOINTMENT OF THE ARBITRATORS

Number of appointed arbitrators

As provided by article 437 of the Code, parties are free to determine the number of arbitrators to conduct the arbitral proceedings, albeit that the number of arbitrators must be an odd number. Unless the number of arbitrators is determined by the contract, each party appoints one arbitrator and they jointly elect the president. In practice, a three-arbitrator-tribunal will result in higher arbitration costs as well as it may make it more difficult to schedule hearings at short notice. On the other hand, a three-arbitrator panel is more appropriate for complex or technical disputes and in cases where the parties are from jurisdictions with different legal systems or commercial customs. It should be noted that in maritime arbitration the arbitral tribunal traditionally consists of two arbitrators, therefore the limitation of odd number of arbitrators in certain cases seems to be inappropriate.

Failure to appoint (an) arbitrator(s)

A party, who is supposed to appoint an arbitrator on the basis of the arbitration agreement, may be requested by the adverse party, who has already appointed an arbitrator and informed the adverse party about it, to perform the appointment and notify the adverse party within fifteen days. Similarly each party may send the requests to a third person that is to perform the appointment of an arbitrator. In case that an arbitrator of the arbitral tribunal has not been appointed on time, or the arbitrators cannot agree on the choice of the president of the arbitral tribunal, and the contract does not state otherwise, the court that would have had original jurisdiction over the dispute according to the applicable rules of civil procedure had the dispute not been subject to arbitration must step in and appoint the arbitrator(s) upon party's request. Appeal is not allowed against that decision of the court. However, any party may request in the claim that the court terminates the arbitration contract if the parties cannot agree on the appointment of arbitrators who they need to elect or a person who has been appointed arbitrator in the contract does not want to or is not able to perform that duty. Moreover, the court terminates the arbitration contract if the parties do not wish to exercise their right to request the court to appoint an arbitrator or the presiding arbitrator.

Challenge of an arbitrator

Arbitrators have to be independent regardless of whether they were appointed by one party or jointly by both. They are requested to disclose any circumstance that could have raised doubts as to their impartiality and independence. They are not allowed to discuss the substance of the dispute privately with any of the parties. The domestic laws do not provide explicit terms on arbitrator immunity. The parties may, in their arbitration agreement, provide criteria for arbitrators to be appointed, such as nationality or professional background.

An arbitrator may be challenged as well as he/she is obliged to exempt himself/herself from the duty of the arbitrator on the same grounds that prevent judges to perform their function (the Article 357 of the Code). However, it should be noted that this solution is too broad and therefore not completely appropriate in case of arbitrators. The Code should amend this provision in light of the UNCITRAL Model Law, so that an arbitrator may be challenged only if

circumstances exist that give rise to justifiable doubts as to his impartiality and independence. These provisions are mandatory and cannot be waived by the agreement of the parties. A party who has individually or together with the adverse party appointed an arbitrator may challenge him if that reason occurred, or the party learned about it, after the appointment of the arbitrator. The court shall decide on the exemption. If no deadline was agreed by the parties, the Code does not provide within what time limits the party who intends to challenge the arbitrator can file a request. In view of the urgency of the matter the Code should set short time-periods as well as it should specifically state that the decision on this matter is not appealable.

THE ARBITRATION PROCEDURE

Duties and procedural powers of the arbitrators

The duties of the arbitrators and their procedural powers are not specifically outlined in the Code. According to article 443 of the Code, the arbitral tribunal leads the arbitration proceeding in a way it considers appropriate (limited by the mandatory rules and principles of the procedure) unless the parties have agreed otherwise in their arbitration agreement. The Code thus in this aspect consecrate the contractual freedom of the parties once again. Additionally, in case that the arbitrators fail to decide on the procedure, they should notify the parties thereof. The arbitrators may speed up the procedure by holding separate hearings for preliminary issues and discrete questions. The question of liability and question of quantum may be dealt with in two separate hearings. The tribunal may request written statements of the witnesses and may fix time frames for oral statements (procedural timetable and case management tasks). It may also order any party to give security for the costs of the procedure.

Evidence

The tribunal is not bound by any rules of evidence that apply in court proceedings and freely decides what evidence to admit and then how that evidence should be weighed in reaching its findings of fact. It may investigate the facts on its own initiative, however it has to disclose the evidence to the parties and give them opportunity to make submissions. The arbitration agreement or the agreed arbitral rules may provide for a possibility of appointment of independent experts. The use of oral hearings or written proceedings is subject to the parties' agreement. If parties have not made such an arrangement, the arbitration tribunal may decide whether the procedure will be conducted only in writing. At the hearing, witnesses are usually cross-examined. The arbitral tribunal cannot impose coercive measures or penalties on witnesses, parties and other participants in the proceedings (article 444 (1) of the Code).

Pursuant to article 444 (2) of the Code the arbitral tribunal may request the court territorially competent for providing legal assistance to present evidence that the tribunal cannot present on its own. The request of the arbitral tribunal is applied in the procedure on securing evidence.

Confidentiality

As to confidentiality, there are no specific provisions in law of BiH. Accordingly, parties should incorporate a confidentiality clause into their arbitration agreement. Moreover, the Code does not provide for the application of the rules of privilege such as legal advice privilege, litigation privilege and "without prejudice" privilege.

Commencement and termination of arbitration

The Code does not contain any provisions regarding the commencement and termination of arbitration. Therefore the manner of commencement and the deadlines for the request depends on the arbitral rules, provided with the arbitration agreement, or the arbitral rules

that have been determined by the arbitrators, whereas termination of the proceedings can be regulated by the parties in their arbitration agreement. However, even if not expressly provided in the Code, usually the claimant firstly files a statement of claim, and the respondent then files a statement of defence or a counter-claim. The order of the procedure, the deadlines for submissions, the number of them and the exchange of submissions and documents between the parties are determined in the arbitration agreement or set out by the arbitrators.

It is also not regulated by the Code what happens if the respondent does not file a statement of defence in time. The arbitral tribunal's authority if this occurs should therefore be addressed in the arbitration agreement.

Competence to rule on own jurisdiction and interim measures

There are two other disadvantages of the regulation of the arbitration procedure in BiH. First it does not provide any provisions regarding competence of the arbitral tribunal to rule on its own jurisdiction which means that the parties should set out the arbitral tribunal's competence to rule on its own jurisdiction in the arbitration agreement. Following the UNCITRAL Model Law rules, if the opposing party challenges the jurisdiction of the tribunal and argues, that the arbitration agreement does not cover the dispute in question or that the dispute requires a decision, which exceeds the powers granted to the arbitral tribunal by the arbitration agreement or that the arbitration agreement is null or void, an arbitral tribunal rules on such a challenge. The challenge must not be raised later than in a statement of defence. Within thirty days from the day such a decision was received, a party may file a challenge in a (specialised) court. The arbitral tribunal can proceed with the arbitration procedure and issue an arbitral award.

Second it does not contain the power of the arbitral tribunal to order interim measures. However, parties may agree on that power of the tribunal, provided that it is in accordance with the mandatory provisions of Bosnia and Hercegovina legislation.

Court involvement in arbitration

In cross-border and international disputes, arbitration is especially attractive dispute resolution method mainly because of unpredictability of national courts and their jurisprudence. It is therefore justified to limit and clearly define court involvement in arbitration. While the laws of BiH do not set out the involvement of the courts in detail, most of the matters are sufficiently regulated. The Code provides the instances and limits of court assistance and supervision.

THE ARBITRAL AWARD

Generally speaking, an arbitral tribunal may grant all remedies as a national court, except for a remedy binding a third party, who was not a party to the arbitration agreement. The Code does not specifically define within what time period is the arbitral tribunal bound to issue an arbitral award; however parties may define the maximum length of the proceeding in their arbitration agreement.

