



**Canadian Institute for Conflict Resolution
Institut canadien pour la résolution des conflits**

Evaluation Report of Pilot Project

Alternative Dispute Resolution Platform in Bosnia and Herzegovina

Introduction of Mediation in Basic Court of Banja Luka

Implications for the Commercial Sector

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1. Background

A law on mediation was approved by the Bosnia and Herzegovina (BiH) parliament at the end of June 2004, was publicized in the BiH “Gazette” August 12th and came into effect August 20th, 2004. The Law encourages mediation as a first step in civil cases, and sets out a framework for the conduct of mediation and subsequent implementation of mediated agreements. It also regulates the establishment and status of mediators.

In order to implement the Law, it was necessary to develop court procedures, hold information sessions for both the courts and the public, and test out the utility and public acceptance of mediation in a culture completely unfamiliar with it. The Southeast Europe Enterprise Development organization (SEED) sponsored a Pilot Project in the Basic Court in Banja Luka to test out mediation processes and procedures for introducing mediation into the court system, and particularly for use with commercial cases. The Pilot Project was carried out between April and July of 2004. This sub-report to the main evaluation identifies the importance of mediation and provides a review of those aspects of the Pilot that have implications for the commercial sector. It sets out recommendations for the implementation of a mediation system within the commercial sector.

Annex A outlines the main perceptions of the parties and their representatives that took part in the mediations.

2. Creating an Enabling Business Environment – The Role of Mediation

In Canada, the USA and many West European countries the practice of mediation and other forms of alternative dispute resolution is increasingly replacing traditional dispute settlement through the courts. In some countries it has become mandatory for certain types of cases. In the USA state of Illinois, Alternative Dispute Resolution (ADR) was introduced to deal with heavy case loads in the 1980s and resulted in full settlement through mediation in 59 percent of the cases. In Ottawa, Canada, a pilot project introducing mandatory mediation for civil disputes has shown significant results, with some 80% of the disputes resolved through court connected ADR mechanisms.

In the commercial arena, companies in North America are increasingly including ADR clauses in their contracts to deal with disputes. In Canada, this has been particularly championed by the construction industry, which by their very nature, contractors are continuously in conflict over

Alternative Dispute Resolution Platform in Bosnia and Herzegovina Commercial Sector Implications

scheduling, costing and quality control issues. In 2000 the USA Air Force placed more than 50% of all its pending litigations with commercial enterprises on an ADR track and at the end of that year it reported that 97% resulted in successful resolution.

In North America and Western Europe, ADR training has become an integral part of training for lawyers and business people. The skill of negotiation, assisted or non-assisted, has become one of the keys to an efficient business operation.

In the business arena, ADR, including internet mediation between business partners geographically distant, has become one of the primary methods for dispute resolution. This entails the need for organizations, whether in the same geographical region or across the globe, to use the same set of principles to survive in the mainstream world economy.

In the BiH, the commercial sector has had no tradition, nor even awareness of alternatives to the court system to resolve major contract disputes. The lengthy and costly court procedures are an anathema to companies, who's very success is based on their ability to move quickly in a highly competitive environment. It is crucial for the well-being of the commercial sector in BiH to have a much greater grounding in mediation processes as a basis for sound contract negotiation and management, the reduction and prevention of disputes, and the smooth settlement of disputes when they do arise.

With the introduction of the new Law on Mediation, the commercial sector needs to be poised to take advantage of its benefits.

3. The Pilot Project

A structure was set up for the Pilot Project that involved the creation of a Center for Mediation at a location close to the Banja Luka Basic Court, for use by the mediators. The Association of Mediators of BiH (AoM) identified and provided mediators. Mentoring of mediators and advisory support was provided by the Canadian Institute for Conflict Resolution (CICR). The Pilot Project was overseen by an Advisory Committee consisting of the Minister of Justice of the RS who served as chair, with representation from the Banja Luka court, the AoM, the mediators' group, SEED, the CICR and a court administrator hired through the project.

Cases appropriate for mediation were identified by judges in the Banja Luka court. All parties were sent a letter of invitation to have their cases mediated. For those cases where both parties responded positively, an initial hearing took place in the court, followed by a session scheduled with a mediator. If the mediation was successful, a mediation agreement was drawn up and signed by both parties. Under the new Law there is no requirement to go back to the court. However, since at the time of the Pilot the Law had not yet come into effect, the agreements were referred back to the judge for her/his approval.

Various means were used to capture information for the Pilot Project evaluation including a Mediation Survey filled out by the parties and their representatives after the mediation (see

Alternative Dispute Resolution Platform in Bosnia and Herzegovina Commercial Sector Implications

Annex A), a focus group with the Advisory Committee, and observations from the mediators and mentors that were captured through other forms.

