



**ALTERNATIVE DISPUTE RESOLUTION MECHANISMS
COST/BENEFIT ANALYSIS**

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*The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations
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ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

COST/BENEFIT ANALYSIS

1. INTRODUCTION

1.1 Background

Alternative Dispute Resolution (ADR) mechanisms have been introduced and developed around the world for a number of decades. However, apart from arbitration, the Serbian legal system only started to incorporate and utilise ADR methods a few years ago. Despite the establishment of a normative framework, the foundation of the Republic Centre for Mediation and many efforts invested by the centres for social work, non-governmental organisations and other relevant institutions/organisations, the number of disputes handed over to mediators or other ADR providers is still unsatisfactory. This situation can be explained by various factors and may be overcome by numerous initiatives.

1.2 Objectives and Methodology

The objective of this paper is to identify the **quantitative costs and benefits and qualitative benefits** of using ADR mechanisms by drawing conclusions from the theory and comparative practice in order **to list recommendations and focus issues for consideration** in the process of the development of an ADR system in Serbia.

The methodology applied was a combination of desk research, interviews and consultations with a variety of stakeholders and discussion and feedback sessions with UNDP representatives.

2. Alternative Dispute Resolution System in Serbia

2.1 Types of Alternative Dispute Resolution in Serbia

There are many different procedures present in Serbia that may be considered **alternative dispute resolution mechanisms**. These are as follows:

- (i) Mediation regulated by the current Law on Mediation (focused mainly on court-annexed mediation),
- (ii) Arbitration,
- (iii) The procedure for peaceful resolution of labour disputes,
- (iv) Mediation and reconciliation in family law procedures,
- (v) Mediation before the National Bank of Serbia,

- (vi) Peer, inclusive and mediation in local communities conducted by centres for social work and non-governmental organisations,
- (vii) Services and procedures conducted by the republic Protector of Citizens, Provincial Ombudsman and some city ombudsmen
- (viii) Procedure before the newly established Commissioner for the Protection of Equality.

2.2 Alternative Dispute Resolution Normative Framework in Serbia

2.2.1 Mediation

The most recognised, used and represented among them is the mediation regulated by the Law on Mediation from 2005. This prescribes **the rules regarding the mediation procedure** in disputes, particularly in property matters and relations of individuals and legal persons, in trade, family, labour and other civil matters, administrative and criminal matters in cases when parties are free to dispose and in cases when the law does not stipulate exclusive jurisdiction of the court or other body.

The Law defines mediation as any procedure, irrespective of its name, in which parties want to resolve their dispute by a **peaceful approach** with the facilitation of one or more mediators who assist both sides to achieve an agreement. The mediation procedure is based on the principles of **voluntariness, equality** of the parties, **privacy, confidentiality** and **urgency** of the procedure. Mediation may be initiated by **the parties themselves, or if the court assesses** that the dispute may be successfully resolved by mediation, then it would instruct the parties to conduct the mediation procedure.

The mediation procedure can last for up to **30 days** and it may be prolonged by the decision of the court or other body upon the request of the mediators or parties and if there are legitimate reasons for its continuance.

The mediator is **a neutral, third person** mediating among the parties in accordance with the principles of mediation and in order to lead the procedure to a resolution of the dispute. Mediation may be conducted by judges, attorneys at law or other distinguished experts in various fields depending on the disputed relation in which they mediate.

The need to improve the current normative framework for mediation and harmonise it with international and European standards¹ as well as to further develop the mediation practice in Serbia resulted in the formation of **a Working Group for the new Law on Mediation** by the Ministry of Justice of the Republic of Serbia. The **key novelties** introduced by the draft Law on Mediation created by this Working Group is the international mediation modelled by the provisions of the UNCITRAL Model Law, highlighting the mediator's active role in the process, listing all possible ways of completing the mediation procedure, the possibility for parties to conclude a written agreement on facts which would be binding on them in a future court or other procedure, less demanding general requirements for mediators, opening of the possibility that expenses of the procedure may be covered by the state or professional organisations, the licence system, the Register of Mediators, the system of accreditation of the training programmes, the Mediators Chamber as an independent, professional organisation of mediators modelled by the chamber system implemented in other systems, with mandatory membership and an Ethical Board as an expert body of the Mediators' Chamber.

