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Paths of Mediation in Bosnia and Herzegovina





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Authors: Alan Uzelac, Gašo Knežević, Steven Auster Miller, Mehmed Hadžić, Jagoda Ribica, Aleksandar Živanović, Fatima Mrdović, Branka Skoko, Lada Buševac

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Table of Contents

Margo Thomas Regional Business Line Leader, Southern Europe Investment Climate Advisory Services of the World Bank Group Introductory Word	7
Adnan Novo Foreword: Paths of Mediation in Bosnia and Herzegovina	11
Alan Uzelac Comments on Law on Mediation Procedure of Bosnia and Herzegovina	17
Gašo Knežević ADR vs. Public Justice: Turn of the Tide?	61
Steven Auster Miller The BiH Mediation Regime: A Practical and Legal Analysis	83
Mehmed Hadžić Mediation in Labor Disputes in Legislation of Bosnia and Herzegovina	113
Jagoda Ribica Aleksandar Živanović Role of the Association of Mediators of Bosnia and Herzegovina in Development of Mediation	131
Fatima Mrdović Branka Skoko Judiciary and Mediation	151
Lada Buševac Mediation in European Union	173

COLLECTION OF PAPERS | Paths of Mediation in Bosnia and Herzegovina

Alan Uzelac

**Comments on
Law on Mediation Procedure
of Bosnia and Herzegovina**



Alan Uzelac¹

Comments on Law on Mediation Procedure of Bosnia and Herzegovina

Introduction

Bosnia and Herzegovina has joined that circle of countries which by means of a unified law regulated the issue of dispute resolution through mediation. Thereby BiH acknowledged the importance of alternative dispute resolution for appropriate and efficient functioning of national legal protection mechanisms. The Law on Mediation Procedure provides, in a generally acceptable manner with only few deviations, the answer to basic questions that the contemporary mediation legislation is dealing with. Although its provisions mainly focus on so-called court-annexed mediation (mediation in addition to a court procedure and mediation upon a court referral), it also anticipates general issues relevant for conduct of any mediation procedure, including non-administered (*ad hoc*) mediation. The Law on Mediation Procedure is a modern law in its essence; however, there are few omissions in its formulations, which may have resulted as a consequence of its drafting and adoption process. This Law also omitted to set forth several standard topics, such as repercussions of instituting a mediation procedure upon the course of statute of limitation and other limitations; validity of mediation clauses (agreement to a mediation attempt in the event of a dispute arising from any other agreement), and incorporation of mediation rules and regulations in mediation agreements. In this light, the Law on Mediation Procedure creates a solid foundation and leaves room for its further development and expansion in the future. In the text below, we intended to provide comments about individual provisions of the Law on Mediation Procedure, bearing in mind the stage of mediation development in BiH and comparative experience of other countries.

1 Alan Uzelac is a professor of civil and procedural law at the University of Zagreb, where he inter alia teaches out-of-court dispute resolution, mediation, and arbitration at undergraduate and postgraduate levels. Since mid 90s he has participated in the work of the UNICITRAL Working Group for Arbitration and Mediation being actively involved into drafting of the UNICITRAL Model Law on International Trade Mediation. He also was among the founders of first conciliation centers in Croatia and he is the author of first mediation rules. In 2003, he drafted a proposed Law on Conciliation of Croatia which was adopted and entered into force in the same year. He is the author of several publications on alternative dispute resolution and comments on the Law on Conciliation of Croatia.

LAW ON MEDIATION PROCEDURE

Published in the Official Gazette of BiH No.: 37/2004 of 12 August 2004

Entered in force on 20 August 2004 (see Art. 33 of the Law)

I. General provisions

Article 1

This Law governs the mediation procedure on the territory of Bosnia and Herzegovina.

The mediation tasks shall by a separate law be transferred to the association or associations by the procedure set forth in that Law.

- Mediation Procedure: Chapter III.
- Requirements for dealing with mediation: Chapter VI.
- Association: Art. 5 Para. 1 and 2; Art. 27; Art. 29; Art. 31
- See: Law on Transfer of Mediation Affairs to Association of Mediators (hereinafter referred to as: ZPPMUM, Official Gazette of BiH, No. 52/05).
- Mediation site: Art. 11

Application field of the Law on Mediation Procedure

1. Field of application of the Law on Mediation Procedure (hereinafter referred to as: the LMP) has been determined by the territorial and not causal fashion. The LMP sets out the mediation procedure on the *territory* of Bosnia and Herzegovina, whereby the sort of disputes and types of mediation procedures are not specified.
2. If read literally, the LMP shall refer only to the *mediation procedure*. Similar as in regard to the title of this Law, the expression “mediation procedure” shall be construed broadly, so that it comprises all relevant aspects of mediation, particularly those which are explicit and contained in the Law. Therefore, for example, although in a literal sense the “procedure” should not comprise

issues such as contents, form and effect of the mediation agreement; effect of the mediation procedure to other procedures; conditions for dealing with mediations and similar, all these issues are mentioned in LPM and it with no doubts “regulates” them.

3. Territorial determination of application field may cause some difficulties. Comparing to the arbitration, where the arbitration site, even if not determined in the arbitration agreement, must be determined in the arbitration decision (award), the practice is not usual for mediation. A single norm in the LMP referring to the mediation site is contained in the provision on the contents of mediation agreement, which should also contain *mediation site* (see: comments about Art. 11). Therefore, a question is raised whether the mediation procedure “on the territory of Bosnia and Herzegovina” shall be considered a mediation, in which (only) a mediation agreement is concluded in BiH; a mediation in which (only) in the contract on mediation BiH is indicated as mediation site; a mediation in which (only) one or more meetings with parties take place in BiH; a mediation in which (only) settlement is concluded in BiH, etc. We believe that this provision shall be construed broadly and permissively, accepting any of the elements of territorial relation. Namely, even only limited personal and institutional application field of the law (to the mediation conducted by mediators registered in BiH supported by association authorized by the Law) creates a sufficient link with the BiH legal order.

4. As the Law specifies neither in its definition nor by a list of cases which may be resolved by mediation (see the comment on Article 2), the field of its application shall be considered broadly to the highest extent in causal terms. Restrictions shall only imply from nature of things, and from the definition of mediation as a path to achieve a resolution of the *dispute*. With no doubt, causal field of LMP application shall comprise of civil, commercial and labor disputes, as well as other disputes about rights which parties may freely dispose of. Also, other disputes, such as status disputes (disputes arising from the family law domain), and also some disputes from the criminal law domain, may be listed under the application field of this Law, provided any of them is entirely defined by some other regulations, thus they act as *lex specialis* in that case.

5. The Law on Mediation Procedure, in comparison to many other laws (for example: Law on Conciliation of the Republic of Croatia) comes from the idea about necessity of an institutional and organizational framework for mediation. Insofar, in several articles it comes from the idea that mediation shall be organized under the auspices of mediation organizations (associations), and

that shall be implemented only by registered members of that organization. Although a trend is also present in Europe to license authorized mediators for purpose of quality and control over mediation, provision of Article 1 Paragraph 2 represents, however, a significant personal reduction of the application scope of the Law to mediations, which are implemented as so-called institutional mediations only, i.e. under auspices of organizations to which implementation of “mediation affairs” was transferred by the Law. For the moment being, this is only one organization – Association of Mediators of Bosnia and Herzegovina (see: Article 4 of the ZPPMUM).

6. Considering the narrowed personal application field of LMP, the question of legal status of the mediation is raised which meets requirements referred to in Art 2, but it is not implemented under auspices and with support of a licensed Association or by a registered mediator. These mediations, although possibly and potentially useful if a settlement is achieved therein, shall not exercise any of benefits anticipated in the LMP, e.g. direct enforcement of the settlement agreement (Art. 25, see comments), court referral to mediation (Art. 4 Paragraph 2), regulated price list of services (Article 30) or accountability of a mediator (Article 27).