4. Results of the Pilot

Outlined below is a summary of the numbers of cases involved at various stages of the process:

- a total of 318 court cases were referred to mediation, 152 (48%) of which were commercial;
- of the 318 cases referred, 76 were mediated of which 38 (50%) were commercial;
- 46 cases reached agreement of which 19 (41%) were commercial.

However, it is important to mention that although the court classifies labor cases like civil cases it may be more appropriate to look at those cases as a type/form of commercial case. Also, the successful resolution of a case had a positive influence on the general business environment in the company that were able to resolve their case.

The large discrepancy between the number of cases referred and those mediated was due to either the wrong address on the letter of invitation to mediate, one or both parties not being willing to mediate because of a lack of familiarity with it, parties not wanting to reach agreement for reasons such as insolvency, and/or a lack of proper authority given to the party's representative.

The average length of time to resolve each of the 19 commercial cases through mediation was 1.4 hours.

For the 19 successful commercial negotiations, the average length of time in the court system had been 3.1 years, including one case that had been in the court system for 22 years. The average time for the other 18 cases (not including the unusual 22-year case) was 2 years.

The total value of the funds involved in the 19 commercial cases successfully mediated was 2,002,003 KM. Of these, 3 cases involved funds under 3000 KM, 15 were between 15,000 and 50,000 KM, 4 were between 50,000 and 100,000 KM and 3 were over 100,000 KM. Seven of the cases did not involve financial transactions and were mainly related to real estate.

5. Efficiency of Mediation

For commercial parties, mediation represents a fast and efficient way to have their case resolved. If mediators are available, a mediation can be held immediately after the first hearing with a judge. In the Pilot Project, all the parties that agreed to mediation had their cases mediated within two months or less while those that refused mediation, from a sample of 27 that were interviewed by phone, 22 (81%) are still waiting for a court hearing to be scheduled.

Alternative Dispute Resolution Platform in Bosnia and Herzegovina Commercial Sector Implications

From a time perspective, the 46 Pilot Project mediations that were successful, were generally resolved in 2.4 hours or less, which included an initial court hearing of 1 hour or less and an average mediation time of 1.4 hours. This is considerably less than the 6-hour average per case when dealt with by the court, as mentioned above. There were only a few cases during the pilot where the time frame was longer than 3 hours or when a second session was really required. While 24 cases were postponed, including 19 commercial, 7 have since been resolved successfully and another 11 will be heard in September. Assessment of the reasons for postponement suggests that most of them were not necessary, a situation that can be corrected as mediators gain more experience.

While the parties also had to go to the court for an initial hearing and briefing, in addition to the mediation session, it was certainly much less involved than normal court procedures, where they might have had to go back to court one or more times (even 4 to 5 times) before a judgment was rendered. And with the potential of an appeal of the judgment, further lengthening the process. If the courts could develop an optional referral possibility so the case would not have to wait for a hearing, the case could be mediated quickly.

To the extent that the parties are willing to go directly to mediation without involvement of the courts, they can save court taxes, legal fees and time. However, in a fully operating mediation system, parties will need to pay for mediation, the cost of which will be negligible compared to the time saved and the relationships left intact, or even improved, through mediated settlements.

Many examples from the Pilot Project showed that a sense of ownership of the solutions by the parties facilitated speedy resolution. Once the first step had been taken so they understood that they owned the outcome, parties were willing to make a trip or more back to their offices, and consult as necessary to resolve the dispute immediately.

The greatest barrier to successful mediations during the Pilot was the lack of adequate negotiating authority on the part of the parties' representative. It is imperative that representatives of the parties have full negotiating authority to settle the dispute. In most cases this suggests that the owner or manager of the business participate in the mediation. Given the limited time involvement of mediations, this should not be a burden on them.

The informal setting of the mediation also made it more efficient. It seemed that if the parties felt equal in the process, they made better agreements. With a business-like, rather than adversarial environment, parties of commercial disputes saw the other party more as a business partner than as an adversary.

In the Pilot Project, insolvency was seen to be the largest barrier to a successful mediation. Often one company would not be able to pay the other party until they collected themselves from a third company. ("If the other company would pay us half, we would pay you.") A third company might even be owed money from a fourth and so on. Accordingly none of the cases would be solved unless the chain was broken. While this issue was not dealt with during the Pilot, it does suggest that perhaps some form of multi-party mediation might be a part of the solution.

6. Effectiveness of Mediation

The main beneficiaries, from an effectiveness perspective, are the parties. Successful mediations result in agreements that both parties have ownership of, with each being satisfied with the results. The parties of mediated agreements often part on good terms leaving relationships intact or improved, with an increased understanding of the other's interests and perspectives. For businesses, this is often extremely important, particularly for ongoing partner or client relationships. Furthermore, appeals on mediated agreements are likely to be rare.

