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# **SYSTEMS FOR ENFORCING AGREEMENTS AND DECISIONS (SEAD) PROGRAM IN KOSOVO**

**REPORT AND RECOMMENDATIONS FOR DEVELOPING AND  
IMPLEMENTING AN APPROPRIATE AND EFFECTIVE ALTERNATIVE  
DISPUTE RESOLUTION SYSTEM**

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# **SYSTEMS FOR ENFORCING AGREEMENTS AND DECISIONS (SEAD) PROGRAM IN KOSOVO:**

Report and Recommendations for Developing and Implementing an  
Appropriate and Effective Alternative Dispute Resolution System

Submitted by:

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## TABLE OF ABBREVIATIONS

ADR	Alternative and Dispute Resolution
AmCham	American Chamber of Commerce
BEEPS	Business Environment and Enterprise Performance Survey
CLIR	Commercial Legal and Institutional Reform
ICC	International Chamber of Commerce
KCA	Kosovo Chamber of Advocates
KJI	Kosovo Judicial Institute
KCC	Kosovo Chamber of Commerce
SEAD	Systems for Enforcing Agreements and Decisions
UNCITRAL	United Nations Mission on International Trade
UNMIK	United Nations Mission in Kosovo
USAID	United States Agency for International Development



## **PART I: THE SEAD PROGRAM**

### **INTRODUCTION TO SEAD PROGRAM REPORT AND RECOMMENDATIONS**

The objective of this report is to describe the strategy, approach, and processes for implementing the SEAD Program tasking. This document also gives the team an opportunity to share knowledge obtained to date, and initial ideas for solutions that will support the development objectives of the project. Numerous reports and assessments have been prepared over the years by several organizations, including USAID. In some areas this report draws on previous work, in particular USAID's previous CLIR assessments. As an assessment, however, it must be understood that the intent of this document is to provide an assessment and recommendations for the SEAD Program's work; it is not a general assessment of Kosovar systems, except as related to specific program objectives.

### **METHODOLOGY**

This report is based on multi-faceted research and assessment that has provided insight into the Kosovo systems for contracts, for adjudication of commercial disputes (in particular on the potential for alternative means of dispute resolution (ADR)), and for the enforcement of judgments. The assessment included:

- A wide range of interviews of the Courts, judges, execution clerks, lawyers, donors, associations of lawyers, Business Associations, Chambers of Commerce, University faculty and Administration, training institutions (e.g., the Kosovo Judicial Institute), utilities, and others.
- Written surveys of courts, business associations, and lawyers.
- Focus Groups.
- Review of the current and draft legislation, including Laws on Obligations, Arbitration, Mediation, Contested Procedures, Execution Procedures, Pledge, and others.
- Analysis of systems, curricula, and institutions.

## SEAD PROGRAM OVERVIEW

The SEAD program will focus on improving the ability of citizens, businesses and the judicial system to use and enforce contracts and obligations; and to enforce court judgments in a timely and just manner. The project has three components – support to institutions to increase the use of, and quality of, contracts; assistance to improve processes for enforcing court judgments and reduce the backlog of cases resolved but not yet enforced; and development of institutions to provide reliable alternative means for resolving contract disputes through both commercial arbitration and mediation of select commercial cases. The project design also anticipates a rather active public education and outreach campaign to raise awareness and understanding of contract law and modern business practices with regard to contracts, and to increase demand for better public, and private services related to the use of contracts.

### The Current Situation in Kosovo

The use of contracts is fundamental to the operation of a modern market economy. Contracts act to distribute risk among the parties to a transaction, and to comprehensively define the parties' expectations and memorialize these expectations with respect to each other's roles in the transaction. The use of contracts enables the parties to minimize or avoid misunderstandings surrounding the obligations they have agreed to, and to establish clearly the rights and responsibilities they have assumed. Contracts enable merchants to craft the “best deals” and to most efficiently and productively engage in commerce; they are part of the societal fabric which optimizes economic activities. Well drafted contracts also assist judges in adjudicating contract disputes, and in more efficiently providing remedies for breaches of contract.

In Kosovo, although businesses and people engage in transactions and commerce every day, and therefore enter into many contracts, effective and modern *written* contracting practices are generally not used. The contracting practices that do exist do not rise to the level of international practice, putting Kosovar businesses at a disadvantage vis-à-vis foreign trading partners. Ultimately, this disadvantages Kosovo itself in relation to other countries given the highly competitive nature of the global economy. The impact on economic growth, and on Kosovo's future ability to integrate into Europe and have a competitive and vibrant economy, is genuinely undermined. Moreover, a failure to “buy-in” to and use formal structures and mechanisms generally undermines the Rule of Law and weakens the relationship between the State and the individual.

A number of factors contribute to the current low use of contracts. Historical factors - the period of repression and war, when Kosovar entrepreneurs were by necessity operating outside of formal structures – as well as the legacy of Socialism, and cultural values—the notion of “Besa”: oath or promise, all operate to influence current business practices and attitudes. But the most serious reasons are rooted in current conditions:

State systems are simply unable to efficiently enforce contracts. Kosovo Government institutions are not equipped to deal with the burden of an ever expanding demand to adjudicate disputes and enforce judgments. The fledgling Court system struggles as a result of being under-resourced, and execution clerks are even more overburdened than the courts. An enormous backlog of execution cases languishes - backlogs can result in a delay of several *years* before execution even begins. The information and institutional infrastructure to enable efficient enforcement is not present: cadastral records, pledge and business registries, etc., are not well enough developed to readily enable the identification and location of judgment debtor property. To make this essentially broken process more effective; in order to more nimbly and effectively provide just results for businesses that have disputes; and to address an enormous backlog of unenforced judgments, will require genuine and coherently planned effort on the part of government institutions to address a range of systemic deficiencies.

“As to why businesspeople do not use contracts that much, most of the business people pointed out to the weak and doubtful system that enforces those contracts; hence they see it as a waste of their time to invest in making an agreement that most likely will not get enforced anyway.” - Summary of Focus Group Responses, from Focus Groups conducted for the SEAD Program by MDA Consulting.

Because of the inability of state institutions to perform the role of neutral arbiter of private disputes, businesses ultimately see no incentive to using formal mechanisms to enforce their agreements:

This quote is a clear illustration that business recognizes the profound disincentives to the adoption of modern contracting practices. This is in fact quite rational behavior on the part of business. There is simply too little benefit to justify the cost: Businesses conclude that, as they cannot enforce arms-length transactions through the courts, they are better off dealing only with known parties, where the agreements are largely oral, and based on relationship and custom. In these transactions, written contracts are deemed unnecessary, or even offensive to the other party (perceived as conveying at least the implication of a lack of trust).

There are certainly exceptions to this general picture, particularly in banking and insurance, where written contracts are common. Generally, however, widespread use of written agreements in the normal course of business is the exception.

A further offshoot of these conditions is a virtually non-existent system for Alternative Dispute Resolution (ADR). Although laws on commercial arbitration and mediation are in place, and shells of the institutions to provide ADR exist, so long as business avoids the use of contracts, these services cannot develop organically – their use presumes either an ADR clause in a contract, or the effective enforcement of an ADR agreement. The establishment of an accessible and effective alternative dispute resolution system able to provide efficient, reliable and respected mediation and arbitration services can serve to minimize the burdens of seeking redress through the Courts. Availability of an efficacious alternative to the Courts will also instill and grow an understanding of the advantages to using contracts generally. This alternative to the State system of resolving disputes (i.e., the Court system) should be made available to the business community as an attractive choice when circumstances merit and businesses seek it. Much of the foundation for growing the use of ADR is in place. It is clear, however, that developing the service providers, and increasing knowledge about and demand for ADR is needed to stimulate the use of alternatives.

An additional problem which arises in this climate is a lack of legal services to the business community, which can be traced to low or no demand for such legal services, and to legal and business education. Law faculties and business schools do not focus much attention on providing their graduates with practical skills, including contracting skills or an understanding of the importance of contracts. Further, there is limited and inconsistent continuing legal education available to help practitioners upgrade their skills and knowledge, (although mandatory Continuing Legal Education for lawyers, scheduled to begin in 2010, should operate to begin to address this issue). A related problem is because there is little demand; there is a dearth of legal information available to business, courts, and lawyers on the use of contracts and contracting practices outside of general theory and basic legislation. Even if widespread use of contracts were to suddenly arise, the ability to use contracts effectively would be hampered significantly by a lack of plain guidance on standards for using them. As a result, business continues as usual – a low level of sophistication as compared to modern market economy practices in transactions and contracting.

Finally, proposed legislative changes contribute to the current situation. The basic framework legislation for contract law is the 1978 Federal Republic of Yugoslavia Law on Obligations (as amended). As the basic contract law, notwithstanding that it was inherited from Yugoslavia and supplemented by the UNMIK regulation on Contract on Sale, it seems to function fairly well.

Nevertheless, a replacement law has been drafted, largely based on German law, and passage of this draft is planned for 2010. The draft has not been analyzed vis-à-vis current practices, nor has there been an analysis of the cost to business should the law be passed and adopted by business (a question, given the foregoing observations; nevertheless, legislation must be both positively and normatively evaluated based on the assumption that it will be fully complied with). This has created general uncertainty on the part of business and bar alike, and further exacerbates the situation.

The use of contracts is a fundamental component of the Rule of Law generally. Law, and the observation and adherence to it by private parties, is crucial to predictability and order. In particular, the use of contracts, assuming an effective system for adopting and enforcing them, is a stabilizing force tying public systems and private parties together, and contributes to increased economic development. But Rule of Law requires that private parties “buy-in” to systems, and conversely that systems serve the public’s needs. For so long as the private sector shuns the use of formal systems and structures for commercial activity, a state of disconnectedness will continue, and the Rule of Law “fabric” will remain weak in Kosovo. An effective Rule of Law and increased, sustainable economic development are directly related and equally important for the future of Kosovo. Accordingly, the general aim of this program will support ongoing rule of law reforms by improving justice system foundational structures that also support greater economic development.

### **SEAD Program Goal**

The overarching goal of the new USAID "Systems for Enforcing Agreements and Decisions" (SEAD) Program is to improve the rule of law foundational structures that provide the basis for increased foreign and domestic economic investment and generally lead to an improved business-friendly environment.

### **SEAD Program Purpose**

The USAID Kosovo Systems for Enforcing Agreements and Decisions (SEAD) Program works to enhance the foundations of contract law in order to strengthen the broader rule of law in Kosovo. This program is designed to strengthen the legal systems in Kosovo available to citizens and businesses for 1) the enforcement of contracts and obligations; 2) the enforcement of civil (commercial) judgments; and 3) the use of alternative dispute resolution mechanisms.

### **SEAD Program Activities**

#### **COMPONENT 1 – MEANS AND MECHANISMS TO ENFORCE CONTRACTS**

This component of the SEAD Program will focus on assisting the government to finalize the development of the draft Law on Obligations; develop standard form contracts for common transactions, with commentary and usage notes; support the Kosovo Judicial Institute (KJI) and Kosovo Chamber of Advocates (KCA) to develop training materials for ongoing, sustainable training programs in contract law; assist the University of Pristina Law Faculty to develop and launch an LL.M. Program in Contract and Commercial Law; and develop specific legal information materials on the application of contract law for judges and lawyers.

#### **COMPONENT 2 – ENFORCEMENT OF JUDGMENTS**

This component of the SEAD Program will focus on assisting the government to streamline enforcement procedures, including the development of new or amended legislation; develop possible alternative policy directions to establish a more effective and efficient system for enforcing judgments; and assist in reducing the backlog of cases awaiting execution, with a particular emphasis on utilities cases.

### **COMPONENT 3 – ALTERNATIVE DISPUTE RESOLUTION**

This component of the SEAD Program will focus on assisting the Government and private institutions to develop reliable, effective, and sustainable alternative dispute resolution system, including Commercial Arbitration, and Mediation in commercial cases.

### **PUBLIC EDUCATION, OUTREACH, AND MEDIA RELATIONS**

The SEAD Program will engage in a wide-ranging campaign through a variety of media to increase knowledge and awareness of the advantages of using written contracts and to stimulate demand for improved legal services and ADR.

## **PART II. DEVELOP AND IMPLEMENT AN APPROPRIATE AND EFFECTIVE ALTERNATIVE DISPUTE RESOLUTION SYSTEM**

### **Executive Summary**

ADR is the commonly used acronym for the umbrella term “alternative dispute resolution.” ADR encompasses a broad spectrum of out-of-court conflict management and dispute resolution processes, ranging from direct negotiation between parties to mediation and arbitration. ADR is not a replacement for the formal judicial system, but rather provides other forms of dispute resolution or conflict management that are better suited to particular disputes. While arbitration is a well-established method for solving business disputes, the use of mediation has grown dramatically in recent decades.

The Laws on Arbitration and Mediation that have been passed in recent years provide the basic framework for establishing arbitration and mediation in Kosovo. Although together the laws provide a comprehensive system for alternative dispute resolution, developing mediation in Kosovo is very different than developing arbitration. The Arbitration Law establishes a complete legal framework for commercial arbitration that is in line with international best practices. In contrast, the Mediation Law covers a very broad range of disputes and delegates extensive rule-making authority to a Mediation Commission.

The first challenge to development of arbitration is to eliminate the conflict between the Law on Arbitration and Chapter 31 of the Law on Contested Procedures, which also regulates arbitration. The procedure for amending the Law on Contested Procedures to eliminate those provisions and replace them with a reference to the Arbitration Law is discussed under Arbitration: Resolve Conflicts with other Legislation.

The second challenge for arbitration is establishing high-quality institutional (sponsored) arbitration. The Kosovo Chamber of Commerce as well as the American Chamber of Commerce in Kosovo provide the best opportunities for providing arbitration to a broad spectrum of the Kosovo business community. Equally important is that the Kosovar courts have the capacity to enforce arbitration awards, both domestic and foreign. Support from the Kosovo Judicial Council will be critical.

The main challenge for the development of mediation is to build the capacity of the Mediation Commission to perform the duties delegated to it under the Mediation Law. This is a precondition for the implementation of mediation in all spheres, including the commercial/economic. Several international donor organizations are providing assistance to the Mediation Commission and SEAD is taking the lead to make sure that the assistance is well-coordinated so that the legal infrastructure for mediation will not be further delayed.

As is the case with arbitration, institutional (sponsored) mediation should be supported. A court referred mediation program could have an immediate effect on reducing the courts’ workload in both civil and penal. The Kosovo Judicial Council should support continuation of the pilot program that began in the Gjilan Municipal Court in 2007. In addition, a pilot program targeting commercial/economic cases could be established at the Economic Court in Pristina. Further, the KCC and AmCham should include incorporate mediation into their ADR programs.

Finally, critical to the success of arbitration and mediation is building awareness and demand among the legal and business communities. Accordingly, promoting ADR will be an important part of SEAD’s comprehensive outreach program.

# 1 INTRODUCTION

## 1.1 Background

The absence of an effective ADR mechanism is a severe impediment to economic growth in Kosovo. The Kosovo courts are severely overburdened, both with new cases and a long backlog. Accordingly, commercial disputes can take years to resolve. Moreover, even when a case is heard, the judgment may not be sound as judges have little experience interpreting commercial contracts. This situation presents a serious obstacle to both domestic and international investment in Kosovo. As a result representatives of the business community as well as commercial lawyers have clearly stated that an efficient, well-structured, highly professional formal ADR system is needed to complement the court system.

Although Laws on Mediation and Arbitration have been adopted in recent years, there is no secondary legislation to facilitate implementation of the laws. Moreover, there appear to be conflicts with other legislation. In addition to the absence of a complete and consistent legislative framework, the general concept of ADR is not well understood, either by the business community, legal professionals or citizens. Accordingly, SEAD will take a holistic approach to creating a sustainable and effective framework for ADR of business/commercial disputes.

In order to ensure local support for these reform interventions, key stakeholders will be included in all phases of project planning and implementation. In addition, ADR interventions will be coordinated with the Component 1 of the SEAD Program (Means and Mechanisms to Enforce Contracts) particularly in the areas of outreach and training for the business and legal communities. The components will undertake joint activities to inform the business community of the importance of well-drafted contracts and the benefits of ADR. Similarly, the components will collaborate on developing courses on contract law and ADR for practicing lawyers, judges, law students and business students.