Article 2

For the purpose of this Law, the mediation shall be a procedure in which a third neutral party (mediator) assists parties in an effort to achieve a mutually acceptable resolution of a dispute.

A Mediator may not impose the solution to the dispute on the parties.

- Mediator: Art. 3 Para. 2
- Settlement Agreement: Art. 24
- Principle of free will: Art. 6

Definition of mediation

7. The Law defines the mediation in a contemporary standard and acceptable fashion. Definition included in Article 2 points out four elements:

- a.) Mediation as a legally regulated procedure;
- b.) Mediation as a procedure which is implemented by a neutral third party;

- c.) Mediation as a procedure whose purpose is to achieve a consensual (amicable) dispute settlement;
- d.) Mediation as a procedure in which a person implementing it has no competence of making a binding decision.

8. Comparing to other classical adjudicative procedures (court procedure, arbitration), mediation is less formal and less regulated method of dispute resolution. Therefore, it is sometimes difficult to differentiate between some informal friendly efforts of a third person to assist to the contesting parties and the mediation as a legally regulated and defined procedure. Although LMP is neither extensive nor it contains many procedural rules, nevertheless it determines several clear elements which differentiate the mediation as a legal procedure from other practices: duty of execute a written mediation agreement; a rule of disqualification of mediator; a rule on suspension of procedure and enforcement of settlement agreement, etc.

9. The formulation of Article 2 contains some of wording awkwardness which requires an adequate interpretation. Reference to the “third neutral party (mediator)” resembles a definition of a mediator, although this definition is provided in the next article (Article 3 Paragraph 2). Also, it stipulates efforts for reaching a “mutually acceptable dispute resolution”, although the purpose of mediation does not stop at searching for and finding a solution, but it also includes the implementation of a found “acceptable” solution– in achieving of a legally binding settlement. Eventually, the provision that the mediator “cannot impose a solution to the parties“ has rather a narrative than strictly legal meaning. Its essence is not in the issue that the mediator cannot offer convincing solutions which would be imposed by its plausibility to the parties (which is not true, see the comment on Article 23), nor in that that the arbitrator cannot use unethical methods for achieving settlement (“imposition“ as mental or physical force). This norm shall be construed as absence of authority of mediator to make a decision based on his/her assessment of legal status of the parties involved in the dispute, which would be legally binding.

10. The LMP makes no difference between facilitation and evaluation methods of dispute resolution, therefore the broad notion of mediation shall include all forms of alternative dispute resolutions which meet the given definition, regardless how they would be called otherwise (mediation, conciliation, early neutral evaluation, *mini-trial*, *DRB*, *etc.*). Exactly for this concept, its procedural provisions (which are mostly created by a measure of “classical” facilitation mediation) should be considered either excessively scarce (as they

do not anticipate rules for some methods of alternative dispute resolution) or excessively detailed (as they contain too detailed rules for institutional facilitation mediation).

Article 3

The mediation procedure shall be conducted by an individual mediator, unless the parties agree to have more than one mediator conducting the procedure.

A mediator shall be a third neutral person mediating in dispute resolution between the parties pursuant to the mediation principles.

- Mediation principles: Chapter II.
- Principle of equal treatment: Art. 8
- Principle of neutrality and impartiality: Art. 9

Number of mediators, definition of mediator

11. Comparing to arbitration or court procedure (at least on higher instances) where a principle of a joint decision-making prevails, in relation to mediation the principle of individual acting prevails. An individual mediator can successfully mediate in number of disputes, thus it shall be a standard solution in absence of other preferences of the parties or applicable mediation rules. However, the parties may reach an agreement about having more mediators instead of one to conduct the mediation. It has to be emphasized that “more mediators” may stand for both, even or odd number of mediators. Comparing to arbitration (and court adjudication), where an even number can block a decision-making, there is no such danger with the mediation. Therefore, the most frequent case of joint mediation is the one which is conducted by two mediators (so-called: co-mediation). In that event, mediators from various professional backgrounds are usually combined (e.g. a lawyer and a psychologist), or mediators of different experience (which helps to training of mediators and to creation of unified standards and techniques of procedures).

12. Number of mediators or manners of their determination can be also defined pursuant to the rules on mediation. Acceptance of the parties to application of certain institutional rules on mediation also implies their agreement on number of mediators referred to in those rules, unless they explicitly agree on specific deviations from the latter.

13. Article 3 Paragraph 2 sets out the definition of a mediator. This partially overlaps with the implied definition referred to in Article 2 Paragraph 1. If we take both articles together, we will come to the conclusion that for the role of a mediator the following is important:

- a) it is about a third neutral person, i.e. a person which is not a party himself/herself in the dispute, nor a party's representative;
- b) the essence of the mediator's act lays in his/her effort to resolve a dispute between the parties in an amicable fashion by means of mediation, i.e. by concluding a settlement;
- c) a mediator has no authority to resolve a dispute by a legally binding decision, but the procedure shall be conducted based on principles of free will, confidentiality, neutrality and impartiality, and equal treatment of the parties (see. Comments on Article 6. to 9 of the LMP).

14. The specified definition implies that some practices of dispute resolutions shall not be considered mediation by the Law. For example, efforts of litigation judge to bring the parties' views closer in order to conclude a (court) settlement shall not be considered mediation. This is also not the conduct of mediatory negotiations, whereby as mediators between the parties appear their representatives (attorneys), or other persons, whose task is primarily to protect rights and interests of a party in dispute.

Article 4

The parties in dispute may agree, either before or after institution of the court procedure until the conclusion of the main hearing, to resolve the dispute in the mediation procedure.

If before institution of the court procedure the parties have not attempted to resolve the dispute in the mediation procedure, the trial judge in the procedure, if he/she deems it appropriate, may at the preparatory hearing propose to the parties to attempt to resolve their dispute in the mediation procedure.

- Instigating a mediation procedure: Art. 10
- Contract on Mediation: Art. 11
- Requirement to notify the court on mediation agreement: Art. 13
- Court acting in the event the parties have subsequently agreed on mediation: Art. 14

Agreement of mediation, court referral to mediation

15. The first step in the mediation procedure is to reach an agreement between the parties to start with mediation at all. Mediation as an alternative fashion of dispute resolution is the most efficient when replacing a court or another procedure. However, it can only assist to resolve those cases which are already before the court or other authorities. Therefore, Article 4 sets forth that the parties can also agree prior to instigating a court procedure (which will be unnecessary in case the mediation ends successfully), and after the charges have already been filed with the court. In the event the parties reach the agreement on mediation after the instigating a court procedure, see the comments on procedures about Articles 13 and 14.

16. Article 4 Paragraph 1 sets out that the parties can agree on mediation in the course of the court procedure until *completion of main hearing*. The reason which most probably led the legislator to this limitation lays in the fact that after the completion of the main hearing, the court is obliged to make a decision, whose validity is related to the moment of main hearing. After the conclusion of the main hearing, the parties do not have opportunity to reach agreement in the mediation attempt. It seems however that this limitation

should not be interpreted in a way that the parties outside the court could not agree on mediation, even after the completion of the main hearing, also after pronouncing the invalid (not final) court decision. In that case, the parties can, for example, agree in a mediation procedure on whether a party or both parties should withdraw their appeals; also, complying with the court decision, they can reach an agreement of payment terms (e.g. in installments) or give up on part of adjudicated benefits and replace it by a faster voluntary fulfillment of their obligations, or withdraw legal remedies, etc. In the same fashion, the mediation is also possible after the valid completion of a dispute by a court decision. Its possible success in that event does not affect the efficiency and legal validity of final judgment, but the fashions of its enforcement and further regulation of relations between the parties. These agreements on mediation should also be included in the definition of entered agreements *prior* to instigating a court procedure, because they decrease probability or prevent further litigation procedures between the same parties.

17. Article 4 Paragraph 2 also authorizes the trial judge to propose mediation to the parties, if he consider that appropriate. A judge's recommendation is not binding for the parties, but it acts convincing, supported by the authority of the court. Even the acceptance of the judge's proposal is not binding, because each party can withdraw iin any moment from the mediation procedure.