There are no explicit provisions relating to the arbitral tribunal's power to award interest and costs. However, the parties may agree that the arbitral tribunal may include this in the award. The arbitral tribunal has therefore the power to decide which party is liable for the costs of the arbitration, what percentage of the costs, the amount of costs and on what basis. The decision on the costs entails costs, incurred by the parties, including lawyers' fees, arbitrators' fees, administrative costs, costs of administration procedure and other procedural costs.

When the arbitral tribunal is comprised of more than one arbitrator, the judgement is reached by majority of votes, unless otherwise stipulated by the arbitration contract. Any party may request in the claim that the court terminates the arbitration contract when the arbitrators cannot reach a required majority of votes. The arbitration award needs to be explained unless the parties have agreed otherwise.

Legislation of BiH contains no provisions on settlement before an arbitral tribunal. It is nevertheless possible that the parties request the tribunal to record their settlement in an arbitral award, which according to the Enforcement Procedure Acts of the FBiH 2003, the RS 2003 and the Brčko District 2013 has the same legal effects as a court settlement.

ENFORCING OR CHALLENGING AN ARBITRAL AWARD

Unless the possibility of contesting an arbitration award before a higher instance arbitral tribunal has been envisaged by the arbitration agreement, the arbitration award shall be considered final for the parties. In the latter case they must define the deadline for the appeal, the composition of an arbitral tribunal and the scope of review. The original copy of the arbitration award and the delivery receipt are kept in the court. At the request of the party, the court puts a note on the copy of arbitration on its finality and enforceability.

Recognition and enforcement of a domestic arbitral award

The procedure for recognition and enforcement of domestic awards is governed by the Laws on Enforcement Procedure (Official Gazette FBiH no. 32/03, Official Gazette RS no. 59/2003, Official Gazette of the Brčko Distrikt no. 39/13). An enforcement procedure starts by filing a motion for enforcement before the competent court and if all legal requirements have been fulfilled, the court issues a decision of enforcement. A decision of enforcement do not need to contain any reasoning and could be issued only by affixing a seal to the motion for enforcement. It is not provided by the BiH's law that the court may deny a request for declaring a domestic arbitral award as enforceable if it discovers that the subject of the dispute cannot be subject to arbitration procedure or if the arbitral award is contrary to the public order of the BiH.

Recognition and enforcement of a foreign arbitral award

On the contrary, the recognition and enforcement of foreign awards can be found in Chapter IV of the Conflict of Laws Act. Additionally, BiH also signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, June 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3) which provides the foundation for cross-border enforcement of arbitral awards. However, it expressed two declarations and a reservation, namely that it will apply the Convention only to awards made in territory of another Contracting State, only to differences arising out of commercial relationships and only to those awards rendered after the Convention comes into force. Arbitration awards rendered in a country which has not signed the New York Convention are therefore not enforceable in BiH under the New York Convention provisions but under slightly more strict provisions of the Conflict of Laws Act.

A foreign award is defined as an award rendered abroad as well as an award rendered in BiH but applying foreign procedural law. A party, seeking recognition of a foreign arbitral award, must provide the original or a certified copy of the arbitral award and the arbitration agreement, whereby the court may request their translation. In FBiH, court fees for an application varies from canton to canton, while in RS the party seeking the recognition of a foreign arbitral award has to pay maximum amount of BAM 10,000. The required court fees must be paid irrespective of the success of an application.

According to the Conflict of Laws Act, the recognition and enforcement of a foreign award can be refused only at the request of the party (and not *ex officio*), if that party proves that the subject matter of the dispute is not arbitrable, if the court of BiH has an exclusive jurisdiction of the subject matter, if the recognition and enforcement of the award would be contrary to public order, if domestic courts of the country in which the reward was rendered do not reciprocally enforce the awards rendered in BiH, if the arbitral agreement is invalid or does not fulfil all the prescribed formal requirements, if the party against whom the award was rendered was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case, if the arbitral tribunal was not appointed or the arbitral proceedings were not conducted in accordance with the arbitration agreement, if the award deals with a dispute that do not fall within the terms and the scope of the arbitration agreement, if the award has not yet become binding on the parties or has been set aside by the court and if the award is not clear or is contradictory. Although the list of reasons is not exhaustive, the courts in BiH have taken a rather strict approach and have accepted only requests based on those explicitly listed reasons. Except for the reciprocal recognition and enforcement condition and the obligation of the clear and not contradictory award, other grounds for refusal are more or less identical to the grounds, incorporated in article 5 of the New York Convention. Moreover, the New York Convention provides two grounds that the competent authority/the court may consider on its own initiative, namely non-arbitrability of the subject-matter of the dispute and violation of public policy of that country. An appeal against a decision on the enforcement of a foreign award may be filed within fifteen days from the date of the delivery of the court decision. The submission of a request or an appeal does not *per se* suspend the course of the enforcement procedure, however a settlement of a claim is postponed until the decision of the court is rendered with regard to the filed request or appeal. Since there was only one case that dealt with the recognition and enforcement of a foreign award in BiH, in which case the award was rendered by the International Arbitral Tribunal having its seat in Vienna and the recognition was rejected because the Cantonal Court of Tuzla concluded that the court of BiH has an exclusive jurisdiction of the subject matter since it was related to a claim for damages arising out of a lease agreement of real estate located in BiH (case no. R-72/02), it is difficult to acknowledge whether the stance of the courts in BiH towards the recognition and enforcement of foreign arbitration awards is favourable or strict. Nevertheless, it is important that the courts refrain from the unduly widening of the concept of public policy in order to find additional grounds for rejection the enforcement of foreign awards.

Pursuant to the entity laws on courts, the second instance courts have the competence to decide on recognition of foreign arbitral awards, i.e. cantonal courts in FBiH and district courts in RS, while the enforcement procedure is held before municipality courts in the first instance in FBiH, before basic courts in RS and before the Basic Court in the Brčko District.

Arbitral awards, governed by the law of BiH and rendered in BiH, are enforceable in all countries, who have signed the New York Convention, in all other countries they are enforceable under the conditions of their national legislation.

Challenging an award

An arbitration award may be set aside only upon the party's claim (and not *ex officio*). The court that would have had jurisdiction over the dispute if the arbitration contract had not been made, annuls the arbitration award exhaustively in the following cases: if an arbitration contract has not been concluded at all, or if the contract is not valid or is ineffective; if in regard to the composition of the arbitral tribunal or in relation with the decision making, a provision of this law or arbitration contract has been violated; if the arbitration award does not contain reasons, or if the original copy of the arbitration award or other copies have not been signed in the prescribed manner; if the arbitration tribunal has exceeded the limits of its power; if the operative part of the decision is illegible or contradictory; if the arbitration award is in conflict with the Constitution of BiH and the Constitution of FBiH; if any of the reasons

for reopening of the proceedings referred to in article 255 of this Law which stipulates the reasons for the reopening of the proceedings exist. The provided grounds are numerous and particularly the latter one should be omitted in accordance with the comparative European legislation on this issue and the UNCITRAL Model law provisions. The provisions relating to the procedure for setting aside an award are mandatory and cannot be waived by the parties. There is no possibility of a partial annulment and other remedies such as returning the case to the arbitral tribunal for a new proceeding and an adjournment of the decision on the annulment. A complaint requesting the annulment of the arbitration award may be filed with the competent court within thirty days from the date on which the award was rendered to a party, however the annulment must not be requested later than one year after the finality of the arbitration award.

ARBITRATION AT THE FTC

From the aspect of foreign investors it is particularly interesting to assess, how user-friendly is arbitration in BiH when cross-border or international disputes with national companies occur. The Court of Arbitration, organised in the Foreign Trade Chamber of Bosnia and Herzegovina, is an independent arbitration institution that conducts conciliation and settle commercial disputes of domestic and foreign legal and natural persons when the parties have agreed to submit their dispute to jurisdiction of the Arbitration Court. The parties also have the opportunity to settle their dispute themselves throughout the proceedings and the concluded settlement has the same validity as an arbitration decision. The seat of the Arbitration Court is based in Sarajevo.