Outcomes sought in this program area include:

- Rationalization of the legislative framework for ADR to ensure consistency with appropriate domestic and international standards;
- Drafting and Implementation of secondary legislation and regulations to support implementation of ADR;
- Developing standards and certification processes and training ADR professionals;
- Create oversight mechanisms to ensure delivery of ethical and professional ADR services;
- Creating demand for ADR through outreach to the business and legal communities; and
- Support development of sustainable ADR services at select Kosovo institutions.

As a result of the assessment process, SEAD believes that the legislative framework and standards for arbitration and mediation should be dealt with separately, while a common approach should be taken to education and outreach. Accordingly this report is divided into three sections: an analysis of the arbitration law and specific recommendations for arbitration; an analysis of the mediation law and specific recommendations for mediation; an analysis of the knowledge of and demand for arbitration and mediation and recommendations on building awareness and demand.

## 1.2 What is Alternative Dispute Resolution?

ADR is the commonly used acronym for the umbrella term “alternative dispute resolution.” ADR encompasses a broad spectrum of out-of-court conflict management and dispute resolution processes, ranging from direct negotiation between parties to mediation and arbitration. This is often referred to

as the continuum of dispute resolution. ADR is not a replacement for the formal judicial system, but rather provides other forms of dispute resolution or conflict management that are better suited to particular disputes. In this context, we should think of ADR as *appropriate* dispute resolution and take a flexible approach to ADR. While some practitioners use the term ADR to refer to processes other than arbitration, in this assessment ADR refers to all out-of-court dispute resolution systems, including arbitration and mediation.

While there are many definitions of mediation and arbitration in use and variations of the processes, which often result in confusion, the following definitions reflect the fundamental elements of mediation and arbitration.

**Arbitration** is an adjudicatory dispute resolution process in which one or more neutral persons (“arbitrators”) issue a judgment on the merits of a case after the presentation of proof and arguments by the disputants. While arbitration is similar to court adjudication, because the arbitrator, like a judge, issues a binding decision, arbitration is a less formal process than court adjudication (litigation) and therefore less timely and less expensive. In addition, parties typically choose the arbitrators and establish the rules of procedure.

**Mediation** is an informal process in which the disputants select one or more neutral persons (“mediators”) to assist them in reaching a mutually satisfactory settlement. Mediation is essentially facilitated negotiation. Mediation is frequently referred to as conciliation.

**Med/Arb** is a hybrid multi-step process in which the parties agree to mediate their dispute with the understanding that any issues not settled by mediation will be resolved by arbitration, using the same individual as both mediator and arbitrator.

The major difference between direct negotiation on the one hand, and mediation and arbitration on the other, is the presence of a third party neutral that assists the parties in resolving their conflict. The key distinction between mediation and arbitration is the role of the third party neutral in resolving the conflict. In mediation, the third party neutral—the mediator—assists the parties in resolving the dispute. In contrast, in arbitration, the third party neutral—the arbitrator—resolves the dispute by rendering a decision based on the evidence and arguments that the parties have presented. While the *degree of assistance* that a mediator provides varies, a mediator *never makes the decision*. In both arbitration and mediation, the skills and competency of the third party neutral is critical. Accordingly, the necessary qualifications and the appropriate level of regulation for these third party neutrals will be examined in detail.

Other distinguishing characteristics are whether the result of the ADR process is enforceable, whether the procedure is voluntary or mandatory, and whether the ADR procedure is ad hoc or administered by an institution. Typically, arbitral awards are treated as the equivalent of court decisions<sup>1</sup> and are immediately enforceable by a court. Mediation agreements, on the other hand, are contractual obligations and must be approved by a court to make them enforceable.

These are among the many issues to be considered in developing an appropriate dispute resolution system for Kosovo.

### 1.3 Why is alternative dispute resolution important?

As mentioned above, ADR should not replace the judicial system, but should provide alternatives where appropriate. ADR is particularly well suited to business and commercial disputes where parties have an ongoing relationship. Moreover, in a jurisdiction where the court system is overburdened or ineffective, ADR offers a much needed alternative and can play an important role in attracting both domestic and foreign investment that will result in economic growth.

The World Bank/EBRD Business Environment and Enterprise Performance Survey (BEEPS) in 2006 determined that more than 50 percent of firms considered the courts to be an impediment to doing business and less than 7 percent of businesses use the courts to resolve disputes. The latter is one of

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<sup>1</sup> An executive title under Kosovo Law on Executive Procedures.

the lowest scores in Southeastern Europe, which averaged nearly 40 percent. The study also found that the courts are considered one of the most corrupt institutions in Kosovo (the others are customs and tax administration, and public procurement)<sup>2</sup>. This aversion to turning to the courts to resolve disputes was confirmed by the focus group meetings and interviews conducted by SEAD.

Perhaps the ongoing reforms in the judiciary, including the appointment of judges based on an extensive vetting process, will increase the confidence of businesses and individual citizens in the court system and result in greater use of the court system. However increased confidence and use of the courts will be a gradual process and is unlikely to yield significant results in the short term. Moreover, even when the courts work well, ADR offers several advantages, including cost and time efficiency, confidentiality and privacy, flexibility, subject matter expertise and finality.

These advantages could be particularly attractive in the agriculture business. The AgCLIR Report notes that within the agricultural sector, systems for dispute resolution and enforcement of contracts are largely dysfunctional or broken. While this is due in part to the fact that agricultural businesses have poor contracting skills that do not establish a basis for alternative dispute resolution, the fact that there is no basis for resolving disputes is inescapable. Considering that 16% of the Kosovar economy originates in agriculture and 78% of the population depends directly on agriculture as its main source of income, meeting the dispute resolution needs of this sector is critical.

While it would be naïve to think that a viable ADR mechanism that can handle a large volume of disputes is achievable in the short term, it is reasonable to believe that Kosovo can have a modest, but functioning ADR mechanism in the medium term (3-5 years). Kosovo has already adopted Laws on Arbitration and Mediation that approximate international standards. Developing a plan for implementation and building the requisite capacity are the next steps. This assessment is intended as the starting point of that process.

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<sup>2</sup> USAID Kosovo Economic Assessment, p. 24.

## 2 ARBITRATION

Arbitration is a widely accepted mechanism for settling business disputes outside of the court system. Similar to the court system, arbitration is an adjudicative process; however, it is private process which is more flexible and efficient than litigation. Moreover, the parties exercise considerable control as they select the arbitrators and determine the procedure.

Arbitration was the preferred method of settling commercial disputes in the Middle Ages; and the first formal rules of arbitration were adopted in the England and the US in the 15<sup>th</sup> and 16<sup>th</sup> centuries, respectively. The growth and promotion of arbitration gained momentum in the 20<sup>th</sup> century when Western European countries and the US adopted laws on arbitration.<sup>3</sup>

In the former Yugoslavia, ADR was introduced during the 1960s and early 1970s. Arbitration was regulated by the Law on Contested Procedures as well as Conflict of Law Acts<sup>4</sup>. In addition, the Yugoslav Federation was a signatory party to international and regional legal instruments regulating arbitration. Prior to the dissolution of the former Yugoslav federation, all international arbitrations were conducted by the Foreign Trade Arbitration Court in Belgrade, while federal republics were limited to national arbitration.<sup>5</sup>

After the dissolution of the Yugoslav federation, the former federal republics established their own systems of arbitration by enacting new laws on arbitration and assuming jurisdiction for international cases. While the Kosovo Chamber of Commerce adopted a regulation on a permanent arbitrage court in 1999, due to the conflict situation in Kosovo, economic development, including the capacity to provide arbitration, was not a priority. The Kosovo Assembly adopted a new Law on the Kosovo Chamber of Commerce in 2004, which provides for an ADR mechanism known as the Court of Arbitration. This Court of Arbitration is discussed later in this report.

In the US, arbitration is regulated by federal and state law. The main federal act, the Federal Arbitration Act, was enacted in 1925 and has been amended several times. At the state level, 34 states and the District of Columbia have modeled their statutes on the Uniform Arbitration Act (UAA) adopted by the National Conference of Commissioners on Uniform State Laws in 1955. The UAA was revised in 2000 to adapt to issues in modern arbitration cases. Twelve states have also adopted international arbitration statutes.

The United Nations Mission on International Trade (UNCITRAL) adopted comprehensive rules for international commercial arbitration in 1976 that parties could agree to follow. The rules provide a comprehensive set of procedural rules that the parties may agree to for conducting ad hoc or administered arbitrations. The Rules cover all aspects of the arbitral process and include a model arbitration clause, rules for appointment of arbitrators and conduct of the arbitral proceedings, and rules for the form, effect and interpretation of the award.

UNCITRAL adopted a Model Law on International Commercial Arbitration (the “UNCITRAL Model Arbitration Law”) in 1985. The UNCITRAL Model Arbitration Law was adopted due to the desirability of establishing uniform rules for international commercial arbitration and application of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The UNCITRAL Model Arbitration Law covers all stages of the arbitration process including the arbitration agreement, composition and jurisdiction of the arbitral tribunal and court

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<sup>3</sup> USAID, Arbitration, 1.3.

<sup>4</sup> See Alan UZELAC, “Current Developments in the Field of Arbitration in Croatia”, page 1, available at <http://alanuzelac.from.hr/Pdf/arb-croatia.pdf>

<sup>5</sup> This legal monopoly of the Foreign Trade Arbitration Court was based on the provisions of Art. 37, paragraph 2 of the former Federal Act on Association in General Organizations and Chambers of Commerce.

intervention from recognition to enforcement of the award. The UNCITRAL Model Arbitration Law was amended in 2006 to reflect modern business practices.<sup>6</sup>

The UNCITRAL Model Arbitration Law was intended to harmonize the law governing international commercial arbitration of States with different legal, social and economic systems and to reduce the risk that parties' expectations from arbitration would be frustrated by unfamiliar or inadequate local law. While the UNCITRAL Model Arbitration Law was designed with international commercial arbitration in mind, it offers basic rules that are suitable for domestic arbitration.

## 2.1 Law on Arbitration

### 2.1.1 INTRODUCTION

The Law on Arbitration (Law N. 02/I-75) (the “Kosovo Arbitration Law”) was passed on 26 January 2007 (See Annex B). The Arbitration Law was drafted with the assistance of USAID<sup>7</sup> and was modeled on the UNCITRAL Model Arbitration Law. The Kosovo Arbitration Law also incorporated the Directive of the European Community 93/13/EEC from the 5<sup>th</sup> of April 1993 for protection of the customer as well the United Nations Convention for Recognition and Execution of the Decisions brought by Foreign Arbitration from the 10<sup>th</sup> of June 1958. Accordingly, the Kosovo Arbitration Law sets forth the rules for arbitration agreements, arbitration proceedings, and the recognition of arbitral awards made inside and outside Kosovo.

The explanatory note for the draft Law on Arbitration dated 25 November 2005 states that although arbitration is regulated in articles 469 till 487 of the Law for the Contested Procedure (Official Gazette of FSRY nr. 4/77), that regulation has serious flaws and in particular does not reflect the international standards and modern developments in this field. Therefore, the purpose of the special law on arbitration is to regulate this matter in accordance with international standards and to treat arbitration as a separate matter from the regular contested procedure in order to highlight the importance of this matter as a special non-judicial mechanism for resolving disputes mainly of a business nature. The explanatory note further states that treating arbitration as separate from regular contested procedures highlights the importance of arbitration as an alternative method for resolving disputes and as such the Arbitration Law should be considered as a package with the Law on Mediation.

The key issues for an effective arbitration system are 1) freedom of the parties to select arbitrators and procedural rules; 2) timeliness—all possible delays should be avoided; and 3) limited role of the courts. As discussed below, the Kosovo Arbitration Law meets those criteria. Moreover the Kosovo Arbitration Law is consistent with the provision of the UNCITRAL Model Arbitration Law.

The following is a brief summary of the main provisions of the Kosovo Arbitration Law, which includes comparisons to the Law on Contested Procedures<sup>8</sup> and the UNCITRAL Model Arbitration Law.

### 2.1.2 ARBITRATION AGREEMENT

#### 2.1.2.1 Form and Contents

The Kosovo Arbitration Law defines an Arbitration Agreement as “an agreement between two or more persons to submit to arbitration all or certain legal disputes, which have arisen or which may arise between them”. (Art. 2).

A dispute can only be settled through arbitration if the parties have so agreed (Art. 5.1). A key issue and fundamental to arbitration is that the parties have intentionally agreed to use arbitration and

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<sup>6</sup> UNCITRAL Model Law on International Commercial Arbitration, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)

<sup>7</sup> USAID/Kosovo Economic Management for Stability and Growth Project.

<sup>8</sup> Law No. 03/L-006, 30 June 2008.

forego their right to litigate in national courts. The determination of whether the parties have freely agreed to arbitrate is a threshold determination that is covered in Article 6 of the Kosovo Arbitration Law and discussed below.

*The Law on Contested Procedures has similar provisions (Art. 511.1).*

The Kosovo Arbitration Law requires that the arbitration agreement be in writing (Art. 6.1). It incorporates the 2006 amendments to the UNCITRAL Model Arbitration Law that provide that an arbitration agreement is deemed to be in writing if it is recorded by means of .....(Art. 6.2). This provision dispenses with the need for actual signatures and allows the record to be made via modern communication methods (telecommunication, electronic communication, etc.) However, if the arbitration agreement is with a consumer, then the parties must personally sign the document containing the arbitration clause. (Art. 6.3) The Kosovo Arbitration Law further provides that unless the requirements regarding the form of the arbitration agreement are met, the arbitral tribunal may not accept the case.<sup>9</sup> (Art. 6.4)

Consistent with the UNCITRAL Model Arbitration Law the agreement to arbitrate may be in the form of an arbitration clause within the main contract or a separate arbitration agreement. While this is not explicit in the Kosovo Arbitration Law, it is implied by the references to an arbitration clause in Article 6.

*The Law on Contested Procedures requires that the agreement to arbitrate be in writing and allows for modern communication methods (Art.511). It also states that the agreement to arbitrate is valid if it is included any place in the contract (Art. 512).*

#### **2.1.2.2 Parties to the Agreement**

Both natural and legal persons may be parties to the arbitration agreement. The term “legal persons” includes legal persons of private law and public law. (Art. 2)

#### **2.1.2.3 Domain of Arbitration**

The Kosovo Arbitration Law applies to the arbitration of disputes in all civil and economic matters unless prohibited by other laws (Art. 5.2). Disputes that do not fall into these two categories (civil-judicial and economic-judicial) are non-arbitrable. The broad scope of the Kosovo Arbitration Law is consistent with the UNCITRAL Model Arbitration Law (Art. 1), which notes that “commercial” should be given a wide interpretation to cover matters arising from all relationships of a commercial nature, whether contractual or not.

*The Law on Contested Procedures provides that parties may agree to resolve a dispute arising from a legal material relationship (Art. 511.2).<sup>10</sup>*

#### **2.1.2.4 Separability of Arbitration Clause**

Art. 14.1 of the Kosovo Arbitration Law gives effect to the principle of separability. For purposes of determining whether the arbitration agreement is valid and whether the arbitral tribunal has jurisdiction over the dispute, an arbitration clause that is part of a contract should be treated separately from the terms of the contract. As a result, an arbitral tribunal’s decision that the contract is null and void does not entail *ipso jure* the invalidity of the arbitration agreement.

#### **2.1.2.5 Effect of the Agreement**

Consistent with the UNCITRAL Model Arbitration Law, the Kosovo Arbitration Law requires a court to reject an action if the defendant raised the issue of the existence of an arbitration agreement in his

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<sup>9</sup> The translation of Art. 6.4 in the English version of the law is misleading and suggests that the tribunal may disregard the non-compliance.

<sup>10</sup> Although the term “legal material relationship” includes statutory relationships (legal status, family, inheritance, etc.) those are not considered arbitrable disputes.

defense, unless the court finds the arbitration agreement to be null and void or the subject matter is not within the scope of the arbitration agreement (Art. 7). Prior to commencing the arbitration procedure, the arbitral tribunal must determine whether it has jurisdiction over the subject matter and that the arbitration agreement is valid (Art. 14).

*The Law on Contested Procedures has similar provisions (Art. 514 and 520).*

If the respondent fails to present his statement of defense or either party fails to attend a hearing or produce documentary evidence, the arbitral proceedings can continue and an award can be made (Art. 26).

### **2.1.3 ARBITRATORS**

#### **2.1.3.1 Qualifications**

The Kosovo Arbitration Law does not have any provisions on arbitrator qualifications except for independence and impartiality. This allows the parties to determine the qualifications. If a Court appoints arbitrators in the case that the parties have failed to do so, the Court must give due regard to the qualifications contained in the arbitration agreement. It is the responsibility of the prospective arbitrator to disclose any such circumstances and to inform the parties if such circumstances arise after the appointment (Art. 10.1).