18. The judge should make a proposal about mediation attempt *if parties prior instigating a court procedure did not try to resolve the dispute in the mediation procedure*, i.e. at the *preparation hearing*. Both conditions witness on certain lack of trust of the legislator in mediation and concern that the mediation shall be misused for the delay of the procedure, i.e. as a way for judges to avoid doing their job. Namely, a proposal (recommendation) of the court is not a formal and binding act, and according to Paragraph 1, the parties may anyway agree on mediation after the preparation hearing, and may repeat it for many times, up to the final dispute resolution. Therefore, we believe that limitation of recommendations to cases with no previous mediation attempts and to preparation hearing should be construed only as a guideline to the court *when* it should consider a possibility to recommend mediation to the parties, and whether its recommendation is *useful* (in case the mediation attempt already failed, as a rule, this will not be the case, although in specific circumstances may be concluded otherwise).

19. Article 4 speaks about *reaching an agreement on* a mediation attempt, which can be interpreted as every agreement based on will consent, regardless

of the form. However, for an informal agreement on mediation attempt to become formal instigation of mediation, it is necessary to enter into a Mediation contract (see the comment on Article 11). Therefore, it is desirable that the verbal agreement of the parties is verified in writing as soon as it is practical, along with specifying all elements which make binding contents of a mediation contract.

20. Article 4 speaks about an agreement *prior or after* instigating a *court procedure*, however it does not specify whether it is a matter of an agreement entered *prior or after occurrence of the dispute*. To that end, there is a certain legal gap in the LMP, since it – focused on the annexed court mediation – does not regulate a legal effect, form, and other details related to the so-called *mediation clauses* (see Introduction).

Article 5

Parties shall jointly select a mediator from the list of mediators established by the Association.

If the parties cannot agree about the choice of mediator, then the mediator shall be appointed by the Association.

The written agreement enactment referred to in paragraph 1 or the enactment of the Association of Mediators referred to in paragraph 2 of this Article shall be submitted and inserted into the case file with the proceeding court, if the mediation procedure has been instituted during or after institution of the court procedure.

- Association: Art. 1, Para. 2; Art. 27; Art. 29; Art. 31
- Background of mediators: Art. 31
- Instigating a mediation procedure: Art. 10
- Mediation Contract: Art. 11

Selection and appointment of mediators

21. Mediation is based on the principle of free will and autonomy of parties, which also includes the right to a mutual agreement about the person or persons who will conduct the mediation. This right is illusive in practice to a

certain extent, because parties in dispute only exceptionally have knowledge about qualities and skills of mediators. On the same ground, the Article of LMP on selection of a mediator anticipates on one side the autonomy of the parties, nevertheless it limits the choice to the list of mediators determined by the Association of Mediators on the other side. This rule should ensure compliance with legal requirements for dealing with mediation, and thereby also competence and quality of procedural acting (see: comments about Article 31).

22. Limitation of choice to the list of mediators can also cause some difficulties. Namely, *list of mediators* according to the LMP does not necessarily conform with the group of all persons who comply with all the requirements referred to in Article 31, i.e. can be narrower in comparison to mediators registered in the *List of Mediators*; LMP does not also contain the explicit rule to include only persons who comply with the respective requirements, although it should imply from the spirit of the Law and other legal norms. These dangers should not be augmented, as the mediation is a flexible procedure which most frequently leads to solutions which are voluntarily respected, yet an issue of settlement status may arise in certain cases, which was achieved after the mediation which was conducted by a mediator who is not on the list (or did not comply with requirements referred to in Art. 31). See: Rulebook of Association of Mediators on Mediators List, “Official Gazette” of BiH No.: 21/06.

23. LMP differs between two documents relevant for implementation of mediation: *Agreement on Mediator/Mediators*, and *Contract on Mediation*. It is not explicitly indicated which of these two documents should be executed first, however as the Contract on Mediation should be signed both by parties and the mediator (compare to Art. 11) it implies that the Agreement on Mediator should be signed first (or executed simultaneously with the Mediation Contract). Thereby, the purpose of separating the Mediation Contract from the Agreement on Mediator is questioned, because it will be logical to expect the parties to agree on mediation procedure first, and to select their mediator in the aftermath. We believe it should not be insisted on rephrasing of these two documents, and that the Mediation Contract, if containing all elements of the agreement on the mediator, can serve as an Agreement on the mediator, which is the subject of this Article.

24. Pursuant to Paragraph 2, in absence of an agreement achieved by the parties, the mediator shall be appointed by the Association of Mediators. The Law does not include closer provisions what this appointment should consist of.

We should assume that the appointment should be also formulated in writing (the argument referred to in Paragraph 3), but also that it would be limited to the list of mediators, i.e. persons who comply with requirements under Art 31. There is also no provision on time limitations for parties to reach an agreement, before the appointment is done by the Association. Also, regulation of the appointment procedure is left to the internal rules of the Association (see comments about Art. 1 Para. 2). Some of these rules are contained by the Rulebook on referral to mediation (“BiH Official Gazette” No: 21/06).

25. Although the wording of the Law in regard to selection of the mediator is relatively scarce and incomplete, it must be noted that it was drafted primarily bearing in mind, so-called court-annexed mediation, i.e. mediation which is implemented after instigation of the litigation, whereas the court refers to the option of utilization of already existing infrastructure (Mediation Office, creditors for mediation, Association of Mediators, etc.) which will assist to ignorant parties in deciding about mediation, enter into all necessary agreements and agree on schedule of meetings.

26. The provision of Paragraph 3 on filing the documents on mediator appointment in the file folder also relies on the court-annexed mediation – which is possible only in case the procedure is already ongoing. The purpose of this obligation is not clear, its title holder (a party/parties or the Association) or consequences of a tentative failure to comply with.

II. Principles of the Mediation Procedure

Article 6

The parties in dispute shall institute the mediation process and participate in reaching of a mutually acceptable agreement on a voluntary basis.

- Instigation of the mediation proceeding: Art. 10.
- Free suspension of a mediation procedure: Art. 19 Para. 1
- Willingness about choice and time of mediation: Art. 12
- Settlement Agreement: Art. 24

Principle of willingness (autonomy of parties' will)

27. Principle of willingness (absence of external force and autonomy of will) shall be a foundation of every mediation, although in specific circumstances for some disputes (e.g. marital divorces) a binding principle may be anticipated to the lesser or higher extent to give a chance to mediation. In the LMP, as a general source of mediation law, there is however no elements of formal force of mediation (informally, parties can feel obliged to follow the court proposal referred to in Art 4. Para 2, (see Comments, but it leaves the legal definition of binding principle)

28. Article 6 mentions willingness in respect to *instigating the mediation procedure* and in respect to *achievement of mutually acceptable agreement*. What the legislator intended to express by these formulations is that there is no binding principle either in terms of participation in mediation procedure (an attempt to resolve the dispute by mediation), or in terms of accepting the proposed solution (conclusion of settlement). Insofar, the principle of willingness refers to all other events in mediation and around it: choice and number mediators and persons; venue of mediation, selection of applicable mediation rules, suspension (completion) of mediation without concluding a settlement agreement, contents and conditions of settlement, etc.

29. Limits of the will autonomy in regulation and implementation of a mediation procedure are determined only by need to comply with other mediation principles, primarily with the principle of equal treatment of parties, about which there should not be any exceptions. As far as confidentiality and independence of a mediator is concerned, the agreement can make exceptions to a certain extent to that regard (see: comment on Articles. 7, 9. and 29).

Article 7

The mediation procedure is of a confidential nature. The testimonies of the parties made in the mediation procedure may not without approval of the parties be used as evidence in any other procedure.

The mediator shall keep secret of the information provided to him/her during the separate meetings with each of the parties, and shall not discuss them with the other parties, unless agreed upon otherwise.