The Draft Law is complemented by **alternative solutions** for its provisions suggested by some members of the Working Group. The most important differences in the proposed system are that **mandatory mediation** should be prescribed in some cases as well as that the written agreement achieved by the mandatory mediation procedures should have **the force of an executive decision**.

Mediation is also regulated by the Law on the Peaceful Resolution of Labour Disputes adopted in 2004. The law prescribes jurisdiction of the **Republic Agency for Peaceful Resolution of Labour Disputes** in procedures in both individual and collective disputes. This includes conciliation, mediation and in fewer cases – arbitration. The law distinguishes between individual and collective labour disputes. Collective labour disputes are for example, disputes on collective agreements, unions and strikes while individual labour disputes are disputes on minimum wages and notice of labour contract etcetera.

¹ In its work, the Working Group has particularly taken into account the UNCITRAL Conciliation Rules from 1980, UNCITRAL Model Law on International Commercial Conciliation from 2002 as well as the provisions of the new Directive 2008/52/EO of the European Parliament and the Council of the European Union in some aspects of mediation in civil and commercial matters, which standardised the basic principles of mediation and envisaged the obligation of the state members of the EU to establish a system of control of the quality of the work of the mediators, to regulate the manner of referral to mediation and of fulfilling the obligations deriving from the mediation agreement (Draft Law on Mediation, Explanation, part II, Reasons for Adoption of the New Law).

2.2.2 Conciliation

Conciliation procedures are typically used in labour and consumer disputes. The conciliator is an impartial person helping the parties to negotiate and directing them towards an agreement they are both satisfied with. However, unlike in mediation, the conciliator plays a **relatively direct role** in the resolution of a dispute and even advises parties on certain solutions by offering suggestions for the settlement. While the mediator during the whole procedure remains neutral and impartial, the conciliator often develops and proposes the terms of settlement. Conciliation is used almost preventively, i.e. as soon as a dispute or misunderstanding appears, so the conciliator invests all efforts to stop a conflict from developing. Mediation is in this sense closer to arbitration since it is used when both parties consider conflict to be serious enough for litigation, although mediation may be also used at an early stage of a dispute. The **Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL)**, adopted on 4 December 1980 by Resolution 35/52 of the General Assembly, are recommended in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of the dispute by recourse to conciliation. These Rules apply to conciliation of disputes deriving from or relating to a contractual or other legal relationship where the parties have agreed that the UNCITRAL Conciliation Rules apply.²

2.2.3 Arbitration

Arbitration is one of the methods for the resolution of disputes which due to its characteristics can be observed both – as an alternative technique for the resolution of disputes, but also, because of its certain elements, as a method closest to an institutional (court) procedure for dispute resolution. The Law on Arbitrage from 2006 and the Law on Resolution of Conflicts of Legislation with Legislation of Other States from 1982 are the most important legal texts related to arbitration in the Serbian legal system.

In practice, arbitration in Serbia is present in the areas of **commercial law**, especially international commercial law and the **Commercial Chamber of Serbia** has a significant role in arbitration in Serbia with its **Permanent Elected Court (Arbitrage)** and **Foreign Commercial Arbitrage**. The Permanent Elected Court (Arbitrage) decides the dispute if such a mechanism is previously agreed between the parties. The court issues a decision on the basis of the law and sub-law regulations,

² *Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL)* adopted on 4 December 1980 by the Resolution No. 35/52 of the General Assembly, <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>

contracts, codexes and customs and may also issue the decision on the basis of justice and equity if the parties in the dispute explicitly agreed so. The arbitration decision has **the force of a final court decision** and regular legal remedy (appeal) cannot be submitted against it. These decisions are executed in accordance with the Law on Executive Procedure. The only legal remedy against this decision is **a lawsuit for annulment**, which may be submitted to the state court and only for reasons listed in the Law on Arbitrage. The arbitration procedure is **less formal** than the court procedure and therefore **faster and more efficient**. The arbitration decision is issued by **the arbiter**, selected by the parties from the List of Arbiters determined by the Assembly of the Commercial Chamber of Serbia, for whom they believe would decide in the dispute *bona fide*, impartially, lawfully and just.