#### **2.1.3.2 Number and Appointment of Arbitrators**

The provisions in the Kosovo Arbitration Law for the number and procedure for appointment of arbitrators are consistent with the UNCITRAL Model Arbitration Law. The arbitral tribunal may consist of either one or a panel of arbitrators (this must be an odd number) (Art. 9.1) The parties are free to agree on the number of arbitrators, which may be a single arbitrator or a panel of arbitrators (Art. 9.1) as well as procedure of appointment (Art. 9.2). However, if the parties fail to agree within 15 days<sup>11</sup>, the Kosovo Arbitration Law provides a default option: a panel of three arbitrators, one appointed by each party, with the third selected by those two arbitrators who shall serve as the chairperson of the tribunal. If a party fails to appoint its arbitrator or the two arbitrators appointed by the parties fail to agree on the third arbitrator within 30 days, the Court can make the relevant appointment upon request of a party. (Art. 9.3-4). The Court must have due regard for the qualifications of the arbitrator specified in the arbitration agreement and make sure the arbitrator is independent, impartial and does not have a conflict of interests (Art. 9.6)

While the UNCITRAL Model Arbitration Law (Art. 11.5) provides that the Court's appointment of an arbitrator cannot be challenged, the Kosovo Arbitration Law does not include that provision.

The UNCITRAL Model Arbitration Law (Art. 11.1) provides that no one may be precluded from acting as an arbitrator on the basis of nationality, unless the parties otherwise agree. Although this is not expressly stated in the Kosovo Arbitration Law, it is included in the Kosovo Law on Foreign Investment.<sup>12</sup>

*The Law on Contested Procedures provides the following procedure: The party that has to name the arbitrator according to the arbitration agreement must notify the other party of its nomination within 15 days and the second party has 15 days to make its nomination. The Law on Contested Procedures also provides for the appointment of the arbitrator by a third party. (Art. 515). If no appointment is made within the specified time, the court may do so upon the request of the parties. The court is also authorized to appoint the chair of the tribunal if the parties fail to do so. The court's decision on appointments cannot be appealed. (Arts. 516. 1-*

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<sup>11</sup> The UNCITRAL Model Arbitration Law provides for 30 days. Art. 11(3)(a)

<sup>12</sup> Law on Foreign Investment in Kosovo, Law No. 02L/33 is available at [http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006\\_28\\_ALE02\\_L33.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_28_ALE02_L33.pdf)

3). *The Article further provides that if a party does not want to use the court's authority to appoint arbitrators, the party may request the court to declare the appointments/arbitration agreement invalid (Art. 516.5). This final provision is against the principle of promoting arbitration and conflicts with the provisions and intent of the Kosovo Arbitration Law.*

### **2.1.3.3 Challenge of Arbitrators**

The provisions for challenging arbitrators in the Kosovo Arbitration Law are similar to the provisions in the UNCITRAL Model Arbitration Law. The only grounds for challenging a possible appointment is the existence of circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not have the qualifications agreed by the parties (Art. 10.2).<sup>13</sup> It is the responsibility of the prospective arbitrator to disclose any such circumstances and to inform the parties if such circumstances arise after the appointment (Art. 10.1). The parties are free to agree on the procedure for challenging an arbitrator and failing such agreement, the Arbitration Law provides a default option which gives a party 15 days to make the challenge (Art. 11.1-2). If the challenged arbitrator does not withdraw, a decision regarding the challenge shall be determined by the arbitral tribunal (Art. 11.3). If the challenge is not successful, the challenging party has 15 days<sup>14</sup> to request the Court to decide on the challenge, which decision cannot be appealed. The arbitral proceedings may continue and an award may be issued while the request is pending (Art. 11.4). If an arbitrator is terminated or withdraws, the replacement arbitrator is appointed pursuant to the same procedure as the initial arbitrator (Art. 13).

*Like the Kosovo Arbitration Law, the Law on Contested Procedures obligates the prospective arbitrator to recuse himself from a case in the same manner as a state court judge. The grounds and procedure for challenging an arbitrator are the same as in the Arbitration Law except that the Law on Contested Procedures gives the parties 30 days (compared to 15) to request the court to make a final decision on a challenge.(Art. 519)*

### **2.1.3.4 Liability of Arbitrators**

There are no provisions regarding liability of arbitrators to the parties.

## **2.1.4 ARBITRAL PROCEDURE**

### **2.1.4.1 Place of Arbitration**

Unless the parties have agreed on the place, the arbitral tribunal can decide on the locations taking into consideration the circumstances of the case and convenience of the parties and tribunal. (Art. 17)

### **2.1.4.2 General**

Like the UNCITRAL Model Arbitration Law, the general rules contained in the Kosovo Arbitration Law are: 1) parties are treated equally and should be given a full opportunity to present their case; 2) parties are free to choose their representative to act on their behalf at the arbitration proceeding; 3) parties are free to determine the procedure (including place of arbitration and language), subject to a limited number of mandatory provisions. If the parties do not specify their own procedure, the tribunal determines the rules consistent with the Kosovo Arbitration Law. (Arts. 16-19). Questions regarding procedure are decided by the chairperson of the tribunal (Art. 31).

The proceedings begin when the Request for Arbitration is received by the respondent (Art. 18). The sequence of proceedings is that claimant submits claim and respondent submits defense, in each case with all supporting documents and a reference to other evidence to be submitted. Parties may

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<sup>13</sup> Article 40 of the Code of Criminal Procedure and Article 67 of the Law on Contested Procedures address disqualification of judges. In addition to specifying specific relationships, both provisions contain the overarching phrase "circumstances that render his or her impartiality doubtful".

<sup>14</sup> The UNCITRAL Model Arbitration Law provides for 30 days. Art. 13(3)

supplement their statements and the respondent may submit counter-claims unless the tribunal determines this will cause undue delay (Art. 20).

Due process is covered in Article 21. The tribunal can determine whether to hold oral hearings or whether to proceed only with written materials. Unless the parties have agreed otherwise, the tribunal must hold an oral hearing upon the request of a party. The tribunal must communicate all statements, documents or other information, including expert reports and evidentiary documents, submitted by one party to the other party.

*The Law on Contested Procedures provides that unless the parties agree otherwise, the arbitration tribunal sets the arbitration procedure. (Art. 521)*

**Termination:** The arbitral proceedings terminate on the issuance of the final award or on the order of the tribunal in specific cases if the claimant fails to state or withdraws his claim, the parties agree to terminate, or if, after the request of the tribunal, the parties do not continue to participate in the proceedings (Art. 33). This should be distinguished from the default provisions that allow the tribunal to continue the proceedings even if the respondent fails to state his defense or if one of the parties fails to appear at a hearing or produce evidence requested by the tribunal (Art. 26).

#### **2.1.4.3 Evidence**

The Kosovo Arbitration Law provides that each party has the burden of proving its claim. The tribunal determines the admissibility, relevant, materiality and weight of the evidence offered and evaluates the evidence freely and impartially. The tribunal can require the parties to produce documents or other evidence at any time during the procedure (Art. 23).

The parties may call witnesses. A party calling a witness must notify the tribunal and other party of the name and subject the witness will address. Evidence from witnesses can be presented at oral hearings or in the form of written statements, provided that the parties have the right to cross-examine witnesses (Art. 24).

The Kosovo Arbitration Law has provisions for the tribunal or the parties to request court assistance for the purpose of collecting evidence or performing other judicial acts which the tribunal is not authorized to carry out (Art.28).

*The Law on Contested Procedures also provides for court assistance (Art. 522). The procedure for the collection of evidence ordered by a court during the course of arbitration is the same as in a court procedure (Art. 522.3)<sup>15</sup>*

#### **2.1.4.4 Experts**

Unless the parties otherwise agree, the tribunal may appoint experts to report on specific issues in writing. The tribunal may order a party to provide relevant information to the expert. The expert's report must be given to the parties and the parties have the right to comment on the report in writing. In addition, unless otherwise agreed, the parties may request that the expert appear at a hearing in order for the party to examine the expert (Art 25).

#### **2.1.4.5 Interim Measures of Protection**

The Kosovo Arbitration Law allows a court to issue a preliminary order at the request of a party regardless of whether there is an arbitration agreement or arbitration proceedings have commenced. The requesting party must provide credible evidence that immediate or irreparable injury, loss or damage will result if a preliminary order is not granted (Art. 8). Alternatively, a party may also request that the arbitration tribunal issue a preliminary order under the same circumstances and then

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<sup>15</sup> In the court system, there is a hierarchy for one court to request assistance from another. Since arbitration under Law on Contested Procedures is equivalent to a first instance proceeding, a tribunal would follow the same procedure as a first instance court. As there is no reference to this in the Kosovo Arbitration Law, it seems that the procedure for requesting court assistance should follow the Law on Contested Procedures.

request the court to enforce the order. The tribunal may require the requesting party to provide appropriate security (Art. 15.1). If the tribunal determines that the preliminary order was not justified, the party that requested the preliminary order must compensate the other party for any resulting damages. (Art. 15.3).

*There is no provision in arbitration chapter of the Law on Contested Procedures regarding the ability of the court to issue preliminary orders during the course of arbitration.*

#### **2.1.4.6 Representation and Legal Assistance**

The Kosovo Arbitration Law does not govern this.

#### **2.1.4.7 Default**

The Kosovo Arbitration Law has provisions in the case of default by a party. If the claimant fails to communicate his claim, without showing sufficient cause, the arbitration is terminated. If the respondent fails to communicate his defense, the tribunal can continue with the proceedings. If either party fails to appear at a hearing or produce evidence within the prescribed time periods, the tribunal can continue with the proceedings and make an award based on the evidence available. (Art. 26)

### **2.1.5 THE AWARD**

#### **2.1.5.1 Type of Award**

The Kosovo Arbitration Law provides for final awards as well as additional awards.

#### **2.1.5.2 Making of the Award**

The Kosovo Arbitration Law provides that if there is an arbitral tribunal, the decision must be made by a majority (Art. 30). There is no time limit for making the award.

*The Law on Contested Procedures also provides for decision by a majority (Art. 524.1).*

#### **2.1.5.3 Form of Award**

The Kosovo Arbitration Law and establishes the minimum formal requirements for an arbitral award (Art. 31), which are consistent with the UNCITRAL Model Arbitration Law. The award must be in writing and signed by the arbitrators.

*The Law on Contested Procedures has similar provisions for the form and effect of the award. (Art. 525).*

#### **2.1.5.4 Pleas as to Jurisdiction of the Arbitral Tribunal**

Both the Kosovo Arbitration Law and the UNCITRAL Model Arbitration Law provide that the arbitral tribunal may determine whether it has jurisdiction over a dispute and whether the arbitration agreement is valid.

The Kosovo Arbitration Law provides that a party should raise an objection to the tribunal's jurisdiction as soon as the party becomes aware of the matter. An objection to jurisdiction cannot be made after the statement of defense is submitted, unless the arbitral tribunal considers that the objecting party had reasonable justification for the delay. Appointment of an arbitrator does not preclude raising an objection. If a party disagrees with the tribunal's decision, it has 30 days to request the Court to review the decision. Similar to the challenge to arbitrators, the arbitration can continue and an award can be made pending the Court's decision. (Art. 14)

*The Law on Contested Procedures also authorizes the arbitration tribunal to decide on its jurisdiction and the validity of the arbitration agreement and provides for court review.(Art.*

520) *However, there is no provision on continuance of the arbitration pending the court's decision.*

#### **2.1.5.5 Applicable Law**

Like the UNCITRAL Model Arbitration Law, the Kosovo Arbitration Law provides that in cases related to international issues, the tribunal will apply the law designated by the parties, and in the absence of such designation, the tribunal will apply the law consistent with principles of private international law. In all other cases the tribunal will apply Kosovo law (Art. 29.1). Consistent with the UNCITRAL Model Arbitration Law, the Kosovo Arbitration Law permits the tribunal to decide *ex aequo et bono*<sup>16</sup> or as amiable compositeur if the parties have expressly authorized it. (Art. 29.2) In all cases, the tribunal shall decide in accordance with the terms of the contract and usage of applicable trade (Art. 29.3). Other principles of contract law also apply to interpretation of arbitration clauses.<sup>17</sup>

*The Law on Contested Procedures also allows the tribunal to decide based on honor (ex aequo et bono). Art. 523.*

#### **2.1.5.6 Settlement**

Like the UNCITRAL Model Arbitration Law, the Kosovo Arbitration Law provides that if the parties reach a settlement before the award is made, the tribunal will terminate the proceedings and if requested by the parties, record the settlement as an arbitral award. (Art. 32)

#### **2.1.5.7 Correction and Interpretation of the Award and Additional Award**

Unless the parties otherwise agree, the award should state the reasoning and should not be made public. Unless the parties agree otherwise, within 30 days of the award, the parties may request an interpretation of the award, correction of clerical, computational, or typographical errors or an additional award. The tribunal must respond to a request for interpretation or correction within 30 days or 60 days in the case of an additional award. (Art.35)

*The Law on Contested Procedures has no provision on interpretation or correction of the award.*

#### **2.1.5.8 Fees and Costs**

The Kosovo Arbitration Law takes a “loser pays” approach, requiring the unsuccessful party to bear all costs unless the parties had agreed otherwise. Unless the parties otherwise agree, the tribunal will fix the cost of arbitration in the award, which includes fees of the tribunal, arbitrators, and experts, expenses of witnesses, reasonable costs of legal representation and any fees and expenses of the Court. The Kosovo Arbitration Law requires that the fees of the tribunal and arbitrators be reasonable based on the amount and complexity of the dispute, time spent by arbitrators and other relevant circumstances. Any disputes over cost will be settled by the Court. (Art. 34)

*The Law on Contested Procedures provides that the arbiter has the right to be compensated for his services and that the parties will share expenses equally (Art. 518.3). However, there is no provision on determining the costs.*

#### **2.1.5.9 Delivery of the Award and Registration**

Copies of the signed award must be delivered to the parties subject to payment of any outstanding fees. (Art. 31.4)

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<sup>16</sup> This means “according to the right and good” or “from equity and conscience” and in the context of arbitration refers to the power of arbitrators to dispense with consideration of the law and decide based on what they consider to be fair and equitable in the given case.

<sup>17</sup> *In favorem validatis* (in favor of validity); *contra preferentum* (contract construed against the drafter); and *effet utile* (give reasonable sense to). See USAID Kosovo Economic Management for Stability and Growth Program, Arbitration Training Manual, Module 5: Validity of an Arbitration Agreement, Section 5.10.

#### **2.1.5.10 Enforcement of the Award**

The Kosovo Arbitration Law provides that an arbitral award has the effect of a final and binding court decision (Art. 31.1) The Kosovo Arbitration Law covers enforcement of both domestic and foreign arbitral awards. A request for the Court to declare a domestic award enforceable must be accompanied by the award or a certified copy. The Court can reject and set aside the award if one of the grounds for setting aside the award specified in Art. 36.2 is satisfied (Art. 38). Enforcement of foreign awards is discussed below.

#### **2.1.5.11 Publication of the Award**

As confidentiality is a key benefit of arbitration, the law provides that the award may only be made public with the consent of the parties (Art. 31.5)

### **2.1.6 MEANS OF RECOURSE**

#### **2.1.6.1 Appeal from Arbitral Awards**

There is no provision for an appeal to a second arbitral tribunal or a court.

*The Law on Contested Procedures states that the verdict is absolute unless the parties include a provision for an appeal to the second instance court in the arbitration agreement. (Art. 527.1)*

#### **2.1.6.2 Setting Aside Arbitral Awards**

Recourse Against the Award: While the goal of arbitration is to reach a final and binding decision in an efficient manner, a party may request the Court to set aside an award under very limited circumstances that undermine the most fundamental aspects of arbitration process as provided in Article 36. There are two categories of challenges: grounds to be proven by the party requesting annulment and grounds that the Court may consider on its own initiative. The provisions on recourse are consistent with the UNCITRAL Model Arbitration Law.

Grounds to be proven by the party:

- a party lacked capacity
- invalid arbitration agreement
- violation of due process- the party did not receive proper notification of the appointment of an arbitrator or of the arbitral proceedings or was not able to present its case
- the award deals with matters beyond the scope of the arbitration, which cannot be separated
- the composition of the tribunal or the arbitral procedure was in conflict with the Law or a valid arbitration agreement and such defect had an impact on the arbitral award.