- Confidentiality in relation to third parties: Art. 16, Para. 2
- Separate meetings with parties: Art. 21
- Obligation to submit documents: Art. 17

Confidentiality principle

30. Unlike a court procedure, mediation is not conducted in public. Confidentiality of the mediation procedure is one of the major prerequisites for securing free and undisturbed communications in which proposals shall be exchanged openly and discussed about real causes and possible directions of dispute resolutions.

31. Confidentiality in relation to mediation may have more meanings: first, it refers to the exclusion of the public from meetings between a mediator and the parties (see comments on Art. 16). Second, it refers to a waiver on the possibility that statements given between the parties confidentially, for purpose of reaching a settlement, can be used as weapon in a court proceeding against the party, which disclosed them. (see: further elaboration under 32). Third, it refers to the confidentiality of information which was disclosed to the mediator unilaterally, in order to find room for reaching a settlement in negotiations with the other party (see more under 35). Fourth, it refers to all other pieces of information in relation to the procedure of conciliation, including the fact that mediation is conducted at all, as well as the information on the mediation outcome. Out of all these meanings, LMP includes corresponding norms in relation to the first three ones, while it has – due to its concept of affiliation with court-annexed mediation – missed the fourth one, which the parties in mediation, conducted before and out-of-court proceeding, have to reach in a separate agreement.

32. Concerning the exclusion of confidential information disclosed in a mediation procedure as evidence in a court or another proceeding, Article 7 Paragraph. 1 speaks about that *statements of parties disclosed in the mediation procedure* shall not be utilized in a court procedure. This norm has to some extent a narrow and uncertain wording, thus needs an adequate interpretation. Confidentiality should not refer to only verbally disclosed statements by the parties, but also to proposals of dispute resolution made in writing, regardless whether they are made by the parties or a mediator, as well as to other facts, which the other party and mediator find out in the course of procedure. Exclusion of evidence excludes only documents related to the dispute, and those which are not prepared specially for purposes of conducting a mediation procedure, because it would otherwise prevent parties to freely and openly present and use them for purpose of settlement achievement.

33. LMP does not set out in which way the mentioned exclusion of evidence is implemented in a court procedure. In any case, one should assume that the court shall not present evidences that can be used ex-officio, i.e. it shall dismiss motions of evidences by the parties who proposed presentation of such evidences. Among these motions, particularly those related to the questioning of the mediator, the very party that filed such a motion, or its opponent, as well as party representatives and third parties that were involved in the mediation, shall be dismissed. The court shall not accept the proposal to obtain documents which are part of the confidentiality requirement, and in case these documents were filed, the court shall dismiss, and if necessary, exclude them from the case file.

34. Exclusion of evidence is not absolute, because some protected information may be used as evidence, but only if there is consent by all the parties. Also, one should assume that a party or the mediator may be required to exceptionally witness or present mediation material, if there is a court obligation to witness about some facts (e.g. to prevent immediate danger of committing a crime, or to provide certain data which will enable the implementation or enforcement of the achieved settlement).

35. Paragraph 2 comprises a provision on so-called internal confidentiality. When a mediator utilizes a generally very useful and extended techniques of separate meetings with the parties, a question arises whether he/she may communicate to the other party what he/she found out from one party (besides the facts for which the party exclusively asked for confidential treatment) or vice versa, should he/she keep confidential everything he/she found out, unless

a party has explicitly made a consent to present certain circumstance to the other party.

36. Violation of confidentiality principle is a violation for which a compensation of damage may be required in relation to all parties who are asked to comply with that principle. Moreover, a mediator shall be accountable on disciplinary counts (see comments on Art. 27).

Article 8

The parties in the mediation procedure shall have equal rights.

- Neutrality and impartiality principle: Art. 9

Principle of equal treatment of parties

37. Article 8 sets out somewhat inadequately formulated general principle, according to which the parties in a mediation procedure should be treated equally, providing to each party the possibility to state all relevant dispute circumstances, to make its own proposals, and to find out about the proposals of the other party, as well as mediator's proposals for dispute resolution. In the mediation procedure none of the parties shall be disadvantaged, or treated differently from other parties in the mediation. The aforementioned rule is closely connected to the neutrality and impartiality principle, whereby a principle of equal treatment of parties was objectively formulated, without prejudice to circumstances existing with individual mediators, while neutrality and impartiality imply rather subjective characteristics of a person leading the case.

38. As opposed to majority of other rules and principles arising from LMP, Article 8 is of strict (cogent) natures and it cannot be even waived by the parties' agreement. In case the parties reach an agreement on the procedure, in which one of them will not be treated equally, a mediator should dismiss such an agreement. Should the parties insist on such an agreement, he/she should refuse to participate in that procedure, or to suspend the procedure in case it was already instigated (see comments about Article 19).

Article 9

The mediator shall mediate in a neutral manner, without any prejudice as to the parties and the subject matter of dispute.

- Mediator as a neutral person: Art. 2 Para. 1; Art. 3 Para 2
- Principle of equal treatment: Art. 8
- Duty of a mediator to suspend mediation: Art. 19
- Reasons for disqualification of the mediator, conflict of interest: Art. 28 and 29

Principle of neutrality and impartiality

39. Even the very definition of mediation and mediator comprises a notion of neutrality. A mediator as a “third neutral person“ must strictly comply with duties to treat parties equally (see comment about Art. 8), so that he should not be perceived by the parties as someone who is closer or more inclined to any of the parties in the procedure. If such circumstances exist or arise, a mediator cannot, except in special cases, continue with conducting mediation (see comments about Art. 28 and 29).

40. The principle of neutrality is demonstrated on one side in the manner of conducting the procedure (*mediation in a neutral way*), and on the other side in a subjective relation of the mediator towards the parties and the dispute in question (*without prejudice in relation to the parties and subject matter of the dispute*). Both duties are absolute and imply from the previously established principle of equal treatment of the parties. (see: comments about Art. 8 and 29).

41. Neutrality, broadly interpreted, also encompasses objective characteristics of the mediator, i.e. his/her link with the parties or other persons, respectively existence of other circumstances, which may in the eyes of parties give a rise to doubts of his/her independence and impartiality. Some of these circumstances are indicated under the title “conflict of interests” in Art. 28 (personal, family, or business relations with the respective party, trial judge, authorized person, legal representative, or advisor to one of the parties). These circumstances are, however, not considered absolute by the LMP (see: comments about Art. 29).

III. – Mediation procedure

Article 10

The mediation procedure shall be instituted by a written agreement on mediation signed by the parties in dispute and the mediator.

- **Mediation agreement: Art. 4**
- **Contents of the mediation agreement: Art. 11**
- **Agreement on mediator: Art. 5**

Instigating a mediation procedure

42. Although mediation stands for an informal and flexible procedure, aiming at amicable dispute resolution, a moment when the mediation is instigated should be determined. It is necessary for various reasons: impact of an instigated mediation procedure to the court procedure (see. Art. 14), filing terms (both in the court procedure and beyond that – e.g. terms for filing an appeal or statute of limitation), rights of mediator to remuneration or compensation, etc.

43. According to the LMP, the mediation procedure *shall be instigated by a written agreement*. This expression should be construed in the sense that the mediation has commenced in the moment the parties *concluded* a written agreement, and not in terms of its filing, registration, and similar. A written agreement on mediation is concluded when it is signed by the contested parties and the mediator. Whereby the agreement must have a mandatory contents set out in Art. 11 (see comments).

44. The signature on the mediation agreement has the meaning of the mediator's acceptance of the mandate to conduct mediation, but also consent to other elements of the mediation agreement contents. We believe that the mediation agreement, when it is signed, can replace the agreement on mediator appointment (see comment about Art. 5).

Article 11

The agreement on mediation shall contain: information on the parties to the agreement, the legal representatives or plenipotentiaries, the subject matter (dispute description), the statement of acceptance as to the mediation principles defined in this Law, the mediation site as well as the provisions on the costs of the procedure, including the mediator's fee.