The Arbitration Court offers organisational, technical and administrative support to the arbitration proceedings. The administrative support includes a suitable venue, “case management”, acting as a conduit for communications between the parties and the arbitrators and is carried out mainly by the Secretariat of the Arbitration Court. If parties cannot agree on whom to nominate for an arbitrator, the President of the Arbitration Court may appoint one or more arbitrators. The Arbitration Court does not, based on a contractual agreement with the parties, provide administrative support to ad hoc arbitration as well.

The specificity of the Arbitration Court is the possibility of conciliation, which can be requested irrespective of whether the parties have agreed on the jurisdiction of the Arbitration Court or not. The process of conciliation is independent from the arbitration procedure. If a conciliation procedure fails, none of what was stated during a conciliation procedure bind the parties. A settlement shall be deemed to have been concluded when the parties sign the record. A settlement reached in this way shall not have the force of a final award of the Arbitration Court; however if the parties make a joint proposal to this effect, the settlement reached in the conciliation proceedings may be made in a form of an arbitral award.

The Arbitration Court adopted its Rules (Official Gazette BIH no. 39/03). The provisions of the Rules generally apply to both international and domestic arbitration. Should there be a difference in the procedure, it is specifically outlined. The rules therefore apply to disputes between the parties which have a place of business or residence in the territory of BiH as well as in those cases in which at least one party is domiciled or has a place of business in the territory of another state.

Unless the parties have agreed otherwise, an arbitral tribunal or an arbitrator will promptly after its appointment, determine the language or languages to be used in the proceedings. This decision applies to all written statements and oral hearings. Until that moment, the claim and evidence can be submitted in one of the languages of BiH, in the language of the main contract or in the language of the arbitration agreement. If arbitrators cannot agree on the language of the arbitration proceeding, the arbitration shall be conducted in one of the languages of BiH, at the discretion of the parties. In this case the parties in cross-border

disputes are practically forced to engage an attorney or a counsel from Bosnia and Hercegovina, even if they are not required to do so by law.

An arbitral tribunal or an arbitrator consider the jurisdiction of the Arbitration Court *ex officio*. According to article 11 with regard to article 42 of the Rules, if parties have stipulated the jurisdiction of the Arbitration Court, the acceptance of the provisions of these Rules is mandatory. If the Rules do not contain a relevant provision, the provision of the Code of Civil Procedure applies provided that a sole arbitrator or an arbitral tribunal estimates it appropriate regarding the circumstances of the case. Even if it seems that the Rules speak for quite a rigid regulation of the application of procedural rules, article 43 enables the parties to choose the UNCITRAL Arbitration Rules to be applied to the proceedings before the Arbitration Court. In this latter situation it would be useful to add an additional provision that in case that the UNCITRAL Arbitration Rules do not contain relevant provisions, the provisions of these Rules apply (see article 45 of the Rules of the Foreign Trade Court of Arbitration of the Republic of Srpska Chamber of Commerce and Industry).

As regards the substantive law, if the parties have failed to stipulate it, the arbitral tribunal or the sole arbitrator shall apply the law indicated by the conflict of laws rules that the arbitral tribunal or a sole arbitrator deem to be the most suitable to the case involved. The award may be made exclusively *ex aequo et bono* if the parties have expressly given such authorization to the arbitrators.

Pursuant to article 23, the arbitrators are chosen from the list of arbitrators, established by the President and Vice President of the Chamber of Bosnia and Herzegovina. The Panel of Arbitrators at the Arbitration Court offers a wide range of distinguished domestic and foreign experts. There are two separate lists of arbitrators, one for domestic arbitration and the other one for international arbitration. Parties to the dispute may also choose an arbitrator who is not on the list of arbitrators, provided he/she is a highly qualified person who possesses specialised knowledge in certain fields of law and business relations. The dispute may be brought before a sole arbitrator or a panel of three members. If parties have not agreed on the number of arbitrators, the dispute is brought before an arbitration panel. The parties may challenge the arbitrators and experts on the grounds set out in the Civil Procedure Codes. The President and Vice President decide on the challenge.

As a rule, hearings are held at the seat of the Arbitration Court, but at the request of the parties, the arbitral tribunal or a sole arbitrator, the President of the Arbitration Court may decide that the hearing be held at another location. However, an award can only be rendered at the seat of the Arbitration Court. It would be better and more flexible to adopt a general rule that the hearings in the procedure, administered by the Arbitration Court, are to be held at any place or venue convenient to the parties and the arbitrators.

The parties attend the hearing in person or through an authorized representative. The representative of a foreign party may also be a foreign citizen. The parties may be assisted at hearings by their counsel. The existence of an arbitration agreement stipulating the jurisdiction of the Arbitration Court does not affect the right of the parties to apply to the competent court for interim measures, however the party must notify the Arbitration Court of such application and of the taken interim measures without any delay (article 17 of the Rules).

An arbitration proceeding at the Arbitration Court is conducted in private. It is cheaper than litigation, less formal and flexible. Usually it has to be completed within one year from the date of establishment of the arbitral tribunal or appointment of the sole arbitrator which speaks for a relatively fast dispute resolution procedure. Moreover, the arbitral award is final and not appealable. It has the force of a final court judgment. In the future the Rules could introduce an accelerated arbitration following the example of the Hong Kong International

Arbitration Centre (see http://www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013) and Slovenian European Centre for Dispute Resolution (see http://www.ecdr.si/eng/rules/rules-of-procedures/rules-on-arbitration.html).
This procedure is managed by a sole arbitrator and is conducted in writing. The arbitral award has to be rendered and issued within 6 months. The costs of this procedure are even lower in comparison to the costs of classical arbitration procedure and court litigation.

Finally, it should be acknowledged that the Rules of the Arbitration Court are flexible and sufficiently regulate all the important arbitration issues. They are predominantly based on the UNCITRAL arbitration rules and follow the concepts and principles of the UNCITRAL Model Law. However, it has been observed that the Arbitration Court does not seem to have been referred to very often. Although there is no officially available statistics on the number of cases before the Arbitration Court, there were around ten cases settled in the period of 2003 to 2013, while from 2013 onwards the Arbitration Court has dealt with approximately two or three cases per year. At this point it should be added that the low number of cases handled by the Arbitration Court could be much more a consequence of the worldwide existence of highly competitive international arbitration institutions with a long-established tradition rather than being a consequence of a lack of knowledge and promotion of the relatively new Arbitration Court. Nonetheless, the question of local business to arbitration remains open. Therefore increased consideration should be given to promoting arbitration as a means of dispute settlement, particularly for small and medium-sized matters. It seems that the current practice has already gone some way down this path by organizing seminars on arbitration such as the one held in Bihać on 20th May 2015 where the Arbitration Court and its advantages were presented to the participants. Moreover, during the consultation process on the assessment of ADR/Mediation in BiH the Chambers of Commerce of all three entities expressed a strong interest to establish also local arbitration and mediation centres within the Chambers. Those activities and ideas prove that the Chambers are already aware of benefits of arbitration as well as of a lack of knowledge and confidence in this method of dispute resolution among the business people and lawyers in BiH and thus ready to take certain actions in this regard.