Additional grounds that the Court may consider:

- the arbitration is prohibited by law
- enforcement of the award is against public policy.

Procedure: The Kosovo Arbitration Law provides that unless the parties otherwise agree, a request to set aside the award must be submitted to the Court within 90 days of receipt of the award. If an award is set aside, the Court may resubmit the case to the tribunal if appropriate and the tribunal can continue the proceedings or eliminate the defect in the award. (Art. 36).

In the event of an appeal, the Court must hear all parties. In contrast to other Court orders issued pursuant to proceedings under the Kosovo Arbitration Law, the decision on an appeal is subject to complaint.

*The Law on Contested Procedures allows the parties to request annulment of the arbitration verdict under certain conditions similar to those in the Law on Arbitration. It also allows for annulment if there exists any reason to redo the dispute procedure according to Article 232 of the Law (Repeating Procedures). This includes discovering new facts or evidence that would have resulted in a more favorable verdict if used in the earlier procedure (Article 232 g) The parties have 30 days to request annulment, which period is counted from the time the verdict is received or from the time the party learned of the grounds for annulment, provided that verdict becomes an absolute decree and cannot be annulled after one year. (Art. 530) **The provisions on recourse conflict with the goal of finality in arbitration as reflected in the Arbitration Law.***

## **2.1.7 FOREIGN ARBITRAL AWARDS**

### **2.1.7.1 Conventions and Treaties**

The former Yugoslavia was party to the international arbitration conventions and rules mentioned below. Like the other federal republics, Kosovo intends to succeed to these treaties. However, as Kosovo's status as an independent country is not yet recognized by the United Nations, Kosovo is not a signatory to such treaties. Nonetheless, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement, Article 14.2.2, Kosovo is bound to all agreements and treaties to which UNMIK is signatory party if it has not been amended or abolished. Moreover, pursuant to the Kosovo Law on Foreign Investment, Kosovo has agreed to the application of the Convention on the Settlement of Disputes between States and Nationals of Other States, Arbitration Rules of the International Centre for Settlement of Investment Disputes, Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules), Rules of Arbitration of the International Chamber of Commerce (ICC Rules), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which are directly applicable to disputes with foreign investors<sup>18</sup>.

### **2.1.7.2 Procedure for Enforcement of Awards:**

A request for recognition and enforcement of a foreign arbitral award must be submitted to the Economic Court together with the original or certified copy of the award and arbitration agreement and a certified translation if the award is not in an official language of Kosovo. The Court may refuse to recognize and enforce the foreign award for the same reasons as setting aside domestic awards contained in Article 36. An additional reason for setting aside a foreign award is that the requesting party proves that the award has not yet become binding or was set aside by a competent authority in the territory where the award was made. (Art. 39.e) This enforcement regime is consistent with the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.

## **2.2 Analysis and Recommendations**

The Kosovo Arbitration Law meets international standards and provides the flexibility that makes arbitration attractive to businesses, including the ability to pursue ad hoc or institutional arbitration. Therefore, adopting secondary legislation that further regulates arbitration is not advisable. However, as outlined below, there are a number of steps that can be taken to develop the capacity and promote demand for arbitration in Kosovo.

- Legislative Framework
- Organization of Arbitration
- Standards for Arbitrators
- Education/Promote Use of ADR
- Educate Legal Community on ADR

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<sup>18</sup> Law on Foreign Investment in Kosovo

## 2.2.1 LEGISLATIVE FRAMEWORK

### 2.2.1.1 Resolve Conflicts with other Legislation

#### *Current Situation in Kosovo.*

Although the drafters envisioned the Kosovo Arbitration Law as the sole regulation pertaining to arbitration of commercial disputes, a new Law on Contested Procedures that includes provisions on arbitration was enacted later.<sup>19</sup> While the new Law on Contested Procedures is consistent with the Kosovo Arbitration Law in many respects, it retained several provisions that violate the key benefits of commercial arbitration (efficiency and finality) and conflict with the Kosovo Arbitration Law, including:

- Parties may include provision for appeal to a second instance court in their arbitration agreement. (Art. 527.1)
- Party can request annulment of arbitral award if there exists any reason to redo the dispute procedure according to Article 232 of the Law on Contested Procedures (Repeating Procedures). This includes discovering new facts or evidence that would have resulted in a more favorable verdict if used in the earlier procedure (Article 232 g) The parties have 30 days to request annulment, which period is counted from the time the verdict is received or from the time the party learned of the grounds for annulment, provided that verdict becomes an absolute decree and cannot be annulled after one year. (Art. 530)

The Kosovo Arbitration Law also improved on Chapter 31 of the Law on Contested Procedures by:

- Appointment of arbitrators—while both laws allow the parties to select the arbitrators and provide that the Court can do this if requested by the parties, if a party does not want to use the Court’s authority it can request the Court to declare the appointment/arbitration agreement invalid. (Compare Art. 9 and Art. 516)
- Continuance of arbitration procedure-while both laws allow the arbitral tribunal to decide on its own jurisdiction and the validity of the arbitration agreement and provide for court review, the arbitration can continue and an award can be made pending the Court’s decision. (Compare Art. 14 of Kosovo Arbitration Law and Art. 520 of Law on Contested Procedures). The Kosovo Arbitration Law also allows the arbitration procedure to continue pending a Court’s decision on a challenge to an arbitrator (Compare Art. 11.4 of Kosovo Arbitration Law and Art. 519 of Law on Contested Procedures).
- Including provisions on 1) court can issue interim measures; 2) interim awards; correction and interpretation of awards.

#### *Recommendation*

The conflict between the Kosovo Arbitration Law and the Law on Contested Procedures should be eliminated through an amendment to the Law on Contested Procedures that replaces the provisions in Chapter 31 of the Law on Contested Procedures with a statement that all arbitration will be conducted according to the special law on arbitration. This conclusion is based on application of legal principles known as “rules of collision” as discussed below. This is also the approach that was adopted to resolve conflicts between the Mediation Law and mediation provisions in the former Law on Contested Procedures.

The doctrine of *Lex specialis derogat legi generali* (particular norms suppress general norms) supports the application of the Arbitration Law and gives it priority over the Law on Contested

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<sup>19</sup> The Kosovo Arbitration Law was passed by Assembly of Kosovo on 26 January 2007; promulgated by the Special Representative of Secretary General of UN Mission in Kosovo on June 5, 2008 and effective on July 5, 2008 (30 days after publication). The Law on Contested Procedures was passed by the Assembly on 30 June 2008; promulgated by Presidential Decree on 27 July 2008 and effective on 4 October 2008 (15 days after publication).

Procedures. As highlighted in the explanatory note, the Kosovo Arbitration Law is a specialized law designed to regulate commercial arbitration in accordance with international standards.

The doctrine of *lex prior specialis derogat legi posteriori generali* (earlier particular norms suppress later general norms) further supports the application of the Kosovo Arbitration Law over the Law on Contested Procedures.

On the basis of *Lex specialis derogat legi generali*, one could argue that the Law on Contested Procedures should be amended to provide that disputes that are within the scope of the Kosovo Arbitration Law are not subject to the arbitration provisions in the Law on Contested Procedures.<sup>20</sup>

As the rules demonstrate that the Kosovo Arbitration Law applies, the conflict should be eliminated through an amendment to the Law on Contested Procedures that replaced the provisions in Chapter 31 of the Law on Contested Procedures with a statement that all arbitration will be conducted according to the special law on arbitration. This is the approach that was adopted for the Kosovo Mediation Law.<sup>21</sup>

The Law on Contested Procedures should be amended on the initiative of the Ministry of Justice pursuant to the Government's Rules of Procedure, particularly Part V, *Rules and procedures for drafting and reviewing primary and secondary laws in the Government*. The Ministry of Justice should establish a working group to draft the amendment, which would then be submitted to the Office for Legal Support Services of the Office of Prime Minister of Kosovo (OLSS), which reviews all legislation prepared by the Government before it proceeds to the Assembly. The OLSS would also have to establish a working group to review the draft amendment.

The Ministry of Justice should immediately request the Government to place this amendment on the legislative agenda for 2010.

### **2.2.1.2 Secondary Legislation**

#### ***Current Situation in Kosovo***

As mentioned under the section on arbitrators above, the Kosovo Arbitration Law does not include the provision from the UNCITRAL Model Arbitration Law that an arbitrator that is appointed by the Court cannot be challenged.

#### ***Recommendation***

To eliminate the possibility that a court-appointed arbitrator might be challenged, which results in a delay in the arbitration procedure, the OLSS should prepare a regulation that would effectively add that provision to the Law. The OLSS would have to take the initiative in this case because the Ministry of Justice does not have competence in the field of arbitration.

### **2.2.2 ORGANIZATION OF ARBITRATION**

#### ***Current Situation in Kosovo***

The Kosovo Law on Arbitration accommodates institutional ("sponsored" or "administered") arbitration and *ad hoc* arbitration and does not make any distinctions between the two types of arbitration. Both institutional and *ad hoc* arbitration are widespread practices and they each have advantages.

The main advantages of institutional arbitration are that an institution manages the ADR process, sets rules of procedure, sets fees, and maintains a panel of arbitrators for which it sets the standards. Another benefit in terms of developing ADR is that a sponsoring institution will promote ADR to the public. While *ad hoc* ("non-administered") arbitration also has certain advantages -- it is less expensive because there are no fees of the sponsoring organization -- the parties only pay the

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<sup>20</sup> However, the doctrine of *lex posterior derogat legi priori* (later norms suppress earlier norms) support implementation of the Law on Contested Procedures over the Law on Arbitration since the law on contested procedures entered into force later on.

<sup>21</sup> Law on Contested Procedure, Art. 411.

arbitrators, and the parties have greater flexibility in choosing arbitrators and determining the procedure, in the absence of institutional management there is an increased burden on the parties and the arbitrators. Inexperienced parties and arbitrators generally lack the knowledge and expertise to effectively organize an arbitration, which may result in not achieving a timely resolution and actually increase the overall cost of the dispute resolution process. Another risk is that the arbitral award will be faulty and that a court will not enforce it. Institutional arbitration may prevent this by providing for scrutiny of a draft award before it is issued, allowing mistakes to be corrected.

Currently, the only institutional sponsor of arbitration in Kosovo is the Kosovo Chamber of Commerce, although this activity has been extremely limited. The Law on the Kosovo Chamber of Commerce gives the KCC the non-exclusive right to offer arbitration services in Kosovo and provides the framework for establishing a permanent arbitral tribunal at the Chamber.<sup>22</sup> Pursuant to the Law on the Kosovo Chamber of Commerce, the Permanent Arbitration Tribunal is authorized to resolve disputes between members of the KCC and between members and other natural and legal entities.<sup>23</sup> Its organization, competencies and procedures are regulated in the KCC Charter and other general acts of the KCC.<sup>24</sup>

The KCC's Steering Council approved the Regulation on the Kosovo Chamber of Commerce Arbitrage in 1999. The Regulation foresees a special mediation-reconciliation procedure that parties may try prior to arbitration or as an alternative to arbitration in the absence of an arbitration agreement. The Regulation contains the basic provisions for arbitration and states that unless otherwise provided in the Regulation, the relevant provisions of the Law on Civil Procedure apply to the arbitration proceedings. At the time the Regulation was adopted, the former Yugoslav law was in force.

The KCC Arbitration Tribunal is managed by the Arbitrage Presidency consisting of the President, Deputy President, Arbitrage Secretary and four members elected for a four year mandate with the possibility of reelection. The President, Deputy President and the four members are elected by the Assembly Chamber<sup>25</sup> while the Arbitrage Secretary is elected by the Chamber Steering Council. The President or the Arbitrage Secretary must be a graduate of the law faculty (a "lawyer").

Arbitrators are selected by the Assembly based on the proposal of the Arbitrage Presidency. The only qualification specified in the Regulation is that an arbitrator has at least a university degree. However, the Regulation contains provisions to assure that a lawyer participates in the arbitration procedure by requiring the participation of the President or Secretary of the Arbitration Tribunal if the arbitration panel does not include a lawyer. The first group of arbitrators under the 2004 Law on the KCC was appointed in 2005 and the next roster will be appointed at the KCC's annual Assembly, which is expected to take place in June 2010.

The Arbitrage Secretary manages the day-to-day operations of the arbitration tribunal and runs the Arbitrage Secretariat. The KCC has one employee that serves as the Secretariat for the tribunal and as the KCC's in-house lawyer.

The Steering Council sets the arbitration fees and compensation of arbitrators, experts and witnesses and reimbursement of expenses. The arbitration fee is 8% of the value of the case. The loser pays all costs.

The KCC reports that a total of eight "procedures" have taken place since 2000. The disputes were between foreign and Kosovar companies. It appears that these were informal procedures initiated by embassies (commercial services) at the request of the foreign companies. The KCC further reported that international companies have requested the KCC's assistance in resolving disputes with local partners, but the local companies refuse to participate and maintain that they can resolve the dispute directly with the business partner. This issue is discussed under Public Education and Outreach.

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<sup>22</sup> Law on Kosovo Chamber of Commerce, Law. No. 2004/7Articles 8.1.k and 8.2.

<sup>23</sup> The scope of the tribunal's competency is "resolving disputes which arise from mutual business affairs related to good exchange and services and disputes, disputes arising from performing the duties of the Chamber and for compensation of damages".

<sup>24</sup> Law on Kosovo Chamber of Commerce, Articles 26-27,

<sup>25</sup> Chamber Assembly can delegate this responsibility to the Steering Committee.

At present, the KCC has bilateral agreements with Bulgaria and Macedonia pursuant to which the Chambers agree to promote international arbitration and to recommend that firms include an optional arbitration clause in their contracts that provides that arbitration will take place at and according to the rules of the Chamber of Commerce of the complainant.<sup>26</sup> The KCC intends to enter into similar agreements with the Chambers in Albania and Croatia.

The American-Kosovo Chamber of Commerce also intends to establish an ADR capacity. At a minimum AmCham will prepare a roster of arbitrators and is considering providing additional services. Neither SEAD nor AmCham are aware of any American Chambers of Commerce in other countries that provide ADR.

## **Recommendation**

The development of institutional arbitration in Kosovo should be supported as this offers the greatest opportunity for the development of a high-quality, sustainable ADR capacity. As described above, an institution can build demand for arbitration, support the arbitration process and provide quality control by maintaining high standards for arbitrators and reviewing arbitral awards.

It is critical that institutional sponsors have the resources to provide high-quality arbitration that can effectively compete with other sponsoring institutions, offer the services that foreign and domestic companies require, maintain a roster of highly qualified arbitrators with a high degree of integrity and continually educate and promote the use of arbitration to its constituents. As the KCC and AmCham are the only institutions that are currently prepared to move ahead on development of ADR, SEAD will initially focus its assistance on them. In the interest of developing the best overall system for Kosovo, KCC and AmCham have agreed to work together with SEAD on common issues. Nonetheless, rather than taking a one-size-fits-all approach, the procedural rules and standards for arbitrators of each institution will be tailored to the types of disputes that it is likely to handle. In that regard, SEAD will enter into a Memorandum of Understanding with each of the KCC and AmCham outlining their cooperation.

SEAD's assistance to each organization will begin with preparation of a strategic plan for establishing ADR services, which will include identification of and funding for resources (financial and human) needed to administer ADR. Assistance will be provided with respect to:

- Update Regulation (rules of arbitration procedure) to conform to the current Law on Arbitration and international standards (for KCC, this will be an update of the current Regulation).
- Draft model arbitration clause that would provide for arbitration at that institution according to the rules of the institution or another recognized set of rules, such as UNCITRAL.
- Develop competitive fee structure.
- Build capacity to administer arbitration, including development of a case management system (for KCC, this will be building capacity of Arbitrage Secretariat).
- Develop standards for arbitrators and protocol for appointment to roster of arbitrators as well as Code of Conduct (see Regulation/Qualification of Arbitrators below).

In addition to providing assistance to the KCC and AmCham, in the future, SEAD will continue to explore opportunities for arbitration at other trade associations and industry groups as well as court-referred arbitration.

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<sup>26</sup> Agreement on cooperation between the Permanent Arbitration Court within the Economic Chamber of Macedonia and the Permanent Arbitration Court within the Kosovo Chamber of Commerce, December 23, 2003.