- Application field of LMP: Art. 1
- Mediation principles: Section II (Art. 6 to 9)
- Representatives and proxies: Art. 15, Para. 2 and 3; Art. 16 Para. 1
- Compensation and remuneration of costs to the mediator: Art. 30

Contents of the Mediation Agreement

45. Article 11 sets out the mandatory contents of the mediation agreement. The mediation agreement which would not comprise all mandatory elements would not be properly drafted, thus a question arises whether such an agreement, once concluded, should lead to instigating a mediation procedure, and what would be the impact of the mediation settlement, if the mediation was implemented and completed based on an defective agreement.

46. We believe that, considering ambiguities mentioned in the previous paragraph, the legislator had too extensively defined mandatory contents of the mediation agreement. Namely, out of elements mentioned in this article only few are essential and necessary (*essentialia negotii*). These are the data about identity of parties, dispute description and willingness to resolve the dispute by mediation (among these data, information on mediator's identity was also included, but it – most probably as an omission – is not among mandatory elements, although that document shall be signed by the mediator). Other elements are not of such nature: representatives and authorize persons can also be determined during the procedure; obligation to accept mediation principles arises from the legal text, and mediation site and costs can be subsequently determined (specific amounts of costs, on contrary, can be possible to determine only at the end of the procedure). Therefore, it appears that provisions about the mandatory contents of a mediation agreement should be interpreted in relation to other elements as recommendations, which in case of their absence would not make a concluded agreement null and void. It would be opposite

to the spirit of the LMP to challenge the settlement effect and final dispute settlements between the parties if there would be an omission by the parties to include any of the elements (e.g. statement on compliance with principles or provisions on costs).

47. This article does not speak about elements which the agreement *may* contain. From the principles of free will and the parties' autonomy implies that the agreement may also include other elements, e.g. closer provisions on relevant procedural regulations (e.g. acceptance of a specific mediation rulebook or introduction of one or more additional rules supplementing or modifying operating parts of the Law). These may also be provisions on mediation language, time limitations, additional statements on confidentiality (or on public nature) of certain data related to the mediation procedure, or similar.

48. The mandatory part of the mediation agreement also comprises the provision on *mediation site*. The relation between this provision and application area of LMP, i.e. principle of territory (s. *supra* t. 3) is ambiguous. The mediation site should be considered a city or an area in which the mediation is conducted. In addition to that, a broadly defined site, the LMP also recognizes *closely defined site*, in which mediation takes place (s. comments about Art. 12).

Article 12

After signing of the agreement on mediation, in arrangement with the parties, the mediator shall schedule the time and the closer location - premises of holding the mediation meetings.

Determination of site and time of mediation

49. Mediation shall physically take place as one or more joint or separate meetings between a mediator and the parties. Pursuant Article 12, following instigation of mediation, a mediator and the parties shall jointly decide about the specific site (*closely defined site*) and time of mediation meetings. This norm is of technical nature and is self-explanatory to its most part.

Article 13

If the court procedure is already in due course, the parties who have agreed to resolve their dispute in the mediation procedure shall be obligated to inform to that effect the judge conducting the court procedure, by submitting him/her a copy of the mediation agreement.

- Mediation agreement, prior and after instigation of a court procedure: Art. 4
- Mediation agreement: Art. 11
- Delay due to mediation attempt: Art. 14
- Notice requirement on mediation outcome: Art. 26

Notice on mediation instigation

50. The parties who have reached an agreement about mediation shall notify the court before which a procedure is conducted about the respective dispute. The purpose of this provision shall be to make possible for the court to temporary adjourn taking any actions during the course of mediation (see: comments about Art. 14).

51. Pursuant Article 13, the parties shall be required to *notify about the agreement by submitting a copy of the mediation agreement*. This somewhat oddly formulated norm should be construed in a way that parties shall notify the judge about reaching an agreement that the respective dispute shall undergo a mediation procedure (see: comment about Art. 4), and to submit the mediation agreement to the court as soon as the latter is concluded.

52. The Law does not comprise of sanctions for failing to perform this duty. Naturally, if the parties fail to notify the court, it shall continue taking actions in the procedure. Although there are no direct sanctions, the court could indirectly sanction a party or the parties who fail to make a notice on mediation by a decision about court expenses.

Article 14

If in the course of a civil action, on their own initiative or upon the proposal of the judge, the parties have agreed to attempt to resolve their dispute in the mediation procedure, the court shall postpone the hearing for the period no longer than 30 days.

- **Mediation agreement: Art. 4**
- **Notification requirement about the agreement: Art. 13**

Delay due to mediation procedure

53. Article 14 provision speaks about the court proceeding in somewhat casuistic manner in case the parties reach an agreement on mediation implementation. This article implies the *hearing delay* only. One can assume that authors of this provision imagined a case in which the parties, independently or encouraged by the court, reach an agreement on mediation in course of a hearing (see Art. 4); or, possibly, they agree about an attempt of mediation after a scheduled hearing outside the court, and notify the court thereabout (see Art. 13).

54. We believe that the application of this particular provision should be extended to cases in which the court have not schedule a hearing yet (e.g. parties have reached an agreement immediately after filing a claim), as to other court events such as (e.g. investigation of parties' motions, making a procedural decision, obtaining of evidences).

55. Time period of 30 day is rather short, thus a question about its possible extension arises. As the procedure management is in hands of the court, we believe that the court and time period of 30 days, if deemed useful, can be extended in consultation with parties, taking account that the procedure is not unnecessarily delayed.

Article 15

If the parties in dispute are natural persons, their attendance at the procedure shall be mandatory.

The interest of the parties in the procedure may be represented by their legal representatives or plenipotentiaries.

The actions in the mediation procedure, including signing of the settlement agreement, as undertaken by the plenipotentiaries, shall have the same legal effect as though undertaken by the parties themselves.

- **Mediation Agreement: Art. 4**
- **Representatives and authorized persons/attorneys: Art. 11; Art. 16, Para. 1**

Requirement of physical presence, representation of the parties

56. Unlike the court procedure, in which a final decision as a rule depends on application of legal norms to the legally established statement of facts, in mediation arguments which are not legal but rather of strictly private nature, are infrequently decisive. To make possible for a mediator to find out about the entire background of a dispute and motivation of the parties, for purpose to increase probability to achieve the settlement, it is justified to request from the parties to participate in the mediation procedure in person.

57. Article 15 confines the requirement of participation in person to natural persons. One should consider as useful, although not mandatory by the law, that persons who are directly authorized for representation in the name and on behalf of legal entities (bodies-representatives, i.e. managers, chairs of board of directors and similar) also participate in a procedure. Their participation shall eliminate need for consultation about possible contents and settlement conditions, thus mediators should encourage them to (i) participated in the procedure.

58. Beside the parties, their voluntary representatives (attorneys, legal representatives) can also participate in the procedure. Participation of the attorneys can be useful for counseling of the parties about legal and/or

technical aspects of the dispute, interpretation of options in case no settlement is achieved, and explanation of consequences of the proposed and achieved settlement.

59. Incompetent persons in the procedure are required to be represented by their legal representatives, because they are only authorized persons to conclude a settlement on their behalf.

Article 16

In addition to the mediators, the parties, or their representatives, the procedure may also be attended by third parties, provided that the parties give their consent to that effect.

Any third parties attending the mediation procedure shall obligate themselves in writing that they shall adhere to the confidentiality principle of the mediation procedure.

- Confidentiality principle: Art. 7

Third parties in mediation procedure

60. Although mediation is not open for the public, if granted consent by the parties, third parties may attend and monitor a mediation procedure. For example, there can be assistants or advisor to the parties or mediator among them, administrative staff assisting in organization of technical affairs, or mediators who by monitoring of mediations led by other persons do their professional training. For presence of all these persons an explicit consent by the parties shall be required.