OPTIONS FOR FUTURE DEVELOPMENT OF ARBITRATION

For the future development of arbitration in BiH it is advised to consider the following recommendations and proposals:

- The regulatory framework for arbitration in BiH is not completely comprehensive. The provisions are provided partly in the Civil Procedure Codes, in the Enforcement Procedure Acts and in the Conflict of Laws Act. For a more uniform, transparent and consistent regulation of the arbitration issues it would be advisable to adopt a monopolistic approach of a single separate act regulation. Since the future regulation on arbitration in BiH should regardless the approach embrace the solutions from the UNCITRAL Model Law which is structured differently than current Civil Procedure Codes in BiH as well as those Codes do not regulate all the civil procedures in one single act as in some other countries like Austria and Germany, the adoption of a new single separate act would seem to be the most appropriate option for this country. Consequently, also greater comparability with other countries that adopted the UNCITRAL Model law would thus be enabled;

- The Code does not expressly state certain general principles governing arbitration. In order to facilitate the interpretation of the Code, it would be useful to incorporate in the Code at least the reference to internationally accepted principles, the need to promote uniformity of application of the UNCITRAL Model Law and/or the observance of good faith;

- In respect of the validity form requirements of an arbitration agreement, the validity of an arbitration agreement should be recognized also when the agreement is stipulated by using

electronic communication and regardless of the form if later recorded in writing. Moreover, it does not need to be signed by both parties of the agreement;

- Article 438 of the Code states that if the parties agreed to entrust the resolution of a certain dispute to the arbitration, the court which received the claim concerning the same dispute among the same parties proclaims itself incompetent upon defendant's objection as a part of the respondent's answer to the claim, revokes actions commenced in the proceedings and dismisses the lawsuit. In the future it could be added expressly by the law that this happens only if it is not established that the arbitration agreement does not exist, is null, has come out of force or cannot be enforced;

- It would be advisable to provide a provision in the Code expressly stating the separability of the arbitration clause from the underlying agreement which allows for arbitration proceedings related to an agreement whose validity is put into question;

- The Code does not deal with the determination of the rules of law governing the substance of the dispute if the parties have not jointly chosen the applicable law themselves. It should therefore undertake the solution from the UNCITRAL Model Law which envisages that the arbitrators decide what is the applicable law, based on the conflict of laws rules;

- As regards the arbitration procedure, the provisions are fragmentary and fail to address all the relevant substantive and procedural law issues. Such underregulation causes uncertainty with inherent risk of frustration of the procedure, especially if the specific issue is not stipulated in the arbitration agreement and the arbitral tribunal is not empowered and authorized to act in the matter. The Code should therefore expressly address the commencement and termination of the arbitral proceeding, statements of claim and defence, further the language of the submissions and possible oral hearings, the seat of arbitration, the appointment of experts, counsels and attorneys of the parties, the decision on costs, the exchange and communication of statements and documents, insolvency of the party, participation of a third party as intervener and multi-party arbitration. Also provisions that empower the arbitral tribunal to act if one of the parties does not participate in the proceeding are of great importance. The UNCITRAL Model Law dictates that unless the parties have agreed otherwise or unless the failure to file a statement of defence in time was not caused by a justifiable reason, the arbitral tribunal proceeds with the arbitration procedure and does not render an award based on the respondent's default. Similarly the arbitral tribunal continues the proceeding where a party fails to appear at the hearing or produce documentary evidence without showing sufficient cause for the failure;

- In maritime arbitration an arbitral tribunal traditionally consists of two arbitrators, therefore the limitation of odd number of arbitrators in this country in certain cases seems to be inappropriate;

- Usually foreign companies want to surrender their dispute to arbitration also because of the confidentiality governing their disputes. Therefore it is of great importance that the confidentiality is expressly provided by law;

- The Code should amend the provision about challenging an arbitrator in light of the UNCITRAL Model Law, so that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence and not on the same grounds that prevent a judge to perform his/her function. Also, the Code does not provide within what time limits the party who intends to challenge the arbitrator can file a request. In view of the urgency of the matter the Code should set short time-periods as well as it should specifically state that the decision on this matter is not appealable;

- The Code should provide a provision regarding competence of the arbitral tribunal to rule on its own jurisdiction following the UNCITRAL Model Law rules which state that if the opposing party challenges the jurisdiction of the tribunal and argues, that the arbitration agreement does not cover the dispute in question or that the dispute requires a decision, which exceeds the powers granted to the arbitral tribunal by the arbitration agreement or that the arbitration agreement is null or void, an arbitral tribunal rules on such a challenge. The challenge must not be raised later than in a statement of defence. Within thirty days from the day such a decision was received, a party may file a challenge in a (specialised) court. The arbitral tribunal can proceed with the arbitration procedure and issue an arbitral award;

- Interim measures are increasingly relied upon in the practice of international commercial arbitration. A possibility of such measures granted by the court already exist under the Arbitration Court (article 7 of the Rules), however the possibly new adopted arbitration act should explicitly provide not only the court-ordered interim measures but also the possibility of granting interim measures and preliminary orders by the tribunal in order to secure parties' claims. Unlike interim measures, preliminary orders preserve *status quo* until the arbitral tribunal issues an interim measure adopting or refusing the preliminary orders and are not subject to court enforcement. When enacting the provisions on interim measures, BiH should follow the UNCITRAL Model Law provisions, in particular the ones on conditions of granting such measures and the recognition and enforcement regime;

- In BiH the role of the competent court in the process of arbitration has the one that would have had jurisdiction over the dispute in the absence of an arbitration agreement. In the spirit of uniformity of the decision-making, particularly in cases as setting aside an arbitral award, appointment, challenge and termination of the mandate of an arbitrator and the jurisdiction of the arbitral tribunal and recognition and enforcement of arbitral awards the BiH's law should envisage a specialised court. If the law of BiH introduces the new power of the court to make preliminary rulings on the jurisdiction of the arbitral tribunal, the specialised court should decide that issue too. To the contrary, court assistance in taking evidence as well as granting and enforcement and recognition of interim measures can be left to the court that would have had jurisdiction over the dispute if an arbitration agreement had not been concluded;

- BiH's legislation should contain a provision on settlement before an arbitral tribunal;

- According to the UNCITRAL Model Law, a foreign arbitral award should be enforced in the same manner as a domestic arbitral award. Article 36 sets certain grounds which are identical to those listed in article V of the New York Convention, however they are relevant for both domestic and foreign awards. Currently, the treatment of foreign and domestic arbitral awards in the legal system of BiH is not uniform. Even if Bosnia preserves its system of enforcement of domestic awards or possibly add to the existing conditions the official supervision of the arbitral award as stipulated in article 5 (2) of the New York Convention, the recognition and enforcement of all the foreign arbitral awards must become more uniform, flexible and simple. The foreign awards can be refused only in cases and under the conditions determined by the New York Convention, regardless of the country, where the arbitral award was rendered. Based on the consideration of the limited importance of the seat of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity should thus not be included as a condition for recognition and enforcement in the law of BiH. The liberalization of the BiH's arbitration legislation requires the country to amend the Conflict of Laws Act in conformity with the provisions of the New York Convention as well as withdraw the reservation to the New York Convention so that the provisions of the New York Convention will be used regardless of the country, where the arbitral award was rendered;

- As regards challenging the award, the provided grounds are too numerous. Some of them should be omitted in accordance with the comparative European legislation on this issue and

the UNCITRAL Model law provisions. Additionally, the Code should add a possibility of a partial annulment and other remedies such as returning the case to the arbitral tribunal for a new proceeding and an adjournment of the decision on the annulment;

- Even if the UNCITRAL Model Law solutions could be widely applied in all types of arbitration procedures, this law expressly regulates only international commercial arbitration. As a result, the specific attention and some extra provisions should be provided when enacting and regulating the area of labour and consumer disputes, in particular with regard to the protection of the weaker party;

- BiH could also introduce some additional expeditious and flexible mechanisms for the settlement of disputes such as already mentioned accelerated arbitration, arbitration within monetary constraints, arbitration with a last offer possibility or emergency arbitration where a so-called emergency arbitrator issues interim measures even before the constitution of an arbitral tribunal. Additionally, BiH could also ensure the possibility of on-line arbitration, where all party submissions have to be made online, the arbitral proceedings have to be conducted on-line and the arbitral award has to be rendered on-line, via the Internet, as well as some hybrid ADR processes, namely a possibility for a mediator to act as an arbitrator (med-arb) or an arbitrator to act as a mediator (arb-med);

- In order to promote the use of arbitration clauses, BiH should consider creating various model arbitration clauses by taking into account specific circumstances, different contexts and the complexity of a dispute. Particular attention should be paid to the case when more than two parties are involved and to the so-called multi-tiered clauses that combine several dispute resolution services. The drafting process should mostly follow the guidance of the American Arbitration Association. Additionally, the participation of the Bar Associations and Chambers of Commerce of all three entities and of BiH should be enabled;

- As suggested by the Chambers of Commerce of all three entities during the consultation process on the assessment of ADR/Mediation in BiH local arbitration and mediation centres within the Chambers should be established.