## 2.2.3 REGULATION/QUALIFICATION OF ARBITRATORS.

### Current Situation in Kosovo

Selection of the appropriate neutral(s) is generally recognized as the single most important issue to the outcome of ADR. The most important characteristics are impartiality, independence, efficiency and professional experience. While the Kosovo Arbitration Law requires that the arbitrator in a specific case is independent and impartial it does not include any requirements on experience or qualifications. This is consistent with the UNCITRAL Model Arbitration Law and international practices. The gap is usually filled by institutional sponsors of ADR, which often set their own requirements.

The only requirement for arbitrators contained in the Regulation on the Kosovo Chamber of Commerce Arbitrage is that an arbitrator possess a university diploma. While the Regulation does not require an arbitrator to have a law degree, a lawyer must participate in arbitration proceedings for the purposes of drawing the attention of the arbitrator(s) to legal matters that are relevant to the decision.<sup>27</sup> The Chamber Assembly appoints the arbitrators from a list proposed by the Presidency for a four-year term with the possibility of reelection. SEAD has not been able to obtain information on specific criteria or the procedure the Presidency has used to identify potential arbitrators.

### Recommendation

While the absence of legal requirements for qualification as an arbitrator in the Kosovo Arbitration Law is consistent with international practices, it is critical that arbitrators are beyond reproach. This is particularly important in Kosovo as there is a general lack of confidence in the courts and other professionals, including lawyers, accountants, etc. If parties do not have confidence in the arbitration tribunal and the arbitrators, they will avoid arbitration in the same manner as they now avoid litigation in the courts.

As discussed above, a benefit of institutional arbitration is that the institution offers competent neutrals. This includes competency in arbitration procedure. Institutional sponsors of arbitration in Kosovo should set minimum standards for arbitrators that reflect the nature and complexity of the disputes that are brought to the tribunal. In addition to a general level of professional experience, specific experience in the disputed issue is a key benefit of arbitration and presents another advantage over litigation before a judge that is not experienced in the particular subject matter. Accordingly, it is likely that the institutions that sponsor arbitration will not adopt the same standards.

The standards set by the major providers of international dispute resolution are high while institutions that handle less complex disputes typically have lower standards. In all cases, standards are generally based on documented experience, training, education, and reputation. A few examples follow.

The International Center for Dispute Resolution, which is the international branch of the American Arbitration Association (“AAA”), requires the following qualifications.

- Minimum of 15 years of senior-level business or professional experience. (10 years for AAA’s national roster).
- Educational degree(s) and/or professional license(s) appropriate to applicant’s field of expertise.
- Honors, awards and citations indicating leadership in applicant’s field.
- Training and substantial experience in arbitration, mediation and/or other forms of out-of-court dispute resolution.
- Membership in a professional association(s).

The AAA conducts a rigorous application process, which requires candidates to demonstrate why they should be selected. The process weeds out applications from candidates who do not have a commitment to maintaining the highest standards of arbitration. The AAA evaluates candidates based

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<sup>27</sup> KCC Regulation, Sections 41 and 45.

on their experience and the demand for arbitrators in specific fields. After appointment, arbitrators are reviewed every two years, and may be removed from the roster because the arbitrator has not met the AAA standards or because changes in the panel are needed to accommodate actual cases. AAA arbitrators are required to complete an initial training program and continuing education.

In comparison, the United States District Court for the Eastern District of New York implements a court-annexed ADR program that is mandatory for all civil cases in which monetary damages of at least \$150,000 are sought. Arbitrator qualifications include being admitted to legal practice for minimum of 5 years and that a judge of the court certifies the applicant is competent to act as an arbitrator.<sup>28</sup>

As part of its assistance to the KCC and AmCham, SEAD will assist the institutions in obtaining additional information about member expectations and the requirements for arbitrators set by sponsors of ADR in the region, including Chambers of Commerce. However, even if those institutions do not have set standards,<sup>29</sup> SEAD will encourage the Kosovo institutions to have clear requirements and to require basic training. In that regard, SEAD is contacting recognized ADR institutions about organizing training for an initial group of Kosovar arbitrators.

#### **2.2.4 STANDARDS OF CONDUCT/PROFESSIONAL ETHICS**

##### **Current Situation in Kosovo**

The Kosovo Arbitration Law requires that arbitrators are independent and impartial and requires that they disclose any circumstances that would give rise to doubts in this regard. This is an internationally accepted standard that derives from Article 12 (2) of the UNCITRAL Model Arbitration Law and is reflected in the rules of virtually all major international arbitration institutions and rules for *ad hoc* arbitration. The KCC does not have a Code of Ethics for its arbitrators.

##### **Recommendation**

Codes of professional ethics are an important mechanism for regulating arbitrators. In addition to the legal obligation of an arbitrator to disclose any circumstances that might affect independence and impartiality as included in the Arbitration Law, many arbitral institutions also maintain a code of ethics that includes and expands on this ethical standard. Among the most famous codes of ethics are the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes; the International Bar Association Rules of Ethics for International Arbitrators and supplemental Guidelines on Conflicts of Interest and the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct.

The ethics codes provide guidance on when an arbitrator should accept appointment; the assessment of bias; disclosure of facts or circumstances that effect or raise justifiable doubts about the arbitrator's neutrality; communications with parties; fees; duty of diligence; confidentiality and other matters.

The ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes consists of nine canons with extensive explanation.

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<sup>28</sup> For cases of lesser value, the parties may request referral to arbitration. Local rule 8310.

<sup>29</sup> For example, the Arbitration Tribunal at the Croatian Chamber of Commerce in Zagreb does not require specific training.

### **ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes**

CANON I. An arbitrator should uphold the integrity and fairness of the arbitration process.

CANON II. An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

CANON III. An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

CANON IV. An arbitrator should conduct the proceedings fairly and diligently.

CANON V. An arbitrator should make decisions in a just, independent and deliberate manner.

CANON VI. An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

CANON VII. An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

CANON VIII. An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

CANON IX. Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

The ABA/AAA Code has a specific provision, Canon X, for party appointed arbitrators that reflects the special circumstances surrounding party appointed arbitrators.

The IBA Rules of Ethics for International Arbitrators consists of nine rules that seek to establish the manner in which the abstract qualities of impartiality, independence, competence, diligence and discretion should be assessed in practice. They support the fundamental rule that Arbitrators should proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias. Because disclosure is critical and that failures in disclosure can frustrate arbitration in a number of ways -- parties can use the information to challenge arbitrators, an arbitrator might be disqualified after a proceeding has already started; and it can result in the invalidity of the procedure -- the International Bar Association compiled a specific set of guidelines on disclosure, including a list of specific situations in which disclosure is or is not warranted.

SEAD will assist the KCC and AmCham in determining whether they should endorse an existing Code of Arbitrator Ethics (such as the AAA/ABA Code or the IBA Rules of Ethics) or draft their own codes. In any event, SEAD recommends that the institutions adopt the same Code of Ethics.

### 3 MEDIATION

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.

Abraham Lincoln, “Notes for a Law Lecture”, July 1850

The use of mediation to resolve commercial disputes has significantly increased in the last few decades. In light of that development, UNCITRAL adopted a Model Law on International Commercial Conciliation in 2002 (UNCITRAL Model Conciliation Law).<sup>30</sup> The UNCITRAL Model Conciliation Law uses the term “conciliation” to encompass all procedures in which parties to a dispute invite a neutral third party to assist them in resolving the dispute. The UNCITRAL Model Conciliation Law provides a set of non-mandatory rules for conciliation. These procedural rules were designed to assist States in drafting legislation, provide greater predictability and certainty in the use of conciliation, and foster harmonization.

The Guide to the UNCITRAL Model Conciliation Law notes that since conciliation is such a flexible concept and totally dependent on the will of the parties, there was a widespread view that it was not necessary to enact legislation on conciliation. It was believed that legislative rules would unduly restrict and harm the conciliation process and that contractual rules between the parties were the appropriate way to provide certainty and predictability.<sup>31</sup> Nonetheless, States began adopting legislation in order to respond to concerns of practitioners that contractual solutions alone were not sufficient to meet the needs of the parties, while remaining conscious of the need to preserve the flexibility of the conciliation process.

Conciliation does not require the same level of procedural guarantees as adjudicative processes such as arbitration and mediation. However, important concerns that are addressed by the UNCITRAL Model Conciliation Law include avoiding situations where information from conciliation proceedings spill over into arbitral or court proceedings and post-conciliation such as enforcement of the settlement agreement.

The Guide to the UNCITRAL Model Conciliation Law also notes that although the model law specifically covers international commercial conciliation as international trade is the purview of UNCITRAL, there is nothing in the law that should prevent an enacting State from extending it to non-commercial disputes.

The European Union has also adopted a directive on mediation in civil and commercial matters (EU Mediation Directive).<sup>32</sup> Similar to the UNCITRAL Model Conciliation Law, the directive specifically applies to mediation in cross-border disputes, but also states that nothing should prevent member states from applying the provisions to internal mediation processes.

As discussed earlier, a key difference between mediation on one hand, and litigation and arbitration on the other, is that the parties to the dispute have full control over the outcome. The mediator, a neutral third party, assists the parties in coming to an agreement. The other key difference is that mediation is based on interests, and not on legal rights. Mediation focuses on mutual interests rather than infringement of rights or breaches of obligations. Whereas litigation and arbitration are win-lose processes, mediation seeks a win-win outcome. While mediation conducted by a skilled mediator

<sup>30</sup> UNCITRAL Model Law on International Commercial Conciliation available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html)

<sup>31</sup> The UNCITRAL Conciliation Rules, adopted in 1980, were prepared to offer parties an internationally harmonized set of rules suited for international commercial disputes. The Rules were also used as a model by many institutions that were drafting their own rules for offering conciliation or mediation services.

<sup>32</sup> EU Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

results in a mutually acceptable solution most of the time, if mediation fails, the parties may still resort to arbitration or litigation.

### 3.1 **Law on Mediation**

The Law on Mediation (Law N. 03/L-057) (Kosovo Mediation Law) was passed on 18 September 2008 (See Annex C). The explanatory note states that the purpose of the law is to eliminate legal gaps in the regulation of mediation in line with EU legislation<sup>33</sup> and to address all issues relating to mediation in one law. Prior to adoption of the Kosovo Mediation Law, the mediation procedure was regulated by the former Yugoslav Law on Contested Procedures<sup>34</sup>. The new Law on Contested Procedures, which was adopted after the Law on Mediation came into force, expressly provides that mediation is regulated by a separate law, while court settlement continues to be regulated by the Law on Contested Procedures<sup>35</sup>. The note states that mediation is often used in the Court procedure and that the law will mitigate the work of the courts in resolving disputes of a quasi-judicial procedure.

The Kosovo Mediation Law provides a flexible procedure and sets basic standards for a mediation agreement that will be enforced by the courts. The mediation must be conducted by an independent and impartial mediator that is registered with and licensed by the Ministry of Justice. The agreement to mediate and the agreement attained in mediation must meet certain formal requirements. The agreement attained in mediation is a final and enforceable document that becomes an executive title upon approval of the court, prosecution or competent body.

Developing mediation in Kosovo is very different than developing arbitration. The Kosovo Arbitration Law establishes a complete legal framework for commercial arbitration that is in line with international best practices. In contrast, the Kosovo Mediation Law covers a very broad range of disputes and delegates extensive rule-making authority to a Mediation Commission. Unfortunately, the Mediation Commission does not have the expertise in mediation to formulate the necessary rules. The following is a brief summary of the main provisions of the Kosovo Mediation Law. An analysis, including other references to mediation in Kosovo legislation, a comparison to the UNCITRAL Model Conciliation Law, the EU Mediation Directive, and other national legislation, and recommendations follows.

#### 3.1.1 **GENERAL**

##### 3.1.1.1 **Definition**

The Kosovo Mediation Law defines Mediation as an extra-judicial activity carried out by a third party (mediator) for the purpose of resolving, by conciliation, disagreements between parties subject to law in accordance with the provisions of the Law on Mediation (Art. 2). .....While the Kosovo Mediation Law does not expressly state that it refers to a process whether referred to by the expressions conciliation, mediation or an expression of similar import as the UNCITRAL Model Conciliation Law does, the Kosovo Mediation Law appears to cover a broad range of voluntary processes controlled by the parties with the assistance of a neutral third person (s).

The EU Mediation Directive further provides that mediation can be voluntary or suggested or ordered by a court or prescribed by law. It also applies to mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute, but not to attempts to settle a dispute in the course of judicial proceedings. (Art. 3)

##### 3.1.1.2 **Scope of Mediation**

The Kosovo Mediation Law has a wide scope and regulates the mediation procedure in contested relationships regarding legal-assets (personal property), commercial, family, labor and other civil,

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<sup>33</sup> EU Directive 2008/52/EC

<sup>34</sup> Mediation of divorces was regulated by the Family Law.

<sup>35</sup> Law on Contested Procedure, Arts. 411 and 412.

administrative and criminal relationships that are not the exclusive authority of the courts or another competent body (Art. 1.2). The Kosovo Mediation Law does not apply to mediation for juveniles or commercial arbitration, which are covered by separate laws (Art. 28.2). In addition, mediation is only allowed in criminal cases punishable by a fine or less than three years imprisonment.

The EU Mediation Directive states that it does not apply to rights or obligations on which the parties are not free to decide for themselves under the relevant applicable law, which are particularly frequent in family and employment law (introductory paragraph 10).

### **3.1.1.3 Principles of Mediation**

Mediation is based on the free will of the parties; the parties should be treated fairly, the mediator must be impartial and independent, the mediation procedure is confidential and the mediation procedure is urgent (Arts. 3-7). These principles are also embodied in the Kosovo Arbitration Law.

The EU Mediation Directive is based on similar principals and further provides that unless the parties otherwise agree, neither mediators nor anyone involved in the administration of the mediation process can be compelled to give evidence in a civil or commercial proceeding or arbitration regarding the information arising out of or connected to the mediation process. The only exceptions are to protect the best interests of children or to prevent physical or psychological harm to the integrity of a person or when disclosure of the content of the agreement reached in mediation is necessary to implement or enforce the agreement. (Art. 7)

### **3.1.1.4 Parties to Mediation**

Both natural and legal persons may be parties to mediation (Art. 9.2).

### **3.1.1.5 Agreement to Mediate**

The Kosovo Mediation Law applies regardless of whether the mediation begins before or after the dispute has been submitted to the courts (Art. 8). Moreover, the Kosovo Mediation Law provides that the court or prosecution may suggest that the parties try mediation and that the court may make the suggestion at any time during the court procedure (Art. 9.5-9.6).<sup>36</sup> Accordingly, parties may agree to engage in mediation on their own initiative or upon the suggestion of the court or prosecution.

The EU Mediation Directive also states that a court may suggest mediation and may also invite parties to attend an information session on the use of mediation if such sessions are held and are easily available. It also provides that mediation may be mandatory or subject to incentives or sanctions, provided that it does not prevent the parties from exercising their right of access to the judicial system. (Art. 5)

## **3.1.2 MEDIATORS**

### **3.1.2.1 Qualifications, Registration and Licensing**

Qualifications for mediators are contained in Article 22: must meet general legal conditions for employment, possess a university diploma, successfully pass a mediation training course, conducted at least six mediations under supervision of a mediator, no criminal conviction for 6 months, possesses high moral qualities, and is registered in the mediation registry. The Kosovo Mediation Law provides for certification by the Mediation Commission (Art. 22.5) and licensing by the Ministry of Justice (Art. 23.1). Although the Kosovo Mediation Law requires that a candidate should be supervised by a mediator, there are no transitional provisions to clarify who will supervise the first group of mediators to be certified and licensed under the Kosovo Mediation Law.

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<sup>36</sup> While the provision allows both the court and prosecution to suggest mediation, it only mentions that the court can do this at any time during the procedure. The failure to include the prosecutor in the clause appear to be a drafting mistake and not a limitation on the prosecution's ability to suggest mediation.

The EU Mediation Directive encourages initial and further training of mediators to ensure that mediation is conducted in an effective, impartial and competent way (Art. 4.2). Paragraph 17 of the introduction to the EU Mediation Directive also provides that mediators should be aware of the existence of the European Code of Conduct for Mediators, which should be made available to the general public on the internet.

### **3.1.2.2 Number, Appointment and Removal**

The Kosovo Mediation Law contains the standard provision regarding mediators—that the mediation will be conducted by one mediator unless the parties agree otherwise (Art. 10.2). Consistent with the principle that the mediator must be independent and impartial, the Kosovo Mediation Law provides that the mediator is expelled in the case of a conflict of interest unless the parties agree otherwise (Art. 15). There are no procedures in the law for appointing or replacing the mediator.