Ad hoc arbitration may be established for individual disputes and a special type of arbitration, closest to mediation, is so-called **quasi arbitration** where experts provide expertise about certain technical issues in a particular legal dispute. In this case the arbiter makes the decision on this technical issue, which does not have the force of an executive decision, but is of very strong authority and usually resolves the dispute among the parties involved. In Serbia, arbitration is very rarely used in legal matters outside the scope of commercial law.

Presently, the Serbian legal system provides ADR methods in the field of family law where appropriate. The **Family Law from 2005** envisages ADR mechanisms in very delicate situations such as divorce, marriage annulments, division of matrimonial/common property, etc. In these cases the judge may instruct the parties to conduct mediation or a reconciliation procedure so that their dispute is resolved without the court. The consent of the involved parties is necessary. The mediator/conciliator can be either a judge (who cannot therefore be involved in further court procedures in that particular legal matter) or a representative of the competent institution – centre for social work or other professionals such as psychologists. If any of the parties involved considers that there is no need for mediation or reconciliation in a particular legal matter, mediation/reconciliation procedure would be ended and the regular court procedure would be continued.

2.2.4 Ombudsman Institution

According to the Law on the Protector of Citizens from 2005, **the Republic Protector of Citizens' Rights (Republic Ombudsman)** is entitled to provide services, to mediate and provide advice and opinions on issues from its jurisdiction in order to improve the work of the administration and the protection of the rights and freedoms of citizens. The **Provincial Ombudsman** is also entitled to

mediate in alternative dispute resolution procedures related to human rights violations in accordance with the Decision on Provincial Ombudsman from 2002.

The legal ground for the development of private and court-annexed mediation in cases of discrimination is provided in the **Anti-Discrimination Law adopted in 2009**. The law envisages two mechanisms of protection in such cases: procedures before the Commissioner for Protection of Equality and court procedures. In the first case, after the Commissioner receives the complaint from a victim of discrimination and before he/she undertakes any other action in the procedure, he/she is obliged to **recommend reconciliation, i.e. mediation** with the respect for the principle of voluntary consent.³ Mediation can also be performed after the lawsuit is submitted to the court. This procedure is implemented according to the provisions of the Law on Civil Procedure, whereby the court is entitled to refer the litigation parties to mediation if it determines that the dispute could be successfully resolved in that manner. The Law also envisages that in the procedure before the court, the parties themselves may jointly propose to the court their attempt to resolve the dispute through mediation.

2.3 European Standards in the Field of Mediation

2.3.1 Council of Europe

Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on Mediation in Civil Matters from 18 September 2002 defines “civil matters” as those involving civil rights and obligations including matters of a commercial, consumer and labour law nature, but excluding administrative or penal matters. The Recommendation envisages, inter alia, the following:

- Even if parties use the mediation method, **access to the court** should be still available as a crucial guarantee for the protection of parties’ rights.
- The states should, when organising mediation, pay attention to the need to avoid unnecessary delay and the use of mediation as a **delaying tactic**.
- States should also consider the opportunity of establishing or providing completely or partially **free mediation** or providing **legal aid for mediation** particularly if the interests of one of the parties require special protection.

³ Article 38 of the Law prescribes that before undertaking any other action in the procedure, the Commissioner suggests conducting the conciliation procedure in accordance with the Law on Mediation.