It should be mentioned that in May 1997 BiH ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 (the ICSID Convention, March 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159, 4 I.L.M. 524 (1965)) which provides for the establishment of the International Centre for Settlement of Investment Disputes (ICSID) as a member of the World bank Group. The latter stands as a primary venue for the settlement of investment disputes between a member state and nationals of other member states. BiH has also followed the international trend of entering into bilateral investment treaties (BITs) with other countries which usually allow for the alternative dispute resolution mechanism whereby an investor whose rights under the BIT have been violated could have recourse to international arbitration. Therefore the inclusion of some modern and practical solutions in arbitration legislation in BiH would implicitly mean an incentive for foreign investment.

Finally, uncertainty about the national arbitration law with an inherent risk of frustration may have a negative impact on the selection of the seat of arbitration. By adopting the principles and solutions of the (amended) UNCITRAL Model Law, BiH will enhance the smooth functioning of the arbitral proceedings and consequently increase the popularity of its arbitration. However, a lack of knowledge on the matter, a lack of experience and the presence of certain lack of confidence are still deemed to be the main reasons that arbitration is not sufficiently accepted in business and legal community in BiH. Therefore this matter should also be adequately addressed, particularly by way of promotion of arbitration and its benefits.

Chapter 9

ASSESSMENT OF THE REGULATORY FRAMEWORK FOR COURT SETTLEMENT

According to the Report on the Project of the Improvement of the Efficiency and Effectiveness of the Judiciary, conducted by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina in January 2014, the latter in 2012 foresaw some activities, directed towards the popularisation of mediation and court settlement, whereas in 2014 it envisaged the improvement and upgrade of the use of mediation and court settlement as well as the increase of the cooperation within the judicial system. Furthermore, the relevance of the use of alternative dispute resolution is also expressed in two domestic strategic documents, namely the Justice Sector Reform Strategy for the period 2008-2012 and the Justice Sector Reform Strategy for the period 2014-2018. The first document emphasized that the minimum of the infrastructure is already established while the real challenge lies in empowering the role of Ministry of Justice in expanding mediation and other alternative dispute resolution procedures throughout the BiH, whereas the second document declared that the main aim in next years will be to train judges for the wider application of the institute of court settlement, to improve the system of out-of-court mediation and to promote the system of alternative dispute resolution among the population by organizing mediation weeks.

Furthermore, within the Project of the Improvement of the Efficiency and Effectiveness of the Judiciary, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina in 2012 introduced the Pilot Project “Court Settlement”. The High Judicial and Prosecutorial Council of Bosnia and Herzegovina cooperated with certain target courts (district courts in Sarajevo, Mostar, Tuzla, Modriča, Prijedor and Zvornik) which delegated judges and judicial assistants who were selected using objective criteria such as type of working division, the amount of experiences and the number of concluded court settlements. The Pilot Project was being implemented from 2012 to 2014. During the implementation a series of activities took place that not only had a direct impact on the increase of the number of the concluded court settlements but also indirectly influenced the promotion of court settlement throughout the entire judicial system. For example, the participants in the Pilot Project attended several special trainings, held by Norwegian experts on court settlement use. Consequently this sort of education became a part of the permanent education program of the Centre for Judicial and Prosecutorial Training of FBiH and RS for 2013, 2014 and 2015. At this point it should be noted that the Centre should organise more intensive trainings and workshops on court settlement in the future. Apart from the trainings, the Norwegian experts also prepared special guidelines for the successful use of court settlement, a form containing the legal provision of the possibility of court settlement for the parties, a brochure and certain amendments of the Rules on the assessment criteria for the performance of judges and judicial assistants introducing the equal evaluation of the judicial work regardless if the dispute is resolved by a decision on the merits or a court settlement when “P” and “Ps”, while in case of “Mal” and “Mals” a concluded court settlement counts 50% of the evaluation provided for a court decision on merits. In order to promote court settlement also few meetings with representatives of the Bar Association as well as a roundtable on court settlement within the European Day of Civil Procedure in October 2013 were organised.

The results of the Pilot Project “Court Settlement” were encouraging. In the period of 2011-2014 the number of the concluded court settlements in the target courts was constantly rising. Also the number of the concluded court settlements in target courts in comparison to the total number of concluded court settlements in all the courts in BiH was increasing. For example, in 2014 one quarter of concluded court settlements in BiH was concluded in 6 target courts, while the rest (three quarters) were concluded in 56 courts. The results speak for the successful promotion of court settlement in the target courts and also for the greater

use of court settlement in general which is certainly due to the amendment of the evaluation of the judicial work. Those enumerated activities and their results thus proved that BiH is on the right path to successfully increase the use of court settlement.

Unlike mediation, court settlement has been part of Civil Procedure Codes of FBiH, of RS and of the Brčko District for many years, however the number of concluded court settlements is still very small. According to the Report on the Pilot Project "Court Settlement" the percentage of the concluded court settlements within all resolved cases in 2014 was only 3,02%.

All three Codes contain practically the same provisions as regards the court settlement. Article 88 (1) of the Code states that at the preparatory hearing, but also at any time during the proceedings, the court shall try to get the parties to settle the case in a way that does not compromise its impartiality. When comparing the provision of the court's obligation to refer cases to mediation, the legislation in case of court settlement applied a more active role of the court. Thus the court may, taking into consideration the will of the parties, the nature of the case, the relationship between the parties and some other specific circumstances of the case, propose possible solutions to the parties and act as a sort of a mediator. However, this double role poses a judge into a challenging position which could be one of the reasons of underuse of this institute. A court settlement may pertain the whole claim or only a part of it and is enforceable. It may be contested only by complaint in a new lawsuit and only if concluded under delusion, duress or deceit within the time limits, provided in the Code.

The main reasons for the unpopularity of court settlement are supposed to be a lack of motivation to use this procedure by judges and judicial assistants, the sceptic mentality and mistrust towards this relatively new procedure held by parties and the fact that lawyers are not encouraged to seek for the dispute to be resolved in such a way due to their poorer fees. Also, in case of a court settlement the parties are released to pay for a 50% of the court fees, however they still need to pay the rest and the cost of their representation. On the contrary, if the dispute is solved by way of mediation, the parties get a total refund of their court fees. Therefore it would be advisable to consider some additional financial measures and possible amendments of the rules on the fees and costs in order to encourage the parties and lawyers to conclude a court settlement.

Moreover, it is of utmost importance to raise awareness and constantly promote education on court settlement in the whole professional community. Part of the training on court settlement should also be included early in the obligatory education of the judicial staff. The idea of a form with the provision of the possibility of a court settlement should be further developed and some other possibilities of informing parties of this procedure should be introduced early in the stage. One of the recommendations of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina also stated that a research among the parties who accepted and those who declined the possibility of solving their dispute by using the court settlement procedure should be conducted in order to discover the possible advantages and disadvantages of court settlement as seen by the parties.

Finally, a mandatory court settlement at the preparatory hearing could be introduced. To fulfil this obligation the judge shall propose and present the court settlement institute to the parties at the stage of the preparatory hearing and thus try to get the parties to settle their case in an amicable way. It would also be worth to consider the option that a settlement judge is other than the one who is assigned to hear and decide the case so that the parties are more relaxed and open in settling their case as the impartiality of the other judge is absolutely preserved. Consequently, the judge who performs the settlement also has a possibility to use caucuses as a powerful tool, usually used in mediation. However, it should be taken into account that such measure would directly affect the capacity of the courts.