## **3.1.3 MEDIATION PROCEDURE**

### **3.1.3.1 General**

In keeping with the concept that mediation is flexible and subject to the will of the parties, the Kosovo Mediation Law permits the parties to develop their own mediation procedure (Art. 10.1) and provides default options in the event that the parties do not agree to other rules. The Kosovo Mediation Law does not include the provision in the UNCITRAL Model Conciliation Law that allows the conciliator to determine the conduct of procedure if parties do not (Art. 6).

Mediation is initiated by one party requesting that the other party engage in mediation. If the second party does not respond in 15 days, it is considered to be a refusal to mediate (Art. 9.3)

The parties must sign an agreement to commence mediation that includes the following: it should specify the agreed procedures, costs of the procedure and fees of the mediator as well as contain basic information on the parties and the dispute (Art. 10.4). If the matter is before the court, the parties must inform the court of their intention to begin mediation and submit a copy of the agreement to mediate (Art. 10.6). Similarly, if an agreement is attained, it must be submitted to the court (12.4)

Prior to the commencement of the procedure, the mediator must explain the mediation procedure and inform the parties about the principles, rules, and expenses of the procedure as well as the legal effects of any agreement attained as a result of the mediation (Art. 9.4 and 10.9).

The Kosovo Mediation Law allows “shuttle” mediation—the mediator may conduct separate meetings with the parties. The mediator may propose options for resolution of the dispute, but the resolution is based on the agreement of the parties and the mediator’s role is solely to assist the parties (Art. 11.1).

The EU Mediation Directive provides that mediation should stay the time limits for initiating judicial proceedings or arbitration. (Art. 8) In contrast, the UNCITRAL Model Conciliation Law does not require this, but includes an optional provision in the footnote to Article 4. The Kosovo Mediation Law does not include a provision on staying time limits; however given the short time limit for mediation procedures (90 days), this may not be problematic.

### **3.1.3.2 Representation and Legal Assistance**

The Kosovo Mediation Law contemplates that representatives of the parties may participate in the mediation procedure and that third persons may attend with the consent of the parties. Such persons are bound by the confidentiality provisions in the law. (Art. 10.7-8)

### **3.1.3.3 Termination**

The mediation procedure terminates when the parties reach agreement; when a party withdraws; when the mediator in consultation with the parties determines that it is unreasonable to continue; or when the 90 day deadline expires. (Art. 14)

#### **3.1.3.4 Costs and Expenses**

The expenses of mediation are split by the parties unless otherwise agreed. Mediator fees will be regulated by a regulation promulgated by the Ministry of Justice (Art. 16).

#### **3.1.4 MEDIATION AGREEMENT/ENFORCEMENT**

When the parties attain an agreement, the mediator must prepare a written agreement that must be signed by the parties and the mediator. The agreement constitutes a final and enforceable document (Art. 12.3-12.4). Upon approval of the court, prosecution or other competent body, the agreement will have the power of an executive title and can be enforced. (Art. 12.5 and 14.4)

This is consistent with the EU Mediation Directive that provides that a written agreement resulting from mediation be enforceable in the Member States.

#### **3.1.5 RECOURSE AGAINST THE AGREEMENT**

The court or prosecution may annul the agreement if it concludes that it conflicts with the applicable law, does not reflect the will of the parties or when the rights and interests are impinged or when the compensation is clearly disproportionate to the damage caused (Art. 14.5).

#### **3.1.6 MEDIATION COMMISSION**

The Kosovo Mediation Law delegates considerable responsibility for regulating mediation to a Mediation Commission established by the Ministry of Justice that consists of five persons that represent the Ministry of Justice, the Kosovo Judicial Council, the Kosovo Prosecutorial Council, the Kosovo Chamber of Advocates and the Ministry of Labor and Social Welfare. The representatives serve four year terms with the possibility of one additional term (Art. 18). The duties of the Mediation Commission include setting policy regarding mediation; drafting and enforcing a code of professional ethics for mediators, drafting and maintaining registry of mediators, organization of training, and informing the public about the possibility of mediation (Art. 19).

The qualifications set for members of the Mediation Commission are: a relevant university degree, at least three years of working experience, good reputation in society and no criminal conviction for six months. There is no requirement that the members have any knowledge of or experience in mediation or dispute resolution in general. (Art. 20).

The tasks delegated to the Mediation Commission correspond to the following responsibilities of Member States under the EU Mediation Directive: adoption of voluntary codes of conduct by mediators and organizations providing mediation (Art. 4.1); and informing the general public about mediation services (Art. 9).

### **3.2 Analysis and Recommendations**

Partners Kosovo and the CSSProject for Integrative Mediation convened a conference -- Mediation in Kosovo: Maximizing Potential--in December 2009. The Conference, which was attended by over 100 representatives of NGOs, governmental entities, the legal community and international donors and organizations with an interest in mediation, addressed several important questions regarding the Legal Framework; Capacity-Building and Certification; Intercommunity Mediation; and Mediation in Resolving Property Disputes. Representatives of the SEAD project also attended. As the focus of this assessment is mediation of commercial/business disputes, some of the issues raised at the Conference will not be addressed in this assessment. However, all issues that must be addressed in order for mediation under the Kosovo Mediation Law to begin are discussed below.

- Rationalize legal framework, including adoption of secondary legislation.
- Build capacity of Mediation Commission
- Define standards for training and certification of mediators.
- Identify and approve training providers. Establish fees for training.

- Determine how many mediators should be trained.
- Develop fair and transparent licensing process.
- Build capacity of MOJ to register and maintain list of mediators.
- Draft Code of Ethics for Mediators
- Determine methods of providing mediation (court-sponsored and private mediation)
- Develop public education and outreach plan.

### **3.2.1 LEGISLATIVE FRAMEWORK**

#### **3.2.1.1 Resolve Conflicts in Domestic Law**

##### **Current Situation in Kosovo**

In addition to the Kosovo Mediation Law, mediation is mentioned in other Kosovo legislation. Some of these laws deal with mediation as a method for resolving disputes, while others use the term mediation in a different sense.<sup>37</sup>

The laws that refer to mediation as a method for resolving disputes in contested relationships are: Law on Contested Procedures; the Criminal Procedure Code, Law on Copyright and Related Rights, Law on Consumer Protection, and Law on Agricultural Land. The provisions in those laws for mediation are described in Annex A. As the Kosovo Mediation Law was enacted later than those laws and is a specific law, the provisions of the Kosovo Mediation Law must be applied to mediation under those laws. Thus, the following matters must conform to the Kosovo Mediation Law: certification and licensing of mediator; the mediation procedure cannot exceed the 90-day time limit; the requirements for the form and content of the agreement to mediate and the settlement agreement; the court may not interfere in the mediation procedure; and enforcement of the mediation agreement.

While the Juvenile Justice Code also provides for mediation, such mediation is not regulated by the Kosovo Mediation Law. Accordingly, it is not discussed in this report.

##### **Recommendation**

The bodies that are involved in mediation pursuant to the above laws must be advised of the existence of the Kosovo Mediation Law and that any mediation that they are authorized to follow must be conducted in accordance with the Kosovo Mediation Law. This includes:

- The Kosovo Judicial Council with respect to cases referred by courts to mediation pursuant to the Law on Contested Procedure.
- The General Prosecutor<sup>38</sup> with respect to cases referred by the prosecution to mediation pursuant to the Criminal Procedure Code.
- The Ministry of Culture and Office of Intellectual Property Rights with respect to mediation pursuant to the Law on Copyright and Related Rights.
- The Consumer Protection Agency with respect to mediation pursuant to the Law on Consumer Protection.

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<sup>37</sup> The laws that refer to mediation in the sense of brokering, facilitating or serving as an intermediary, are: Family Law (Article 160), Law on the Privatization Agency of Kosovo (Article 6, paragraph 1, point g), Law on Weapons (Article 1, paragraph 46), Law on the Central Bank of the Republic of Kosovo (Article 2), Law on Hotel and Tourist Activities (Article 7, 10, 39, 46), The Waste Law (Article 4), Law on Information Society Services (Article 2), Law on Trade of Petroleum and Petroleum Products (Article 2), Law on Internal Trade (no. 2004/18), Regulation No. 2004/2 on the Deterrence of Money Laundering and related Criminal Offences (Article 6), and Regulation No. 2006/47 on the Central Banking Authority of Kosovo (amended by Regulation No. 2007/8).

<sup>38</sup> This will be the Kosovo Prosecutorial Council when that body is established.

- The Ministry of Agriculture Forestry and Rural Development with respect to mediation pursuant to the Law on Agricultural Land.
- The Ombudsman with respect to mediation pursuant to the Law on Ombudsman or the Anti-Discrimination Law.
- The Legal Aid Commission with respect to mediation pursuant to the Regulation on the Legal Aid Commission.

In accordance with the duties of the Mediation Commission under Article 19 of the Kosovo Mediation Law , the Mediation Commission should issue an **Explanatory Note** on Mediation to inform responsible ministries and other institutions, courts and other stakeholders about the Mediation Law, role of the Mediation Commission and plan for coordination on implementation of mediation. For purpose of strengthening the Explanatory Note, the Ministry of Justice should adopt a formal act such as a “**Circular**” which should include the Mediation Explanatory Note as adopted by Mediation Commission and submit this to all stakeholders.

In addition to notification, representatives of these bodies should be consulted or included in relevant working groups to ensure that their requirements are reflected in any secondary legislation or mediation-related activities carried out by the Ministry of Justice and Mediation Commission. Further, consideration should be given to expanding the Mediation Commission to include representatives of these organizations (see Section 3.2.3: Mediation Commission).

### 3.2.1.2 Scope of Mediation Law

#### **Current Situation in Kosovo**

There is a long history of alternative dispute resolution practices in Kosovo, which may be referred to as “traditional” or informal mediation, and there is concern about whether the Kosovo Mediation Law prohibits such traditional or informal mediation. The question of the relation between this informal mediation and the Kosovo Mediation Law was raised at the Mediation Conference as “the law lacks a catalogue of issues where mediation is applicable” and in the context of requirements for mediators as the requirement of a university diploma would disqualify most “traditional” mediators as well as many individuals engaged in inter-community mediation.

#### **Recommendation**

To avoid confusion, the Mediation Commission should address this issue in the Mediation Explanatory Note referred to above. Further, this distinction should be emphasized in all mediation-related outreach and public education activities.

### 3.2.1.3 Confidentiality

#### **Current Situation in Kosovo**

Confidentiality is one of the key benefits of alternative dispute resolution. In fact, one of the key considerations in drafting the UNCITRAL Model Conciliation Law was to avoid situations where information on conciliation proceedings would spill over into arbitral or court proceedings. In that regard, the UNCITRAL Model Conciliation Law specifically prohibits disclosing that a party has agreed to engage in mediation or that the mediator has suggested certain settlement options or that a party has refused to accept a settlement proposal.<sup>39</sup> A similar provision was included in the draft mediation law prepared by Partners Kosovo.

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<sup>39</sup> UNCITRAL Model Conciliation Law, Arts. 9-10.

The confidentiality provisions in the Kosovo Mediation Law are quite general and state that “the mediation procedure is of a confidential nature” and that “testimonies of the parties should not be used as evidence in other procedures”. While the basic confidentiality is consistent with other mediation laws and “testimonies” is broad enough to cover all documents, information, and evidence that is revealed in the mediation procedure, the provisions fall short of those in the UNCITRAL Model Conciliation Law and the EU Mediation Directive.

### **Recommendation**

The Mediation Commission should issue an administrative direction in accordance with its Internal Rules of Procedure specifying the extent of the confidentiality provisions that is consistent with Article 10 of the UNCITRAL Model Conciliation Law and the EU Mediation Directive.<sup>40</sup> . The administrative direction should also specify that the mediator’s staff and other persons working with the mediator are subject to the confidentiality provision. As the Mediation Law permits “shuttle mediation” the administrative direction would benefit from the provision in the UNCITRAL Model Conciliation Law (Art. 8) that if the conciliator receives information from one party, he may disclose that information to the other party, unless the first party states it is confidential.

Confidentiality should also be addressed in the Ethics Code for Mediators.

#### **3.2.1.4 Mediation Procedure**

##### **Current Situation in Kosovo**

By allowing the parties to determine the mediation procedure<sup>41</sup>, subject to a few mandatory provisions, the Kosovo Mediation Law respects the flexibility and control of the parties that make mediation attractive. However, there are some inconsistent provisions in the Kosovo Mediation Law and provisions that could be expanded.

- The Kosovo Mediation Law does not specify any mechanism for appointing the mediator. While this is consistent with the parties’ ability to specify their own procedure, it is noted that the UNCITRAL Model Conciliation Law states that the mediator should be selected by agreement of the parties and that the parties may request assistance from an institution in appointing the mediation (See UNCITRAL Model Conciliation Law Art. 5). The Kosovo Mediation Law also lacks an express mechanism for challenging and replacing a mediator.
- The Kosovo Mediation Law does not include the provision in the UNCITRAL Model Conciliation Law that allows the conciliator to determine the conduct of procedure if parties do not (Art. 6).
- Article 9 on Initiation of the Mediation Procedure provides that the procedure begins at the moment when the parties agree to begin it (Art. 9.1), while Article 10 on Development of the Mediation Procedure provides that mediation starts after the parties sign the arbitration agreement (Art. 10.3). While Article 10.3 is arguably a clarification of Article 9.1, clarifying the date that mediation is deemed to begin is important because of the 90-day time limit on the mediation procedure. This clarification would be consistent with the EU Directive on mediation, which provides that the parties should be deemed to have agreed to use mediation at the point in time when they take specific action to start mediation.
- The Kosovo Mediation Law fails to address the relationship between mediation and arbitration. Whereas the UNCITRAL Model Conciliation Law specifically restricts the ability of a mediator to act as the arbitrator for the same dispute or a dispute that arises from the same contract or legal relationship as the dispute being mediated unless the parties otherwise

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<sup>40</sup> See also Article 20 of the Macedonian Law.

<sup>41</sup> Kosovo Mediation Law, Art. 10.1.

agree, the Kosovo Mediation Law does not address this. In addition, the Kosovo Mediation Law does not provide that a court or an arbitrator should respect an agreement to mediate and refrain from starting a court or arbitration procedures during the period available for mediation. (See UNCITRAL Model Conciliation Law Art. 12-13).

## **Recommendation**

The Mediation Commission should issue an administrative decision to address the above in accordance with its Internal Rules of Procedure.

### **3.2.1.5 Mediator Qualifications**

#### **Current Situation in Kosovo**

The Kosovo Mediation Law specifies the basic qualifications of a mediator, which include a university diploma, training and experience in mediation, and “high moral characteristics” both objective and subjective matters. The Ministry of Justice licenses mediators that meet these requirements. Questions were raised at the Mediation Conference about the relevance of a university degree and that “high moral characteristics” is too vague. (training requirement is discussed separately in Section 3.2.3: Mediator Training and Certification)

The objection to the requirement of a university degree is that it would exclude many people currently serving as mediators. This concern can be addressed in part by clarifying the scope of the Kosovo Mediation Law as previously discussed. As for mediators that are within the scope of the Kosovo Mediation Law, it can be argued that a university degree does not itself indicate competence as a mediator, which is covered through the training requirements. Nonetheless, a university degree is generally considered as an indication of professional achievement and a certain status in the society. Accordingly, a university diploma is a common requirement for mediators: it is a requirement in the Albanian and Macedonian mediation laws.

In contrast, the Austrian Mediation Law<sup>42</sup> does not specifically require a university degree; it requires professional qualification, which is defined as possession of the knowledge and skills of mediation and familiarity with its legal and psychosocial basic principles, as a result of completion of training at an institution approved by the Minister of Justice.<sup>43</sup> The assessment of qualification is also based on qualifications of specific professions, including lawyers, psychologists, social workers, engineers, teachers, etc.

As a practical matter, the university diploma requirement will not result in a scarcity of mediators in Kosovo. Partners Kosovo, which has provided the most mediation training in Kosovo, believes that most of the trainees and all of its “external” mediators have university diplomas.<sup>44</sup> Further given the number of university graduates in Kosovo, there is a large pool of potential mediators.