61. Third parties are not generally bound by the procedure conducted by other parties – that procedure is for them rather *res inter alios acta*. In order to extend the requirement of information confidentiality to them, and to mitigate the evidentiary process and sanctioning of a possible violation of the confidentiality principle, all third parties shall sign a binding statement to keep confidential all data about which they become aware during the mediation procedure. Also, it should be considered that statement disclosed about these facts can be made only if they are exempted by the parties, if they are legally bound to witness about it (see comments about Art. 7).

Article 17

Parties shall in due time submit to the mediator any of the relevant documents related to the subject matter of dispute.

- Suspension of mediation due to ineffectiveness of further procedure conduct: Art. 19 Para. 2

Submission of documents

62. The meaning and scope of the provision of Article 17 which sets out that parties are required to submit all the relevant documentation on time, are not clear. To the best, this obligation shall be taken as recommendation, because parties voluntarily participate in a procedure, and therefore they cannot be forced to take any action in the procedure. If they submit some documents to the mediator, this is only expression of their benevolence to present information to the mediation which can be helpful to his better understanding of the dispute and thereby to contribute to achieving a settlement. A mediator may, however, suspend a mediation procedure if the parties' resistance to cooperate would lead him/her to conclude that further conduct of mediation will not be effective (see Art. 19, Para. 2).

Article 18

In the beginning of mediation procedure, the mediator shall briefly inform the parties of the mediation goal, of the procedure to be conducted, and of the role of the mediator and the parties in the procedure.

Advice to parties at the beginning of procedure

63. In principle, a provision of Article 18 has a didactic meaning. Normally, a set of skills and techniques to be utilized in the procedure shall be a subject matter of legal regulation. However, the legislator made an exception to the rule here, probably taking account of low level of mediation knowledge of the parties, and lack of experience of most mediators.

Article 19

The mediation procedure shall be terminated by either party at any time in the course of the procedure.

The mediator may terminate the mediation procedure if he/she believes that any further procedure should have no purpose.

The mediator shall terminate the mediation procedure if reasons exist or appear in the course of the procedure preventing him/her from being neutral and impartial.

A written or verbal statement of a party of termination of the procedure, or a belief on the part of the mediator that any further procedure is with no purpose, shall be drafted by the mediator in the form of a separate enactment, and signed and submitted by him/her to the proceeding court.

- Principle of neutrality and impartiality: Art. 9
- Principle of equal treatment: Art. 8

Suspension of mediation procedure

64. Provision set forth in Art. 19 comprise of cases in which a mediation procedure can be terminated with no settlement achieved. Here, the LMP makes use of the notion “suspension of the procedure“ in different meaning of its usual procedural meaning. Unlike the rules of litigation procedure, in which *suspension* stands for *temporarily suspension of action in the procedure*, this notion here means *final suspension (termination)* of the mediation procedure.

65. Pursuant Article 19, termination (“suspension”) of mediation may occur in three cases:

- a) If any party make a statement about ending its participation in the mediation;
- b) If the mediator assess that further conduct of the procedure is not effective;
- c) If the mediator perceives reasons preventing him/her to be neutral and impartial.

66. As for the first case, the option to terminate the mediation by a unilateral statement of a party arises from the principle of free will. Parties cannot be forced to participate in the mediation against their will. However, it should be considered that an obviously non-loyal participation in the mediation procedure (instigation of mediation without readiness to be involved in searching a mutually acceptable solution) can in certain cases lead to the accountability of the party for the damage which was caused thereby. Statement about withdrawal from the mediation can be made either in verbal or written form.

67. The mandate of a mediator shall be in searching a solution together with the parties, which could, at least partially, lead to an amicable dispute settlement. He/she is granted discretion herein. Within the framework of his/her professional abilities and experience, he/she can assess whether it makes any sense, in light of all circumstances, to continue the mediation procedure any further. If he/she assessed that a party or the parties by their behavior lead to conclusion that chances for settlement are scarce or very minimal, the mediator can suspend any further action and terminate the mediation. Such his/her authority is also significant to prevent that any party misuse mediation procedure as a curtain for procedure delay.

68. Mediator must also suspend mediation when he/she finds out that, due to objective or subjective reasons, his/her neutrality and impartiality, can be challenged. More about the principle of neutrality and impartiality see comments on Article 9 and 28.

69. Suspension (termination) of mediation *shall be drafted in form of a special document* by the mediator. The Law does not anticipate any special conditions for the form of that act, unless it sets out it should be made in writing and signed by the mediator, stating clearly why the mediation is suspended. Informal letter to the court by the mediator shall be as a rule sufficient.

Article 20

The mediator shall be obligated to conduct a mediation procedure without any delay.

- Mediation procedure: Section III
- Responsibility of the mediator: Art. 27

Requirement of timely procedural acts

70. Mediation strengths are demonstrated only if the mediation procedure is conducted promptly, aiming at use of the parties' will to become involved in searching of a mutually acceptable solution. Because of the past experiences there is also a fear in practice that the mediation would be used for the additional delay of the procedure. Therefore, the LMP insists on the mediator's duty to conduct the procedure without delays. For violating of this requirement, the mediator can bear responsibility for incurred damage (see comments about the Article. 27).

Article 21

In the course of the mediation procedure, the mediator may also have separate interviews with either party individually.

- Reporting of the substance of separate meetings: Article 7 Paragraph 2

Separate meetings of mediators and parties

71. Possibility of separate meeting in which a mediator discuss with the parties the modalities to bring their points of view close and to open the room for settlement is one of the mediation strengths as alternative dispute resolutions. This technique (*caucusing*) is principally allowed neither in a court not in an arbitration procedure, in which it can raise doubts about impartiality of the person who is supposed to make a decision, as well as to ensure equal possibility to hearings of both parties. The mediation, however, are included in the most important means available to mediators in order to ensure open discussion

and to take advantage of trust relations between parties and mediators. A rule according to which mediators are required to keep confidential all information they become aware from the parties during separate meetings, also contributes thereto (see comments about Article. 7, Para. 2).

72. While having separate meetings, the mediator shall pay attention to treat the parties equally by meeting them interchangeably. In addition to separate meetings, it is also useful for mediator to have occasionally joint meetings with all parties.

Article 22

The mediator shall not give promises or guarantee any specific outcome of the mediation procedure.

- **Definition of mediation: Article 2, Para. 1**
- **Principle of free will: Article 6**

Granting no promises and guarantees

73. By accepting to conduct mediation procedure, a mediator also accepts best endeavor and not performance obligation. It implies both from the principle of free will (see comments about Article 6), and from the definition of mediation as a procedure in which a dispute between the parties is not directly resolved, but the parties are *assisted to achieve a mutually accepted solution*. Therefore, the mediator shall neither promise nor grant any result. If he/she would do this, the parties may be led to misconceptions, for which he/she can be accountable for damage (see comments about Article 27).

Article 23

Upon the request of the party, brought up during a separate interview, a mediator may propose options for dispute resolution, but not a solution itself.

- Separate meetings: Article 21
- Competences of mediator: Art. 2, Para. 2; Art. 3, Para. 2
- Principle of free will: Article 6

Competences of mediator to propose a dispute resolution

74. Procedures of alternative dispute resolutions differ in the part whether a person conducting them is authorized to only assist to the parties in bringing closer their views with no competences to propose dispute resolution (facilitating mediation), or a mediator is additionally authorized to propose dispute resolutions (evaluation mediation). To that end, Article 23 was phrased in somewhat unusual and ambiguous manner. Namely, as the mediator is authorized to propose *options for dispute resolution* if required by a party, *a contrario* it could be concluded that a mediator has no such authority without requirement of the party.

75. If this is required by (at least) one party, a mediator *can make a proposal*. It is not clear why a legislator stipulated that such a claim should be expressed in *a separate meeting*. We believe that there is no obstacle that the parties put forward that claim in a joint meeting. From a principle of equal treatment implies that the proposed options would be useful to submit not only to one party but to both of them, because on contrary, it is not a matter of dispute resolution options, but of informal discussion. According to the principle of voluntarism and autonomy, claim and authority to draft a resolution proposal can be granted to the mediator by both parties.