The effectiveness of mediation is substantiated from the Pilot Mediation Survey, whereby 57% of commercial respondents felt that mediation was very appropriate and a further 36% felt it was a somewhat appropriate way to resolve their dispute. Fifty one percent were fully satisfied with the outcome of the mediation, a further 26% were mostly satisfied and 16 % were neutral. In response to a question on how mediation changed their opinion of the other party, 22% were very positive, another 42% were positive and 30% were neutral. Ninety three percent considered the agreement to be either fair or fully fair, although only about half of the respondents answered this question. With more skilled and experienced mediators and a greater awareness and preparation by the parties, these figures are likely to increase even further. It could also be noted that there were no negative responses.

However, for certain types of cases, mediation will not be the answer and an agreement may not be effective. For example, in situations of a defendant's insolvency, the biggest problem is a willingness to accept mediation and being able to reach an agreement.

7. Access to Mediators

One of the greatest barriers to implementation of the Law on Mediation in courts across BiH, is the availability of trained and certified mediators. It would be unwise to attempt any broad scale implementation without mediators trained to international standards, given the extreme importance of having public, party and lawyer acceptance of the mediation process. Negative publicity from improperly done and unsuccessful mediations would do much to slow momentum on implementation of mediation as a normal way of resolving business disputes.

At this point, there is a very limited number of people in BiH trained in mediation. The only judges that have an understanding about mediation are the ones trained through the Canadian Institute for Conflict Resolution (using the Institute's Third Party Neutral basic and advanced training modules) and the Association of Mediators. Most judges and potential mediators trained so far are from the major centers of Banja Luka, Tuzla, Mostar and Sarajevo. There are perhaps another 20 people that have attended introductory seminars sponsored by other organizations that provided only a very basic overview of mediation.

It may be useful for Chambers of Commerce and other business associations to consider having a number of people trained as mediators that could work exclusively with and for the commercial

Alternative Dispute Resolution Platform in Bosnia and Herzegovina Commercial Sector Implications

sector. With appropriate financial support, a training program for commercial mediators could be put in place in collaboration with the Association of Mediators of BiH.

8. Payment of Mediators

Since the mediation process is outside the court system, there is no obligation by the courts to be involved with it, financially or otherwise. Accordingly, the parties themselves must be willing to eventually pay all the costs associated with mediation.

From the results of the Mediation Survey, 87 % of the commercial respondents indicated a willingness to pay for mediation in amounts ranging from 20 to 500 KM, with the average being 82 KM. Given that each party is required to pay half, the total income from a mediation of some 160 KM may be sufficient to cover the cost of full time mediators and related overhead costs, based on at least 2 mediations per day. It is probable that with greater public awareness and acceptance of mediation, particularly in the commercial sector, higher fees than those cited above would be acceptable if mediator salaries and other related costs are more than originally estimated.

In the short run, until the commercial sector becomes more familiar with the advantages of mediation, it may be important that mediation costs be subsidized. Full payment for mediation would likely be an obstacle for any parties not familiar with its benefits and would slow down the introduction of mediation. However, it may be important to have partial, or even token payment for mediation, in order to have businesses recognize that this is a cost related to the settlement of a dispute. And certainly well worthwhile to avoid very long court delays and procedures.

9. Public Awareness and Education

As part of the Pilot Project, round table sessions were organized and delivered in partnership with the Chambers of Commerce in Sarajevo canton, Banja Luka region, Tuzla canton, Zenicko-dobojski canton, Dobojski region, and Bijeljina region to a total of 280 attendees between January and June 2004. The sessions were picked up by a total of 51 TV stations, radio stations and newspapers.

As was seen during the Pilot, awareness and education regarding the benefits of mediation were essential to getting parties to consider mediation. More specifically, awareness about the successful results of other mediations encouraged parties to be more positive about their own mediation, further contributing to their successful mediations.

Accordingly it will be important to continue and intensify a public awareness program with the commercial sector through media events and articles, talks, workshops, and distribution of posters and pamphlets.

It may also be useful to develop a Guide or Manual on the process and benefits of mediation for distribution to businesses and other end users.

10. Recommendations for the Commercial Sector

It is recommended that:

- emphasis be given to mediation of commercial cases, given the greater incentive and resources of this sector, coupled with the greater ease of reaching agreement for inexperienced mediators;
- companies or organizations being referred to mediation be made aware that the owners or senior managers with proper authority need to be present at the mediation session(s) in order for it to work;
- business associations consider developing their own cadre of certified mediators;
- an expanded public awareness program with the commercial sector be implemented through media events and articles, talks, and distribution of posters and pamphlets;
- managers and owners of companies, and other end users be provided with workshops on the process and benefits of mediation;
- a resource guide on mediation be developed and distributed to businesses.