Chapter 10

ASSESSMENT OF THE MEDIATION IN CRIMINAL MATTERS

Like in civil law, mediation is neither mandatory in criminal law. Under BiH's law, it is only used in criminal proceedings when deciding on property claims. Court may thus refer the parties to mediation if he/she finds the claim appropriate to be resolved in such a procedure. Also the parties may suggest the mediation procedure until the end of the main hearing (article 212 of the Criminal Procedure Code of FBiH (Official Gazette FBiH no. 35/03), article 108 of the Criminal Procedure Code of RS (Official Gazette RS no. 50/03), article 198 of the Criminal Procedure Code of the Brčko District (Official Gazette of the Brčko District no. 10/03). Additionally, all three units envisage in their law on Protection and Treatment of Children and Juveniles in the Criminal Procedure Code (article 26) mediation also as a method of applying the measures of personal apology and compensation to the injured party (so called victim offender mediation).

A similar Pilot Project as described above should be conducted also for mediation. Nonetheless, the results of the Pilot Project "Court Settlement" could also be used in the area of mediation. The amendment of the rules on assessment criteria on performance of the judges and judicial assistants proved successful in the case of court settlement, therefore a similar solution should be introduced also in mediation where currently a (civil) case that a judge refers to mediation and is solved by an agreement is valued only half of the case solved by a decision on merits, whereas the case that a judge refers to mediation and is not successfully resolved does not enter the norm of the judge at all. This certainly does not represent a sufficient incentive for judges to refer cases to mediation.

In addition, the law should adopt a greater obligation for courts to refer cases to mediation and even possible introduction of mandatory mediation, at least in certain types of disputes. Therefore mediation trainings not only for mediators but also for judges should be more widely provided within the Association of Mediators in Bosnia and Herzegovina (hereinafter: Association). Moreover, mediation should become interesting also for lawyers when advising the clients, therefore it is of utmost importance that the cost of representation in mediation is specifically prescribed and made attractive for both clients and their representatives.

Since the application of mediation in criminal proceedings is practically not realised in practice, the potential total referral of the cases by judges and mainly prosecutors where minors are involved and in certain types of misdemeanours should be explored and subsequently elaborated. As an example of good practice, Slovenian criminal law provides an early alternative intervention of public authorities in criminal matters. Even before the commencement of a criminal proceeding as well as during the proceeding, a prosecutor may refer a case to mediation, provided that the crime is punishable under law by *imprisonment* up to three *years* or by a fine and in certain other explicitly enumerated crimes. A prosecutor uses his/her discretionary power considering the type and nature of the offense, the circumstances in which it was committed, personality of the offender, his criminal record and the degree of his criminal liability. Such mediation is carried out by an independent mediator provided that he has a consent of both the suspect and the victim. If a prosecutor receives a notification of the successful conclusion of the settlement, the case is dismissed. In Slovenia in 2014 there were 1.465 (9%) dismissed cases as regards adult offenders and 122 (12%) dismissed cases as regards minor offenders solved by mediation or deferred prosecution. Those data prove that such mediation represents a successful mechanism regarding the relief of *the courts' caseload*. However, it should be noted that comparing 2014 and 2013, in 2014 the referral of the cases to mediation was lower due to the lack of funds reserved for the fees of mediators (article 161a of the Criminal Procedure Code of the Republic of

Slovenia, Official Gazette of the Republic of Slovenia no. 87-3503/2014; see also the Annual Report 2014 of the Office of the State Prosecutor General of the Republic of Slovenia http://www.dt-rs.si/uploads/documents/letno%20porocilo/letno_porocilo2014.pdf). For a successful adoption of this institute in BiH therefore regulatory framework has to be carefully developed, training for prosecutors and mediators should be organised and finally also a sufficient financial and administrative support should be provided.

As a final point, mediation is still a relatively new means of dispute resolution and public is sceptic and oblivious of its advantages. Therefore its promotion in all spheres and by all means should be made.

Chapter 11

ADR POLICY RECOMMENDATIONS

Taking into account findings in this Report and referring to the most recent proposals on ADR development to BiH and five other countries of the Western Balkans from the "Report on comparative overview and analysis of good practices with identification of elements of court-annexed mediation program and comparative study on accreditation and certification systems (RCC :Support of the Implementation of the South Europe 2020 Strategy/Implementation of the Regional Action Plan in the Area of Justice; 2015)", the following policy recommendations should be considered:

Ministries of Justice should consider to:

- Design an **ADR expert committee or council,** composed of domestic and, if feasible, international experts, which may, in due time, evolve into a permanent advisory body to the MoJ regarding ADR policy (ADR strategy and action plan, regulatory issues, monitoring the implementation of mediation schemes in public sector, including courts, ADR public awareness campaign, comparative policy research, best practices exchange etc.).

- Issue a **public ADR mission statement** of recognizing further development of ADR, in particular mediation, as a political priority (e.g. Where are we now? Where and how do we want to go? How we will achieve and measure the progress?).

- Provide an evidence that government is taking mediation seriously and practices what it preaches by issued **public mediation pledge** on behalf of the government to consider referral to mediation in every dispute where a State is a party to it (see Model Alternative Judicial Dispute Resolution Act).

- Invite key stakeholders from business sector (domestic and foreign companies, corporations, Chambers of Commerce, insurance companies, banks and other players) to sign and subscribe to a **Mediate First Pledge** by which they'd express their commitment to consider mediation in future or existing disputes (see ADR pledge at the web page of the MoJ of Slovenia and Department of Justice Report on the working group on mediation, 2010 Hong Kong).

- Develop an **ADR strategy and action plan, which shall include development of both, pre-filling and post- filling court-related mediation as well as out of court mediation**, aimed at defining goals (improved access to justice, decreased court backlogs, earlier and increased number of settlements, saved time and money of litigants, ensured higher compliance, provided most appropriate dispute resolution process for specific types of cases), performance areas (regulatory, self-regulatory, non-regulatory), target groups (judges, litigants, lawyers, businesses, general public, media, public sector bodies) measures/actions (including robust public awareness campaign), performance indicators, timing, SWOT analysis etc. (see National Mediation Strategy for Croatia 2006-2008; Europe Aid/123293/D/SER/HR).

- **Amend the Rules of Courts Performance** in order to authorize courts to adopt ADR programs by which they determine principles, rules and forms of court-related ADR processes, in particular mediation.

- Revise and/or draft **amendments to civil procedural codes ("CPC")** in order to regulate interactions and balanced relationship between litigation and mediation such as duty of litigants and lawyers to consider mediation after case filling, automatic assignment to mediation and assignment by stipulation of both parties, upon motion of one party or upon judge's initiative, duty of lawyers to meet and confer, ADR certification on discussed ADR options and compared assessment of litigation and mediation costs, notice of need for ADR telephone conference, mediation information session, motion for relief when parties are compelled to mediation, smart cost sanction for unreasonable refusal of mediation and other related case management issues (compare Civil Procedure Rules 2011 of England and Wales SI 2011/88; United States District Court Northern District of California ADR Local Rules, July 2, 2002; de Palo, Trevor: EU Mediation, Law and Practice, Appendix B, Oxford, 2012).

- Revise and/or draft amendments to existing **Law on mediation procedure** or alternatively, draft **a new Mediation Act** in order to harmonize it with EU Directive on certain aspects of mediation in civil and commercial matters 2008/52/EC and guided by UNCITRAL Model Law on International Commercial Conciliation, 2002,having regard Recommendations of the Committee of Ministers of the Council of Europe to Member States on family mediation (1998), on mediation in civil matters (2002) and CEPEJ Guidelines (2007) on better use of abovementioned recommendations (see model provisions in Chapter and attached Annex 3 on why and how to regulate particular issues).