The second controversial requirement is that a mediator possess “high moral qualities”, which is not defined. Although this concept is quite subjective, a requirement of this nature is present in many mediation laws and in other Kosova legislation. For example, in the Albanian law, the formulation is “the appropriate moral and public reputation in order to conduct the mediation activity”<sup>45</sup> while the Austrian Mediation Law requires that the mediator is “trustworthy”. The Austrian Mediation Law states that if trustworthiness is not a legal requirement of the applicant’s profession, it

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<sup>42</sup> Austrian Mediation Act (Law on Mediation in Civil Law Matters), published 6 June 2003.

<sup>43</sup> Id., Article 9-10.

<sup>44</sup> Partners Kosovo has trained over 400 people, but only 45 of them are working with Partners as “external” mediators. The others have been trained as community mediators, etc.

<sup>45</sup> Republic of Albania, Law on Mediation in the Dispute Settlement, No. 9090, dated 26.06.2003. Article 3 d.

may be proven by a criminal records statement that confirms there has been no conviction.<sup>46</sup> The new Kosovo Law on Notaries requires a notary to have a “good professional and moral reputation”.<sup>47</sup>

It is noted that the draft mediation law prepared by Partners Kosova required a bachelors degree in a field related to mediation such as law, psychology, or social work or significant managerial experience in a specialized area that is often the subject of disputes. The draft mediation law did not include the subjective requirement of “high moral qualities” or a similar formulation.

### **Recommendation**

Although relevance of a university degree is subject to question, given that it is a common requirement in other jurisdictions and a recognized indicator of competence in Kosovo, combined with the fact that there is not currently a great demand for mediation, the provision should not be changed now. Rather, the Mediation Commission should continue to study the demand for and supply of competent mediators. Similarly the requirement of “high moral qualities” does not need to be changed.

However, to minimize disputes surrounding the licensing of mediators and applications that are denied, the Ministry of Justice, as the licensing authority for mediators, needs to adopt a regulation on the application process to ensure that the process is fair and transparent. It should specify the documents to be submitted, specify the time periods for application and review, and provide for hearings (interviews). The regulation should also adopt the approach in the Austrian Mediation Law that requires that persons that are not deemed to have met the qualification be notified by a formal Decision. The procedure for adopting such regulation would be for the Ministry of Justice to establish a working group to draft the regulation pursuant to the Government’s Rules of Procedure, particularly the Part V, *Rules and procedures for drafting and reviewing primary and secondary laws in the Government*. Technically, the regulation would be subject to approval of the OLSS (see Arbitration-Resolve Conflicts with other Legislation).

The procedure for licensing of mediators by the Ministry of Justice should be coordinated with the certification and registration procedures carried out by the Mediation Commission as discussed in Section 3.2.4: Mediator Licensing and Registration.

#### **3.2.1.6 Mediator Fees**

##### **Current Situation in Kosovo**

The Kosovo Mediation Law provides that mediator fees will be regulated by a sub legal act issued by the Ministry of Justice (Art. 16). The Minister of Justice signed an administrative direction on 24 August 2008 that provided for fees of 150 Euro per day and 75 Euro for a half day. However, as the administrative direction was not published in the Official Gazette, it is not binding.

The fee for mediation in other countries in the region is set in various ways. The Bulgarian Mediation Law does not set fees—they are set by individual mediation providers. In Bosnia and Herzegovina and Macedonia, the mediation laws provide that the fee will be set by the National Association of Mediators. The Mediation Act in Montenegro states that mediators are entitled to compensation, but does not set a fee. Currently there is no law regulating mediation in Slovenia. The courts operate a court-annexed mediation program in which the mediators are sitting judges that have been trained as mediators. Accordingly there is no separate fee for mediators. Fees for private mediation are set by the providers—the Slovenian Association of Mediators has set a fee for their members.

The fees for mediators range from approximately 25 Euro/hr. in Bulgaria to 100 Euro/hr. in Slovenia for civil disputes; 50-150 Euros respectively for commercial cases, with higher fees for large or more

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<sup>46</sup> Article 11(2).

<sup>47</sup> Law on Notaries, Article 4, par. 1.3.

complex commercial cases. However, it is not uncommon for fees to be for certain cases as providers can supplement their income through training and other activities. Moreover, charges are frequently waived for small cases. In addition to the mediator fees, mediation centers also charge registration and administrative fees.

Although the fees set forth in the administrative decision signed by the Kosovo Minister of Justice are in the range of the fees charged by mediators in other countries in the region, this level of fees will undoubtedly create an obstacle to the development of mediation in Kosovo. Considering that the fee that is paid to defense attorneys that are assigned cases by the court is 500 Euro a month, 150 Euro for a day's work seem to be very high.

## **Recommendation**

Given the current economic situation in Kosovo, the fact that to date, most mediation in Kosovo has been provided for free and therefore parties are not accustomed to paying for the service, as well as the broad scope of the Kosovo Mediation Law, it is very difficult to determine the appropriate level of fees. Accordingly, SEAD recommends that the Ministry of Justice adopt a sub-legal act that allows each provider of mediation (whether an institution or an individual) to establish its own fees.

### **3.2.2 STATE REGULATION OF MEDIATION/MEDIATION COMMISSION**

#### **Current Situation in Kosovo**

The Kosovo Mediation Law establishes the Mediation Commission, which has primary responsibility for formulating mediation policies, including setting standards for mediator training and certification; adopting and supervising compliance with a Code of Professional Ethics; and maintaining a Registry of Mediators. The Chair of the Mediation Commission is appointed by the Minister of Justice and the other members are appointed by the Kosovo Judicial Council, the Chamber of Advocates, the Prosecutors Council, and the Ministry of Labor and Social Welfare. There is no requirement that the members have any expertise in mediation. In addition, the members have been working on a pro-bono basis and are not given any relief from their regular duties to undertake the Commission's work. The result is that after a year, the regulations necessary to implement mediation are not in place. Further, the Mediation Commission, as currently constituted and resourced, does not have the capacity to perform the ongoing duties assigned to it under the mediation law (ongoing training, supervision of mediator ethics, maintaining mediator registry).

Several organizations, international and local, are advising the Mediation Commission. In addition to SEAD, this includes the EU Twinning Project (mediation is being covered by Austrian experts), CSSP, UNDP and Partners Kosova. The IFC/PEPSE project, which has supported pilot commercial mediation programs in the region, is also planning a project in Kosovo that is likely to start during 2010.

- EU Twinning Project has a broad mandate, which covers a full range of assistance to the Mediation Commission, including developing training standards and training of 45 mediators, developing a Code of Ethics, and developing registration and licensing procedures. However, the project will not provide support for mediation services/facilities. The project held a workshop on Mediator Ethics for the Mediation Commission on April 28-29, 2010.
- CSSP focuses on inter-community mediation. The organization was one of the organizers of the December 2009 Mediation Conference and conducted a one-day overview of mediation for the Mediation Commission.
- Partners Kosova, a Kosovo non-governmental organization affiliated with Partners for Democratic Change International, has significant mediation experience and is interested in the

full scope of mediation. They were also a co-sponsor of the December 2009 Mediation Conference.

- The UNDP project will support mediation at three levels: legislative development; capacity building of Mediation Commission and mediators; and public awareness campaign.

SEAD has taken the initiative in coordinating the activities of these organizations and hosted the first donor coordination meeting in April as well as a working lunch on April 29 for the donors and Mediation Commission members that coincided with the EU Twinning Project's workshop on Mediator Ethics. In addition, in response to the Mediation Commission's request for additional information and training on mediation, SEAD is in the process of organizing a workshop for the Commission members to inform them about the theory and practice of mediation and to present this Assessment. This workshop should take place in June/July.

### **Recommendation**

In the short-term, an expert working group should be established to advise the Mediation Commission and assist it with the duties identified in Article 19 of the Kosovo Mediation Law ( immediate tasks are to adopt regulations on training, a code of ethics) . The expert working group would consist of representatives of the organizations mentioned above and other stakeholders designated by the Mediation Commission. While the expert working group should have a specific mandate developed in cooperation with the Ministry of Justice, the composition of the working group and its working procedures should be flexible.

A key challenge is coordination of the expert working group to avoid overburdening or confusing the Mediation Commission. As mentioned above, SEAD has taken the lead in coordinating the assistance and will continue to do so. In that regard, SEAD has prepared a draft Decision on Establishing an Advisory Council for the Mediation Commission.

While formation of an Advisory Council to assist the Mediation Commission will significantly reduce the burden on the members of the Mediation Commission, the members will still have to devote considerable time and effort to the business of the Mediation Commission. The Mediation Commission has continuously raised the issue of compensation for their work. While SEAD is not expressing any opinion about such compensation, it is important that the Ministry of Justice clarify the issue of compensation for the Commission.

In the long-term, consideration should be given to expanding the membership of the Mediation Commission and/or delegating the Mediation Commission's ongoing duties to an Association of Mediators as discussed below (see Section 3.2.6: Organization of Mediation Profession). For example, the Austrian Mediation Law, which was the model for the Kosovo law, provides for broad representation and includes representatives of the mediation profession.<sup>48</sup> There is a 29 person Advisory Council: 12 members are from associations of mediators (an association whose members include a significant number of members working in mediation); two members that are academics or researchers in the field of mediation; four members from Ministries (Education, Science and Culture; Health and Women; Social Security and Consumer Protection; and Economics and Labor); and eleven from professional associations (psychologists and psychiatrists; attorneys; notaries, architecture, engineering, etc). The Advisory Council advises the Minister of Justice on mediation, determines mediator training requirements (in accordance with a general outline contained in the Austrian Mediation Law), and participates in the approval of mediation training providers. A six-person Board composed of members of the Advisory Council is responsible for registration of and maintaining the

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<sup>48</sup> Austrian Mediation Act , Section II, Articles 4-7. It should be noted that the Austrian Law only applies to mediation of civil disputes and regulates establishment of the Advisory Council for Mediation and the mediation profession. In comparison, the Kosovo Law regulates mediation in a broad scope of legal matters as well as the mediation procedure.

list of mediators. (Council members serve on an honorary basis and Board members receive reimbursement of expenses.)

### **3.2.3 MEDIATOR TRAINING AND CERTIFICATION.**

#### **Current Situation in Kosovo**

The Mediation Commission is responsible for the organization of training and mediation courses in cooperation with the Ministry of Justice. Trainees receive a certificate from the Mediation Commission upon successful completion of the course, which is the basis for entering the list (registry) of mediators. The Mediation Commission needs to establish the training curriculum and determine what institutions should provide the training.

Requirements for mediation training vary across jurisdictions. The training mandated by the Austrian Mediation Law is extensive (200-300 theoretical training hours and 100-200 practical training hours). The Austrian Mediation Law specifies the topics to be included in the training. Additionally the Austrian Mediation Law allows the Minister of Justice to adopt a regulation further specifying the conditions for training and allows for different requirements for different areas of professional expertise. The Austrian Mediation Law requires continuous training for mediators of at least 50 hours within a five-year period. These are very high standards.

In Macedonia, the Ministry of Justice establishes the training and certification standards and issues certificates. The transitional provisions of the Macedonian Mediation Law provide that within two months of the law coming into force, the Ministry of Justice will publicly announce and organize a basic level mediator training program and an advanced program or persons that have already completed training and received a certificate from a recognized institution. The proposed program is for a five-day basic training and a two-day advanced/refresher course.

The mediator training that was conducted in connection with the Gjilan pilot mediation project described below consisted of 30 hours of training (Level 1)<sup>49</sup> plus 20 hours of simulated training (Level 2) as a substitute for the co-mediation requirements. The training was conducted by mediators from Bulgaria and Slovenia. A similar training program is required under Bosnian law—40 hours on theory (Mediation I) and 16 hours of practice (Mediation 2)<sup>50</sup>.

Partners Kosovo offers a five-day basic mediation course, which it has used to train 400 individual mediators plus over 100 court staff (in Prizren, Leposavic, Shterpece, North Mitrovica and other locations). The course covers the theory of mediation, the mediation procedure, mediator skills, and mediator ethics.

#### **Recommendation**

The Mediation Commission should adopt a regulation specifying a minimum level of required training and provisions for accrediting training institutions and courses. The regulation should include a mechanism for certifying mediators that have already undergone training, including attendance at a refresher course. SEAD recommends a basic course for new mediators similar to the one conducted in connection with the pilot mediation program in Gjilan or the training program offered by Partners Kosova—the courses are essentially the same. The refresher course should have a short review of mediation theory, procedure and mediator ethics combined with simulated mediations.

The Mediation Commission could also adopt a regulation specifying additional requirements for certification in a specific field. This might include commercial mediation, construction, divorce and family and inter-ethnic.<sup>51</sup> However, given the limited experience with mediation in Kosovo, it is

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<sup>49</sup> The curriculum for Level 1 covered mediation theory, forms of ADR, ADR in Europe, mediation skills and judicial mediation.

<sup>50</sup> Association of Mediators in Bosnia and Herzegovina, Rule on the Training Curriculum for Mediators, February 27, 2006.

<sup>51</sup> At the Mediation Conference, the working group on inter-ethnic mediation was concerned that mediators have specialized qualifications.

recommended that the Mediation Commission focus on general standards and training requirements and observes how the mediation practice develops over time. In the interim, the Mediation Commission should solicit recommendations from the expert working group and organizations and individuals with interest in a specific type of mediation for future consideration.

In addition to basic requirements set forth in mediation legislation, institutions that offer mediation frequently include specific requirements to ensure that the mediators on their rosters have the knowledge and experience to help resolve the disputes of the institution's clients. For example, fields such as construction where disputes are common, require mediators that understand construction. While one can argue that the mediator's experience is not important, because the parties are the ultimate decision makers, a mediator that has good general mediation skills as well as specific expertise in the subject matter of the dispute, is likely to be able to help the parties focus on the critical issues in the dispute and generate better proposals for the parties to consider. SEAD will provide technical assistance to organizations that will offer commercial dispute resolution to determine appropriate mediator standards for their organizations.

#### **3.2.4 MEDIATOR LICENSING AND REGISTRATION.**

##### **Current Situation in Kosovo**

The Kosovo Mediation Law requires that the Ministry of Justice license mediators and that the Mediation Commission maintain a public registry of mediators and distribute it to the courts, prosecution and other competent institutions on a regular basis. The Ministry of Justice may suspend or revoke a mediator's license upon the proposal of the Mediation Commission. Protocols for the licensing and registration procedures as well as the administrative capacity to execute these tasks must be established.

Typically there is a fee for registration, which is used to offset the cost of maintaining the register. In Bulgaria, the registry of mediators and training institutions is maintained by the Ministry of Justice, which charges a registration fee of 10 Euro for mediators and 50 Euro for training institutions. In Bosnia, where the registry is maintained by the Association of Mediators, applicants must also pay a membership fee.

##### **Recommendation**

The Ministry of Justice and Mediation Commission should coordinate the procedures for licensing and registration of mediators. A separate department within the Ministry of Justice could be established to perform both tasks. Alternatively, if a Chamber or Association of Mediators is established, the tasks could be shared in a similar way to the licensing and registration of advocates and notaries as described below. In either case, registration fees should be established that would help finance the registration and licensing function.

Licensing of advocates and notaries, including administering the bar and notary exams, are assigned to specific staff of the Ministry of Justice that notify the Chamber of Advocates or Notaries, as the case may be, that an individual has received the license. The Chamber is then responsible for maintaining the registry of advocates and notaries. The Chambers also perform other duties that, in the case of mediators, are currently assigned to the Mediation Commission.

#### **3.2.5 ORGANIZATION OF MEDIATION SERVICES**

##### **Current Situation in Kosovo**

The Kosovo Mediation Law accommodates institutional ("sponsored" or "administered") mediation and *ad hoc* mediation and does not make any distinctions between the two types of mediation. As with arbitration, both institutional and *ad hoc* mediation are widespread practices and they each have advantages. Institutional sponsors include courts, private businesses and associations. As with

arbitration, institutional sponsors typically maintain their own panel of mediators, set mediator standards and monitor mediator conduct.

Initial steps were taken by the USAID Kosovo Justice Support Program to introduce a court-referred mediation program in the Gjilan in 2006-2007. A Memorandum of Understanding dated May 17 2007 with the KJC Court Administration Committee envisioned a pilot project for the court-referred mediation of civil cases in the Gjilan District and Municipal Court. The Court Presidents selected eight candidate mediators that received 30 hours of training (Level 1) plus 20 hours of simulated training (Level 2) as a substitute for the co-mediation requirements. The Court Presidents as well as the clerk for the civil section at the Municipal Court also completed the training. The training was conducted over a two week period by two trainers from Bulgaria and one from Slovenia. All civil cases were to be eligible for referral to mediation; no standards for referral were developed. The Court initiated discussions with the nearby school about using space at the school to hold mediations.