76. The notion in plural (*options for dispute resolutions*) could mean that at least two various proposal of resolution should be made. In our opinion it should not be construed literally, and the mediator should not be forced to produce proposals (options) which are not held credible or acceptable, just to make more proposals to the parties. The parties in terms of mediator's proposal have always two options – to accept them or not. The statement that the mediator cannot give *dispute solution* is entirely self-explanatory, and reiterates what

was said about mediation and role of the mediation in Article 2, Paragraph 2; Article 3, Paragraph 2, and what implies from the principle of free will and autonomy of the parties (Article 6).

Article 24

Once the parties in the mediation procedure identify the solution to the dispute, with the assistance by the mediator, they shall draft a written settlement agreement and sign it off immediately.

- **Mediation procedure: Section III**
- **Purpose of mediation: Art. 2, Paragraph 1**

Settlement agreement

77. The purpose of mediation as an alternative dispute settlement is in finding a mutually acceptable solution by the parties autonomously. These solutions in a rule mean that both parties shall compromise and give up on at least one part of their pretensions. Insofar, an optimal solution from mediation procedure is a settlement. The LMP does not define a settlement achieved in mediation, but there is no doubt it is a matter of legal institute which has elements of procedural law (as agreement of parties achieved during the mediation for dispute settlement), and elements of the substantive law (as a civil law agreement in which a dispute is settled by mutual compromise). In case it comes to diverging between elements of procedural and substantive law (for example, if parties conclude an agreement in a form of a settlement, which entirely accepts a position of one parties), we believe that priority should be given to elements of procedural law (i.e. such an agreement shall be considered a mediation settlement).

78. Article 24 implies that three elements are important for settlement in a mediation procedure, such as:

- a.) that parties reach a dispute settlement (at least partially) therein;
- b.) that solution is a result of a mediation procedure, i.e. that it was achieved with assistance of a mediator; and
- c.) that a settlement agreement was formulated in writing and executed by all parties in dispute.

79. We believe that for mitigation of evidentiary process it would be helpful that a settlement agreement is also signed by the mediator, although it was not explicitly required by the Law (see: further comments about Article 25).

Article 25

The settlement agreement referred to in Article 24 of this Law shall have the force of a final and enforceable document.

- Settlement Agreement: Article 24.

Legal force of the settlement agreement

80. The settlement as an option to resolution of a dispute is based on the agreement between the parties and is a result of their autonomously expressed will. Therefore, the probability of the parties to comply with their own agreement is significantly higher in relation to decisions imposed in a procedure in which one party is considered a winner and the other a loser. However, for this autonomous solution to have appropriate strength, and to avoid another court procedure in case of its violation, the Law sets forth that the settlement agreement has the power comparative to the valid court decision, i.e. that it has the force of enforcement document, pursuant which, if necessary, enforcement can be directly required.

81. As opposed to any other out-of-court settlement agreement, the settlement agreement achieved in mediation has the quality of enforcement there might be an issue of proving the origin of the settlement. For the settlement agreement a minimal threshold of formality is required – signatures of the parties and written form of the agreement. In order to avoid difficulties in evidentiary process that the settlement has indeed resulted in the mediation procedure implemented according to the LMP, it would be useful to have the settlement agreement resulted from mediation procedure also signed by the mediator, who in any case assists to the parties to formulate the settlement agreement.

82. The LPM does not require to submit any other document with the settlement agreement in the enforcement procedure (e.g. agreement on selection or appointment of mediator or similar). If in the enforcement procedure the issue arises whether the settlement was resulted from mediation in accordance with provisions of the law, the party who is referring to the settlement can file these documents if necessary. It would be useful if the mediator, while formulating the settlement agreement, also makes integral therein all facts on mediation implementation which are necessary to determine how the mediation was implemented.

83. The enforcement quality can be acquired only by that part of the settlement agreement which is of condemnatory character, and which would naturally be a subject of enforcement if it was a part of a court settlement. We also believe that enforcement can only be acquired by a settlement agreement in which rights of the parties are freely disposed of.

Article 26

If a civil action is in due course, the parties shall be obligated to inform the court of the outcome of the mediation procedure immediately, and no later than before the hearing is scheduled pursuant to Article 14 of this law, by submitting the settlement agreement.

- Requirement on informing of institution of the mediation procedure: Art. 13
- Delay of the hearing due to mediation procedure: Art. 14
- Confidentiality Principle: Article 7

Requirement on informing of the procedure outcome

84. Through reaching a settlement agreement, a dispute between the parties has been resolved, but its conclusion has no effect to the course of the civil action – it is still in due course. In order to suspend or to terminate a civil action, it is necessary to take appropriate actions in the very civil action. As a rule, a part of the settlement agreement shall also refer to that effect, for example, the claimant shall be obligated in the settlement agreement to withdraw its claim, partially or entirely. In that light, Article 26 has primarily the meaning of an instruction or a monitoring character: it reminds the parties that the civil action has not been terminated and that the court should be informed of their amicably achieved dispute resolution. Also, the purpose of this Article is to avoid unnecessary burden to the court with continuing the events in the procedure.

85. The parties shall inform the court *immediately, and no later than before the hearing is scheduled*. This norm is also a recommendation, which shall enable the court to plan its work effectively, concerning the fact that holding a hearing after the settlement shall be unnecessary. No sanctions, however, are anticipated by the Law for failing to comply with this requirement. We believe that the court shall indirectly sanction the parties who fail to inform of the settlement in a timely manner, through the decision on the court fees.

86. The parties shall inform the court of the *outcome of the mediation procedure by submitting the settlement agreement*. This wording shall lead to conclusion that the requirement refers only to a successful mediation (because the outcome of a failed mediation is not a settlement agreement). On the other hand, the question arises whether the law made one step too far when it set forth that the parties should, along with the notice on conclusion of a settlement agreement, submit even the respective settlement agreement. Namely, the principle of confidentiality in broader sense also comprises confidentiality of information about the mediation outcome, which includes confidentiality in relation to the court. A settlement agreement can be made of various provision, including manners of resolution of other disputes and procedures, as well as other issues that makes entire context and settlement conditions, and which do not directly refer to the court dispute, in which the parties reached an agreement on mediation. Fortunately, this requirement is also not sanctioned; this is kind of *lex imperfecta* to be normally followed by the parties, unless there are no other significant reasons for which they would like to keep the contents of the settlement agreement confidential.

Article 27

The mediator shall be subject to liability for any damage he/she may inflict on a party through his/her unlawful proceeding, according to the general rules of liability for damage, and or disciplinary liability in accordance with the enactments of the Association.

- Unlawful proceeding: s. on status and duties of the mediator in Article 2; Art. 3 paragraph 2; Art. 7; Art. 9; Art. 12; Art. 18; Art. 19, paragraph 3; Art. 20; Art. 22; Art. 23; Art. 28
- Association: s. Law on Transfer of Mediation affairs to the Association of Mediators (Official Gazette of BiH, No.: 52/05).

Mediator's liability for damage

87. The mediator is required to conduct the mediation in accordance with the law and rules of the profession. Otherwise, he/she is subject to liability for any damage he/she may inflict and can also be held liable on other counts (the LPM explicitly mentions disciplinary liability, however the other forms of liability under special regulations should not be excluded, for example minor offence and criminal liability). Mediators, as opposed to judges, have no

immunity therefore they are subject to liability for any damage in accordance with general rules, including general liability for all forms of culpability, both intention (*dolus*) and negligence (*culpa lata, culpa levis*).

88. According to the enactments of the Association, the mediators are obligated to have mandatory insurance against damage up to the minimal amount of 50,000 KM (comp. Rule on Liability of the Mediator for Damages Inflicted during Performing of Mediation, Official Gazette of BiH, No.: 21/06).