- Draft **Alternative Judicial Disputes Resolution Act** aimed at mandatory development of court-annexed, court-affiliated and/or court-connected mediation programs at all courts with jurisdiction in civil, commercial, labor and administrative matters, providing funding for mediation programs by court's budget, establishing sustainable training and accreditation system and registry of mediators in court-related programs and encouraging emergence of other types of court-related ADR (early neutral evaluation, binding and non-binding arbitration, hybrid processes) towards **multi-door courthouse model** (see above Model Alternative Dispute Resolution Act in Judicial Matters; see Summary of the US Alternative Dispute Resolution Act of 1998 in Guide to Judicial Management of Cases in ADR, Federal Judicial Center 2001)**.**

- Draft **Alternative Dispute Resolution Act in Consumer Disputes and** Initiate designing **pilot projects on consumer-related (high volume-low value) off and on-line alternative dispute resolution schemes**, having regard implementation of the European Union Regulation on ODR (Regulation (EU) 524/2013) and ADR Directive (Directive 2013/11/EU).

- Revise and/or draft provisions in **Legal Aid Act** which would provide access to both, out of court and court-related mediation for disputants with limited financial means. According to international recognized standards legal aid could be conditional and approved for litigation upon mandatory participation of the applicant for legal aid in mediation, if the other party provides its consent or if both are referred to mediation.

- **Revise and amend chapter in Civil Procedural Code concerning arbitration or draft new Arbitration Act** in order to implement recommendations from Chapter 8 of this Report.

- **Amend provisions in Civil Procedural Code** in order to introduce mandatory settlement conference (possibly merged with a preparatory hearing).
- **Revise and amend Criminal Procedural code** in order.to implement recommendations from Chapter 10 of this Report.

Courts in BiH should **consider to**:

- Designing **pilot court-annexed mediation program**, where feasible.
- Adopt the **rules of court-annexed mediation program** in which it could, inter alia, be described the court-oriented and user-oriented goals of mediation.
- Among user-oriented goals courts should **point out savings of time and money of litigants,** in particular, when dispute is referred to mediation early in the litigation process. In addition, higher compliance with mediated settlements when compared with judgments could be a defined goal.
- As regards court-oriented goals, in addition to wider access to justice and reduction of waiting time of litigants (as a semantic term, used instead of backlogs reduction), it is suggested that **courts aim to encourage earlier settlements**. This is important because even among judges is still present a view that they could facilitate settlements anyway at the preparatory or first hearing. Taking into account that these hearings cannot be performed soon after case filling, earlier settlement as a goal could be used by court leaders as persuasive argument why courts should invite litigants, to consider mediation much earlier in the process as courts do now.
- It is also of utmost importance that courts adopt and promulgate Rules of court-annexed mediation program in order to define legal and administrative issues such as automatic invitation to consider mediation, early case assessment, time standards for court staff, parties and their lawyers, mediation certification regarding implemented duty of litigants and their lawyers to consider mediation, elements of referral order, opt-out requirements from mandatory referral, accreditation criteria for mediators, mediator assignment procedure, monitoring and evaluation, data collection and statistics, complaint procedure regarding mediator's performance etc. (see Program of alternative dispute resolution at the District Court of Ljubljana Su 46/2013 from 4.3.2013; see Court Dispute Resolution Program Design Guide; see Model Local ADR Rule of Judicial Council of the Ninth Circuit (1999); see National Standards for Court-Connected Programs in Judge's Deskbook on Court ADR, Harvard Law School (1993);see Guidelines for Ensuring Fair and Effective Court-Annexed ADR in Guide to Judicial Management of Cases in ADR, Federal Judicial Center 2001).

Most important issues from the perspective of timing and scope of referrals, to be dealt with by these Rules, are the following:

- In order to make mediation presumptive dispute resolution option for litigants, **courts should introduce automatic written invitation for litigants to consider mediation** in all civil cases.
- Written invitation to consider mediation, should be supplemented by **information brochure** (explaining how can mediation help in party's case), by the **checklist matrix of benefits, likely delivered by mediation**, by **frequently asked questions and provided answers**, by **self-test form for referral to mediation, consent form for selecting mediation** and should direct parties for additional queries to contact person at mediation administrative office at court.

- Courts should **deliver invitation to consider mediation at earliest convenience** (e.g. at case filling by a plaintiff and/or together with service of a complaint to a defendant) since early intervention of a court is crucial for promotion of time savings for litigants as mediation benefit.

- In invitation letter to consider mediation courts should inform the parties, that the case is registered with the court but because of heavy workload**, litigants can't expect scheduling of a preparatory hearing before certain period of months** (depending on average scheduling time) while this waiting time could be effectively used by referring dispute to mediation. Courts should underline that statutory deadline for completion of mediation prevents any delay of litigation if the case wouldn't settle.

- Rules of court-annexed mediation program should define, **what process may trigger mediation**: stipulation of both parties in all civil cases (voluntary referral to mediation), motion of one party followed by an order of a court or court order upon judges initiative (mandatory referral to mediation).

- Rules of court-annexed mediation program should promulgate the **period of the pilot regarding its duration to minimum 2 years.**

- Rules of court-annexed mediation program should, upon previously signed memorandum of understanding between courts and bar associations or upon legislative authorization, determine a **duty of lawyers and their clients to certify in writing, signed by lawyer and litigant** (on a mediation certification form filled at court), that they had read the mediation information brochure, discussed the option of mediation, provided by the court and considered, whether the case might benefit from mediation option.

- Rules of court- annexed mediation program should, upon previously signed memorandum of understanding between courts and bar associations or upon legislative authorization, determine a **duty of lawyers, representing plaintiff and defendant,** to discuss mediation option (either on a meeting or via telephone) This rule shouldn't apply for cases with unrepresented litigants;

- Rules of court-annexed mediation program should, upon previously signed memorandum of understanding between courts and bar associations or upon legislative authorization, determine a duty of lawyers, who haven't reached an agreement to mediation process during their meeting or telephone conference, to provide court with a **notice of need for mediation telephone conference** with liason mediation judge or law clerk at court in order to explore obstacles for attempting mediation. Report on the fact that telephone conference with designated court officer took place, should be filed and signed by that officer. This rule shouldn't apply for cases with unrepresented litigants.

- Courts should consider introducing **mandatory mediation information sessions** as procedural events, integrated in preparatory sessions **in advance determined category of disputes**, in which parties and their lawyers haven't reached an agreement neither in their direct interactions nor during telephone conference with mediation liaison officer.

- Courts should consider introducing soft **mandatory referrals to mediation in selected disputes upon discretionary decision of a judge,** either after screening of the eligibility of a case and of parties' ability to bargain and compromise at mediation

information session or automatically after receiving the mediation telephone conference report and a motion of one party to issue an referral order (without scheduling mediation information session). Parties should retain their right to opt out from mediation upon good cause shown in their written motion, if lodged within 8 days from the day they received referral order.

- Courts should determine **projected number of referred cases to mediation per year for each referral track**, taking into account average monthly inflow of particular kind of cases.

- courts should **adjust monitoring and evaluation system concerning the Pilot to new procedural events and separately for each referral track** (number of stipulations of both parties, number of motions of one party, number of orders upon judges initiative, number of mediation telephone conferences and information sessions, their impact on parties consents to mediate, duration and outcome of mediation sessions).

- Courts should, after setting up accreditation criteria and selection procedure for court approved mediators in the Rules of court-annexed mediation program, **invite trained and experienced mediators at the Association of Mediators to apply for accreditation at courts** and therefore in short-term ensure capacity for dealing with considerably higher number of mediations.

- **Mediation liason judge, serving at each court, should be appointed** in order to increase court's advisory capacity.

- **Administrative staff at court mediation unit shall undergo training courses on mediation and referrals to mediation** in order to gradually take over the role of dispute resolution specialists and perform mediation telephone conferences with lawyers and litigants.

- Courts should **invite active and retired judges from all three court instances to express their interest to attend initial mediation training course** and subsequently serve as mediators in a pilot programs.

- Courts should prepare **mediation awareness campaign** in order to communicate its' new policies with general public through press conferences, web site, mediation telephone hotline, mediation milestone events, mediation week (see CEPEJ Guidelines for a better implementation of existing CoE recommendations concerning family and civil mediation).