SEAD understands that the pilot project broke down over the issue of mediator compensation. The KJC established a committee to determine the fees for mediation and proposed that the mediator fees be paid from the court taxes. When the Ministry of Finance objected to this proposal, a decision was made to suspend the pilot program until the Law on Mediation was passed. Although the Law on Mediation was passed in 2008, the issue of financing has not been addressed.

Partners Kosova (Mediation Service) has four trained mediators on staff and also works with 45 external mediators trained by Partners Kosova. Cases are referred to Partners Kosova from a variety of sources, including from municipalities and court staff that Partners Kosova has trained. Mediation sessions are held in the Partners Kosova office in Pristina or in the field, depending on the needs of the disputants. As most disputants are poor, the mediation service is free.

## **Recommendation**

SEAD recommends restarting the court-referred pilot mediation project in Gjilan. The President of the Gjilan Municipal Court reports that all of the trained mediators remain interested in the pilot program and that initially they would be willing to work without compensation. He also stated that the judges at the Court were positive about mediation and recognize the potential mediation has to reduce the court's backlog.

The Municipal Court has 8 judges, 5 assigned to penal cases and 3 (including the President) to civil cases. At the end of 2009, there were 2,344 civil cases pending (including property, loans, economic, labor) and 4,680 criminal cases, of which 330 could be mediated in accordance with Article 228 of the Criminal Procedure Code (cases punishable by a fine or imprisonment of up to 3 years). The Court President believes that it would be easier to start with mediation of the criminal cases and that this would have the greatest short-term benefit to the court. Nonetheless, SEAD recommends that both criminal and civil cases be included in the pilot project.

Prior to restarting the Gjilan pilot project, guidelines on case referral must be prepared and judges must be trained on these guidelines. For criminal cases, it will also be necessary to consult with the prosecutor's office in Gjilan. In addition, one or more persons should be designated and trained to serve as coordinator for the project. Further, the mediators that were trained for the project should attend a refresher course as it has been three years since they were trained. The refresher course should focus on practice.

SEAD could provide technical and financial support for restarting the Gjilan pilot program. However there should be a clear agreement with the appropriate governmental entities regarding future funding. As part of the evaluation of the pilot project, SEAD, in cooperation with the KJC, could conduct a cost-benefit analysis to determine the relative costs of litigation and mediation and whether an investment in mediation would result in a benefit to the court system.

Assuming that the KJC will consider providing funding for court-referred mediation in the future, consideration should also be given to establishing a second pilot mediation project. As the Acting

President of the District Court in Peja is a member of the Mediation Commission, Peja may be a good location for a second pilot project.

Institutional sponsors of commercial arbitration should also provide mediation or med/arb. As the existing KCC rules provide for a form of med/arb, SEAD will encourage the KCC to include this in updated rules and maintain a list of mediators that have expertise and experience in business matters. SEAD will also encourage AmCham to offer commercial mediation.

### **3.2.6 ORGANIZATION OF MEDIATION PROFESSION.**

#### **Current Situation in Kosovo**

Currently there is no mediation association in Kosovo and the Kosovo Mediation Law does not contemplate a self-regulating body of mediators. Complete regulation of the mediation profession is delegated to the Mediation Commission. However, in other jurisdictions, this responsibility is shared with an association of mediators.

In Bosnia and Herzegovina, the Law on Mediation Procedure<sup>52</sup> provided for the transfer of certain mediation activities to an association of mediators pursuant to a separate law. The Law on Transfer of Activities delegates the regulation of mediation to the Association of Mediators in BiH and any newly established associations of mediations that register with the Ministry of Justice.<sup>53</sup> The Association has adopted rules on the registry of mediators, mediation fees, training, referral of cases and an ethics code.

In Macedonia, the mediators are organized into a Chamber of Mediators that is supervised by a Committee composed of representatives of the Ministry of Justice.<sup>54</sup> All registered mediators are members of the Chamber. The Chamber is responsible for the Directory of Mediators and for adopting and enforcing the Code of Ethics, while the Ministry of Justice sets the training and certification standards and issues certificates. The transitional provisions of the Macedonian Mediation Law provide that within two months of the law coming into force, the Ministry of Justice will publicly announce and organize a basic level mediator training program and an advanced program or persons that have already completed training and received a certificate from a recognized institution. Similar to Macedonia, Bulgaria and Bosnia/Herzegovina have Mediators Associations.

Although the Kosovo Mediation Law does not provide for a chamber or association of mediators, it is noted that the draft mediation law prepared by Partners Kosova contemplated a Chamber of Mediators.

#### **3.2.6.1 Recommendation**

To establish mediation as a recognized profession, in the future, the Mediation Commission should adopt a by-law that would delegate certain duties to a Chamber of Mediators composed of all licensed mediators. Like attorneys or notaries, this Chamber should enforce its own code of ethics and maintain the registry of mediators. The Chamber could be supported by annual membership dues.

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<sup>52</sup> Law on Mediation Procedure, PS BiH No. 76/04, July 29, 2004.

<sup>53</sup> Law on Transfer of Mediation Activities, Parliamentary Assembly of BiH, No. 204/05, July 28, 2005.

<sup>54</sup> Law on Mediation, Official Gazette of RM no. 138 of November 17, 2009

## **4 KNOWLEDGE OF AND DEMAND FOR ALTERNATIVE DISPUTE RESOLUTION**

### **4.1.1 EDUCATE LEGAL COMMUNITY ON ADR**

#### **Current Situation in Kosovo**

Arbitration and ADR in general are not familiar concepts in Kosovo. As discussed below, there has been some training for the legal community that focused on arbitration. Other than the mediation training done in connection with the proposed Gjilan pilot mediation project and training for court staff conducted by Partners Kosova, nothing has been done on mediation.

According to the 2009 ABA/ROLI Legal Reform Index, Kosovo, lawyers who practice primarily in the commercial law area, and particularly those with international clients, are familiar with the routine use of ADR clauses in contracts and with international providers of those services. However, they have little experience with actually participating in ADR proceedings in these alternative forums. This situation was confirmed in discussions with members of the AmCham Legal Committee, which represent the largest law offices in Kosovo and frequently represent foreign clients as well as in focus group meetings conducted in March 2010.

During 2009 a limited amount of arbitration training was provided to judges and attorneys through the Kosovo Judicial Institute and the Kosovo Chamber of Advocates with support from the USAID/Economic Management for Stability and Growth Project. The project produced an excellent arbitration manual that has been the basis for a two-day course designed to provide a framework for understanding the main concepts of arbitration as one of the most widely used methods of resolving commercial disputes. Both the KJI and KCA intend to continue to include this course in their curricula. This short course was also conducted for the students in the Master's in Civil Law program at the University of Pristina law faculty.

In terms of legal education, the curriculum of the University of Pristina Law Faculty lists a course on arbitration in the Masters in Civil Law program and as an elective in the third year of the bachelor's program. The Master's level course is a new course that is being offered for the first time in the Spring 2010 semester. The course syllabus follows the outline of the Arbitration Law. The professor teaching the course advised SEAD that he consulted the USAID Arbitration Manual in preparing the course and reports that the students are very interested in the course.

Currently there is no separate undergraduate level course on arbitration. Rather, one professor offers a course in International Trade and Commercial Law, which includes a short unit on arbitration. According to the Professor, students are very interested in international trade and commercial law topics and are would like additional courses in this area. In that regard, the Professor recommends that a new Department be established that would include courses in international trade, commercial law, corporate law, arbitration, competition law, securities/stock exchange regulation; consumer protection, etc.

Since 2002, a small team of students from the UP Law Faculty have participated in the Vis International Commercial Arbitration Competition. Previously the team was coached by a University of Pristina assistant faculty member. Since that individual was not in Kosova during the past year, other alumni of the Vis Competition coached the team for the 2010 competition. There is no comprehensive training for the team.

#### **Recommendation**

All segments of the legal community need a better understanding of ADR in general and lawyers and judges that will be directly involved with arbitration and/or mediation must also understand the specifics of those mechanisms and the relevant laws and regulations. A general understanding of the ADR procedures and their benefits is critical to building support from the legal community.

Practicing attorneys are typically obstacles to building demand for ADR as they fear that ADR will take work away from them. This group needs to realize that this is not true and that there is a place for lawyers, both as trained neutrals and as advisors to their clients. Judges need to understand which cases are appropriate and should be referred to ADR and the courts role in the process. Judges also need to understand that ADR does not strip them of their ability to dispense justice. The following specific educational activities are suggested:

- Organize round-table discussions for judges and lawyers as a general introduction to the SEAD project, in coordination with the other project components.
- Develop a one-day introductory ADR workshop for judges and lawyers (including in-house counsel).
- KJI and KCA should continue to offer basic arbitration course using the USAID Arbitration Manual. A similar training module and manual on mediation should be developed.
- Design more advanced separate, practical training curriculums for lawyers and judges based on the USAID Arbitration Manual and the Mediation Manual after it is prepared.
- Judicial training should cover interpretation of the arbitration agreement; determination of validity of an arbitration agreement and jurisdiction of arbitral tribunal; appointment and challenge of arbitrators; issuing preliminary orders; determining costs; scope of judicial remedies, and recognition and enforcement of arbitral awards.
- Training for lawyers should focus on drafting arbitration clauses and representing/advising clients on arbitration.
- Develop Master’s level ADR course that builds on current arbitration course and incorporates practical information. Coordinate with Objective 1.
- Identify professor(s) to develop curriculum for ADR course at undergraduate and graduate levels. Coordinate with Objective 1.

#### **4.1.2 PROMOTE ADR TO BUSINESS COMMUNITY**

##### **Current Situation in Kosovo**

Only a small segment of the business community has any familiarity with arbitration, mediation or ADR in general. In focus group meetings conducted in March 2010, only 20% of the participants were familiar with ADR. When the concept was explained, most respondents said they would be willing to use ADR if it was available, but they were skeptical about the success of ADR in Kosovo due to a lack of information about ADR, failure of the government to take steps to implement ADR, and the absence of a “culture of contracts” that is a prerequisite for the use of ADR.

Meetings with small- and medium-sized businesses in key business sectors (agriculture, wood processing, etc)<sup>55</sup> indicate that businesses typically settle disputes through negotiation and only work with parties that they know and trust. They have no trust in the courts or state bodies in general, due in part to problems with tax and customs authorities and municipal inspectors. There is still significant reliance on the concept of “Besa”. At a local level, this means that business people will only deal with businesses that they know directly. For international trade, this is generally businesses that they meet at trade fairs or are otherwise introduced to them. Many Kosova companies conduct international trade through brokers and not directly with the supplier or purchaser.

A key obstacle to the widespread use of arbitration and mediation is that the business community in Kosovo generally lacks a culture of contracting. Local companies frequently do not use contracts and even when local companies use contracts, they do not contain alternative dispute resolution clauses. When Kosovo companies enter into contracts with international companies, often they do not review, let alone understand, the terms of the contract. For example, companies had entered into contracts with foreign companies that provided for litigation in a national court of the foreign party or for

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<sup>55</sup> SEAD met with companies recommended by KPEP during March 2010.

arbitration at an international tribunal. The local companies were not even aware of these provisions, let alone the procedure and cost that would be involved in litigation or arbitration.

### **Recommendations**

As one of the key challenges to implementing ADR in Kosovo is to educate the business community about the benefits of ADR and contracting in general, a comprehensive public education and outreach program is essential. This should include the institutions that will sponsor arbitration as well professional and business associations, the courts and educational institutions. This activity will be closely coordinated with the other components of the SEAD Project.

## ANNEX A: KOSOVA LAWS WITH MEDIATION PROVISIONS

### Criminal Procedure Code<sup>56</sup>

The Criminal Procedure Code (Art. 282) provides that the public prosecutor may refer the criminal report on a criminal offence punishable by a fine or by imprisonment of up to three years for mediation. The mediation must be conducted by an independent mediator, can only be settled with the consent of the defendant and injured party, and cannot take longer than three months. The Code provided that an Administrative Decision setting forth detailed procedures on conducting the mediation would be issued.

### Law on Copyright and Related Rights<sup>57</sup>

The Law on Copyright and Related Rights provides that collective associations (associations that administer copyrights on behalf of copyright owners) and representatives of users may use mediation to resolve specified disputes (Art. 182)<sup>58</sup>. Similar to the Law on Mediation, the Law on Copyright and Related Rights provides that mediation must be based on a mediation agreement and sets basic standards, including independence and impartiality of the mediator, confidentiality, and a three month limit on the mediation procedure. The Office for Intellectual Property Rights<sup>59</sup> established to carry out certain administrative functions in accordance with the law, is charged with defining rules for the mediation procedure, standards for mediators maintaining a list of mediators and providing administrative assistance to the mediator. That Office has not been established although the Ministry of Culture has drafted and submitted a regulation on establishing the Office to the Prime Minister. That regulation and any rules for mediation it adopts should conform to or incorporate by reference the provisions of the Mediation Law.

### Law on Consumer Protection<sup>60</sup>

The Law on Consumer Protection authorizes the Consumer Protection Association to undertake certain activities for the purpose of protecting consumer interests, including mediating between central bodies and consumers as well as between sellers and consumers (Article 34.5).<sup>61</sup> The Law does not include any other provisions on mediation.

### Law on Agricultural Land<sup>62</sup>

Law on Agricultural Land at Article 37 introduces mediation as a form of solving disputes between parties on the lease of agricultural land if parties agree on mediation. As with the Mediation Law, mediation must be based on the agreement of the parties and the mediator must be impartial. In addition, the law requires the mediator to have knowledge in the field of agriculture and authority in the community where he/she lives. The Law does not set any time limit on mediation or require confidentiality. If mediation fails, the parties can go to court.

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<sup>56</sup> Provisional Criminal Procedure Code of Kosovo as promulgated by UNMIK Regulation No 2003/26.

<sup>57</sup> Law on Copyright and Related Rights as promulgated by UNMIK Regulation No 2006/46

<sup>58</sup> Disputes concerning a) conclusion of a general agreement, b) conclusion of an agreement for cable retransmission of broadcasts, and c) use for the benefit of people with a disability, use for the purpose of teaching, private or other internal reproduction, performance of official proceedings and ephemeral recordings made by broadcasters.

<sup>59</sup> Article 169.

<sup>60</sup> Law on Consumer Protection as promulgated by UNMIK Regulation No 2004/42.

<sup>61</sup> Other activities include presenting the interests of its members and all consumers, representing consumers at meetings, and giving opinions on bylaws.

<sup>62</sup> Law on Agricultural Land as promulgated by UNMIK Regulation 2006/37

### Anti-Discrimination Law<sup>63</sup>

Mediation is introduced at Anti-Discrimination Law, Article 7.4, which provides that “Any mediation or conciliation procedures which are available under the applicable law may be utilized, at the option of the claimant or the claimants, in order to address violations of this Law”.

### Law on Ombudsperson<sup>64</sup>

The Law on the Ombudsperson charges the ombudsperson with monitoring, promoting and protecting the human rights and fundamental freedoms of persons in Kosovo (Art. 1). The functions and competencies of the Kosovo Ombudsperson include mediation, reconciliation and conciliation (Article 4.2). However, the law does not specify how the Ombudsperson participates in such activities. Nonetheless, any mediation initiated by the Ombudsperson should conform to the Law on Mediation.

### Regulation on Legal Aid Commission<sup>65</sup>

The Legal Aid Commission is authorized to provide primary legal aid<sup>66</sup>, which includes legal information, advice and assistance with legal procedures, including mediation, arbitration and alternative dispute resolution (Art. 9.1 (i)). To date, the Legal Aid Commission has not participated in any such procedures. However, such procedures would have to be done in accordance with the relevant legislation.

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<sup>63</sup> Anti Discrimination Law as promulgated by UNMIK Regulation 2004/32

<sup>64</sup> Law on Ombudsperson Institution in Kosovo UNMIK Regulation No. 2000/38 as amended by UNMIK Regulation No 2006/06.

<sup>65</sup> Regulation on Legal Aid Commission in Kosovo as Promulgated by UNMIK Regulation No. 2006/36.

<sup>66</sup> Primary legal aid is defined as legal aid to persons entitled to receive or receiving social assistance or are in an equivalent financial position. Art. 11.2.

## **ANNEX B: LAW ON ARBITRATION**

## **ANNEX C: LAW ON MEDIATION**