89. Disciplinary liability of the mediator is regulated by the Rule on Disciplinary Liability of the Mediators. Among other things, the mediators are subject of liability for violation of the Code of Mediation Ethics. (both enactments are published in the Official Gazette of BiH, No.: 21/06).

IV. Conflict of Interest

Article 28

The mediator may not proceed in the cases in which he/she has any personal interest, family, or business relation with a party in dispute, or if any appears in the meantime or if other circumstances exist which shall give rise to doubts in his/her impartiality.

The mediator shall not proceed in cases in which he/she has previously proceeded as a judge, or has been a plenipotentiary, legal representative or advisor to either of the parties.

- Principle of neutrality and impartiality: Art. 9
- Consent about the mediator's further proceeding in case of existence of reasons for his/her disqualification: Art. 29

Reasons for disqualification of the mediator (conflict of interest)

90. Article 28 provision sets forth the duty of the mediator to take into account circumstances which may give rise to doubts in his/her integrity and neutrality in the eyes of the parties. The provision is to some extent awkwardly formulated as it differentiates cases in which mediator *may not proceed* (Paragraph 1) and those in which mediator *shall not proceed* (Paragraph 2). The scope of both

provisions is essentially equal, as both of these qualities may be a reason for disqualification of the mediator, about which he/she has to notify the parties, but they exceptionally may agree in both cases about continuation of the mediation by the mediator.

91. Although Article 28 does not mention that, the parties may also give warning about existence of circumstances that give rise to doubts in neutrality of the mediator. According to the Code of Mediation Ethics, the mediator shall, if any party has doubts about his/her neutrality, withdraw from the mediation.

Article 29

The mediator may conduct the mediation procedure even in cases referred to in Article 28 of this Law, if the parties, once informed of existence of such circumstance, have agreed to have him/her conduct the procedure.

- Reasons for disqualification of the mediator: Art. 28

Consent about the mediator's further proceeding if reasons for his/her disqualification exist

92. If reasons for disqualification of the mediator exist (conflict of interest), the mediator shall inform the parties of the latter and suspend any further conduct of the mediation procedure. The mediator's withdrawal from the mediation procedure shall normally suspend and terminate the mediation, unless the parties had agreed about modifying their mediation agreement and about selection and appointment of another mediator.

93. In accordance with LMP, all reasons for disqualification of the mediator are of a relative character. The parties, after they were informed of existence of reasons for the disqualification, may amicably request the mediator to continue the procedure despite of the existing reasons. We believe that the mediator shall accept to continue conducting the mediation procedure with the consent by the parties, provided he/she believes that despite external circumstances which may give rise to doubts, he/she can continue conducting the procedure in a neutral and impartial manner. Otherwise, he/she should be obligated to withdraw from the mediation.

V. – Payment of Costs for the Mediation Procedure

Article 30

The fee and compensation of the mediator's costs, in the amount set forth in the enactment of the Association, as well as other costs necessary to conduct the mediation procedure, shall be paid by the parties in equal parts, unless the mediation agreement provides otherwise.

- Mediation Agreement, provisions on costs: Art. 11

Fees and compensation of the mediator's costs

94. The parties shall cover the costs equally unless they agree otherwise. The fees and compensation of the mediator's costs in the court annexed mediation have been regulated by the enactments of the Association (see: Rule on Fees and Costs of Mediation).

VI. – Requirements for Conducting the Mediation

Article 31

The mediator may be a person meeting general requirements for employment.

In addition to the requirements referred to in paragraph 1 of this Article, the mediator shall meet the following requirements:

- a) a university degree,
- b) completed training in mediation according to the program of the Association or according to another training programs recognized by the Association,
- c) entry into the registry of mediators held by the Association.

The person who is successful in completing the training program for mediators shall be issued an appropriate certificate serving as a basis for entry into the registry of mediators in Bosnia and Herzegovina.

- Mediator: Art. 3 paragraph 2
- Selection and Appointment of the Mediator: Art. 5, paragraph 1 and 2
- The List of Mediators: s. Rule on the List of Mediators (Official Gazette of BiH 21/06).

Requirements for mediators under the BiH Law

95. For a mediation to be applied under the LMP (see comments on Article 1), it is necessary to be conducted by a qualified and registered mediator. Otherwise, the mediation outcome shall not have legal consequences, primarily direct enforcement of the settlement agreement. Requirements referred to in Article 31 shall naturally be prerequisites for registration in the list of mediators (see comments about Article 5).

96. The Association of Mediators regulated its training curriculum by the Rule on the Training Curriculum for Mediators (Official Gazette of BiH 21/06).

Article 32

A foreign national authorized to conduct mediation activities in another country may in specific cases, under the condition of reciprocity, conduct the mediation procedure in Bosnia and Herzegovina, provided that he/she obtains a prior approval from the Ministry of Justice and the Association of Mediators of Bosnia and Herzegovina.

- Mediator: Article 3, paragraph 2
- Capacity of the mediator under the BiH Law: Art. 31

Recognition of capacity of the mediator for foreign nationals

97. The provision on rights of foreign nationals to conduct the mediation refers only to those foreign nationals who do not meet the requirements set forth in Article 31 (which does not stipulate the condition of citizenship and place of residence for the mediator).

98. *A contrario*, it would imply that citizens of BiH who are authorized to be mediators abroad cannot obtain the approval referred to in this Article, which most likely was not the intention of the legislator due to its discriminatory effect.

99. The foreign nationals who are licensed as mediators outside their country of origin can conduct the mediation in BiH under more conditions, which aggregately have to be met, namely if:

- a.) they are authorized to conduct the mediation in another country;
- b.) there is reciprocity, i.e. if the mediators registered in BiH can conduct mediation in the foreign country in which the foreign mediator has been registered;
- c.) they have obtained the prior approval by the Ministry of Justice and the Association of Mediators, i.e. for each individual case.

It appears that the specified conditions are set too high, particularly concerning the approval to be granted by two authorities; therefore they will make this Article entirely inapplicable until further notice/amendments.

FINAL PROVISIONS

Article 33

This Law shall enter in force on the eighth day from the day of publication in the “Official Gazette of BiH” and in the official gazettes of entities and the Brcko District of BiH.

Entrance in force of the Law

100. The provision on entrance in force of the Law is a standard provision. As the LMP was published on 12th of August, it entered into force on 20th of August 2004.



International Finance Corporation

World Bank Group

Advisory Services in ECA

Sarajevo Office

Hamdije Kreševljakovića 19/IV
71000 Sarajevo
Bosnia and Herzegovina
Tel: (+387-33) 251 555
Fax: (+387-33) 217 762
Contact: Samira Sauvage
E-mail: SSauvage@ifc.org

Belgrade Office

Bulevar Kralja Aleksandra 86
11000 Belgrade
Serbia
Tel: (+381-11) 3023 750
Fax: (+381-11) 3023 740
Contact: Igor Matijevic
E-mail: IMatijevic@ifc.org

Tirana Office

Deshmoret e 4 Shkurtit, No. 34
Tirana
Albania
Tel: (+355-4) 231 401
Fax: (+355-4) 231 260
Contact: Fatbradh Cangu
E-mail: FCangu@ifc.org

Skopje Office

Street Vasil Agilariski b.b.
SORAVIA 3rd floor
1000 Skopje
FYR Macedonia
Tel: (+389-2) 3223 306
Fax: (+389-2) 3223 298
Contact: Marina Perunovska
E-mail: MPerunovska@ifc.org

Regional Program Manager

Igor Matijevic
E-mail: IMatijevic@ifc.org
Bulevar Kralja Aleksandra 86
11000 Belgrade
Serbia
Tel: (+381-11) 3023 750
Fax: (+381-11) 3023 740

Regional Communications Officer

Slobodan Brkic
Email: SBrkic@ifc.org
Bulevar Kralja Aleksandra 86
11000 Belgrade
Serbia
Tel: (+381-11) 3023 750
Fax: (+381-11) 3023 740

www.ifc.org/pepse