- Courts should analyze and select old pending civil cases, representing court backlog (e.g. cases, older than 5 years) and announce **backlog reduction program through mediation**, aimed at providing savings of litigants' time, money, risk of protracted litigation, dignity, stress and relationship. Litigants in selected cases should be invited to consider mediation.

High Judicial and Prosecutorial Council should consider to:

- approve **collection and dissemination of judge's individual statistics** regarding number of referred cases to mediation, number of performed mediations (if a mediator is a judge or prosecutor), and number of mediated settlements. Monthly comparison among judges and prosecutors could serve as an incentive for increase in referrals.

- **Allow and stimulate judges to attend mediation training courses and to perform function of mediator** in court-annexed mediation schemes taking into account Opinion No.6 of the Consultative Council of European Judges at CoE (CCJE).
- **recognize referrals to mediation after performed preparatory hearing as objective criteria for measuring performance** and inserting them into rules on performance evaluation of judges, referring to similar best practice approaches (e.g. in Netherlands and Slovenia) Different ponders could be used for referrals, resulting in mediated settlement and those, where mediation was completed without settlement. Nevertheless, the same ponder should be used for a settlement reached during trial and a settlement reached during mediation.

- upon consultation with courts and ministries of justice, **start planning yearly costs of court's mediation programs, including mediators' fees, and integrate them into regular judicial administration budget** to ensure program's sustainability.

- issue **public statement** aimed at promoting mediation, encouraging litigants and their lawyers to consider mediation as well as supporting judges at their efforts to refer cases to mediation and to mediate court disputes.

- together with the supreme courts, **encourage courts in the country to consider designing court-annexed pilot mediation scheme.**

Bar Associations should consider to:

- support courts' endeavors to engage litigants and their representatives into early discussions and exploration of mediation benefits by **signing memorandum of understanding with courts concerning mediation certificate and mediation telephone conference** and in such a way implement ethical principle of lawyers to advise their clients about ADR benefits.

- **publicly endorse court-annexed mediation programs.**

- **Integrate mediation advocacy training into (mandatory) training of lawyers on ethical issues**.

- **establish mediation center at bar associations** and provide business opportunity to members of bar associations, who wish to practice as mediators as well as to the clients and their lawyers, who are willing to recourse to mediation prior to litigation. Mediation center at bar association could also serve as a platform for resolution of disputes between lawyers and their clients as it is a case in many jurisdictions in USA and Europe.

- explore opportunities for **financial incentives/rewards (increased fee, tax exemption)** for lawyers who represent client in mediation, taking into account best practice examples from Italy, Germany and Slovenia.

Association of Mediators should consider to:

- **assist Chambers of Commerce at establishing mediation schemes**;

- **encourage active and retired judges** to attend initial training programs for mediators;

- define **reduced mediator's fee** for court-annexed mediation service;
- invite practicing lawyers to attend initial mediation program for reduced fee;
- offer Bar Associations **assistance at creating mediation centers at Bar Associations**, if feasible**;**
- **revise Code of Ethics for mediators** as advised in this Report;
- **invite foreign mediators to register** in BiH in order to support cross-border mediation;

Chambers of commerce and associations of arbitrations should consider to:

- **initiate the process of drafting revised chapters of Civil procedural Codes and/or new Arbitration Act** in order to implement recommendations from Chapter of this Report;
- **establish cooperation with Association of mediators**, aimed at creating mediation scheme within institutional arbitration;
- **Chamber of Commerce of District Brčko should encourage authorities to establish arbitration at that Chamber by the law;**
- develop **model ADR clauses and agreements and promote their use among Chamber's members;**
- promote the **adherence of companies to ADR pledge**;

Chapter 12

ACTION PLAN FOR FURTHER POLITICAL AND OPERATIONAL SUPPORT OF EUD TO THE DEVELOPMENT OF ADR IN BIH

I. Recommendations on pilot court – annexed mediation programs at first instance courts in Sarajevo and Banja Luka			
Actions	**Activities**	**Timeframe for implementation**	**Budget needed**
Set up the project	Formulation of project management functions and mechanisms	1 Month	**129.500 EUR**
	Local consultation and coordination		
	Mobilization of stakeholders & organization of the kick-off meeting		
	Definition of a precise work plan		
Assessment of current capacities	Review of capacities & organizational structure for mediation	1 Month	
	Analyse the results of previous or similar projects		
	Draft and present the Inception Report		
	Launch the procedures for the implementation of the work plan		
	Ensured and improved operational requirements and sustainability of the court-annexed mediation program at		

Designing the program on court–annexed mediation	two selected courts benchmarked against performance indicators (functions, organizational structure, physical structure, neutrals, stakeholders, monitoring, evaluation, data management, fees)	1 Month	
	Determination of standards for selection and accreditation of mediators, ethical standards for mediators and complaint mechanisms		
	Designing rules, principles and forms of the program		
Implementation of the program of court – annexed mediation	Implementation of court-annexed mediation program (referrals, case management and administration, reporting, data protection)	12 Months	
	Establishment of court's register of mediators		
	Assistance throughout the implementation of the program		
	On sight expert advice concerning management, administration, monitoring and evaluation of the program.		

II. Recommendation on public and private ADR capacity and quality building			
Actions	Activities	Timeframe for implementation	Budget needed
Drafted model ADR clauses and agreements	Drafted model ADR pre-dispute multi-tiered clauses and post-dispute ADR agreements, depending on the type of contract or dispute	1 Month	**10.000 EUR**
Analysis and improvement of institutional arbitration at all chambers of commerce and of international trade	Analysis of the existing structure and operations of all institutional arbitrations and revision of rules of arbitrations	3 Months	**40.000 EUR**
	Organized 2 study visits to arbitrations at Chamber of Commerce in EU Member States		
	Ensured and improved operational requirements and sustainability of arbitrations and benchmarked against performance indicators (functions, organizational structure, physical structure, neutrals, stakeholders, monitoring, evaluation, data management, fees)		
	Established cooperation and coordination between institutional arbitrations and courts (referrals, case management and administration, reporting, data protection)		
Established ADR centers/schemes for consumer claims	Ensured and improved operational requirements and sustainability of centers/schemes and benchmarked against performance indicators (functions, organizational		**40.000 EUR**

	structure, physical structure, neutrals, stakeholders, monitoring, evaluation, data management, fees)	12 Months	
	Developed med-arb rules for consumer disputes resolution		
	Identified mechanisms for selection and accreditation of mediators and arbitrators (neutrals)		
Designed ODR scheme	Designed ODR scheme for domestic and cross-border consumer disputes	3 Months	**25.000 EUR**
Designed and performed train the trainers program	Revised existing mediation training curricula for the training of trainers	3 Months	**90.000 EUR**
	Conduct a Training Need Analysis		
	Design the training curricula for the training of trainers with specialized modules on commercial, family and civil cases		
	Developed and produced the training material for the training of trainers		
Performed training programs for lawyers and judges	Organized train the trainers programs	6 Months	
	Organized training programs (16 hours per 1 program) on mediation advocacy		
	Organized informative seminars (1 day per 1 seminar) for judges and prosecutors on referrals to ADR		

III. Recommendation Public awareness campaign			
Actions	Activities	Timeframe	Budget needed
Developed communication strategy	Identified target groups and communication messages	2 Months	**135.000 EUR**
	Developed communication strategy		
	Action plan for implementation of communication strategy		
Key advertising approaches	Media campaign	2 Months	
	Printed information material		
	Visibility events		
Publish and disseminate a brief quarterly project newsletter	Define the format and channel for communication with target groups	12 Months	
	Prepare and disseminate information		
	Discuss mechanisms to ensure the long-term sustainability of the information flow		
Developed a national website on mediation	Developed structure of a national website on ADR	3 Months	
	Ensured the ownership and sustainable management of the website		

IV. Recommendation of regulatory framework for ADR			
Actions	Activities	Timeframe	Budget needed
Drafting model arbitration act	Consultation process with stakeholders	3 Months	**20.000 EUR**
	Identification of best regulatory practises		
	Drafting statutory provisions		

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