- The costs of mediation should be **reasonable and proportionate** to the importance of the issue and to the amount of the work undertaken by the mediator.
- The parties should be given **enough time** during the mediation procedure to think about the issues at stake and any other possible settlements of the dispute.
- **A written document** defining the subject-matter, the scope and the conclusions of the agreement should be usually drafted at the end of every mediation procedure and the parties should be allowed a limited time for reflection, agreed by them, after the document is drafted and before it is signed.
- Mediators should **inform the parties** about the effect of the agreement and about the steps they should take if one or both of them would like to enforce their agreement.
- States should gather and distribute **detailed information** on mediation in civil matters including the costs and efficiency of mediation. They should also make available information on mediation in civil matters for professionals involved in the functioning of justice.
- Steps should be taken to establish, in accordance with the national law and practice, a **network** of regional and/or local centres where impartial advice and information on mediation may be obtained, including by telephone, correspondence or e-mail.
- States should encourage the setting up of mechanisms, which would promote the use of mediation in resolving issues with **an international element** and should promote cooperation between existing services dealing with mediation in civil matters in order to facilitate the use of international mediation.⁴

Recommendation R (98) 1 of the Committee of Ministers to Member States on Family Mediation from 21 January 1998 lists the general standards concerning mediation in family matters some of which are the following:

- Mediation should not, in principle, be compulsory.
- **The mediator** should be impartial between the parties and neutral as to the outcome, should preserve the equality of the parties' bargaining positions, should not impose a solution on the parties, should provide certain information to the parties, take care of the welfare and best interests of the children, pay particular regard to whether violence has

⁴ Recommendation Rec (2002)10 of the Committee of Ministers to Member States on Mediation in Civil Matters from 18 September 2002,
[https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2002\)10&Language=lanEnglish&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2002)10&Language=lanEnglish&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

occurred or may occur in the future between the parties, may provide legal information but should not provide legal advice.

- The **privacy** in the procedure and **confidentiality** of discussion should be guaranteed.
- The State should facilitate the approval of mediated agreements by a judicial or other competent authority where parties request it and provide **mechanisms for enforcement** of such approved agreements, according to the national law.
- The State should recognise **the autonomy of mediation** and the possibility that mediation is conducted before, during or after legal proceedings. It should also establish mechanisms, which would enable legal proceedings to be interrupted for mediation to take place, to ensure that in such cases a judicial or other competent authority retains the power to make urgent decisions in order to protect the parties or their children or their property.
- States should promote the development of family mediation and are free to establish **methods in individual cases** to provide relevant information on mediation, for instance, by making it compulsory for parties to meet with a mediator.
- States may also apply in an appropriate manner these principles to other means of resolving disputes.
- States should consider setting up mechanisms for the use of mediation in cases with an **international element** when appropriate, especially in all matters relating to children, and particularly those concerning custody and access when the parents are living or expect to live in different states.
- All these principles are applicable to international mediation. States should, as far as possible, promote cooperation between existing services dealing with family mediation in order to facilitate the use of international mediation. With regard to the particular nature of international mediation, international mediators should be required to complete **specific training**.⁵

Recommendation (2001) 9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties from 5 September 2001 was adopted considering that the courts' procedures in practice may not always be the most appropriate in resolving administrative disputes and that the widespread use of alternative

⁵ Recommendation R (98) 1 of the Committee of Ministers to Member States on Family Mediation from 21 January 1998, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2>

methods of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public. Recommendations in this field are provided for the following alternative means: internal reviews, conciliation, mediation, negotiated settlement and arbitration.⁶

Recommendation R (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters from 15 September 1999 was adopted considering the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community, by recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain an apology and reparation, considering the importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation, by recognising that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes. The guidelines from the Recommendation apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).⁷

2.3.2 The European Commission for the Efficiency of Justice

The European Commission for the Efficiency of Justice (CEPEJ) adopted **Guidelines for a better implementation of the existing recommendations concerning family mediation and mediation in civil matters** on 7 December 2007. These guidelines are, inter alia, the following:

- In order to **expand equal availability** of mediation services, measures should be taken to promote and set up effective mediation schemes across as wide a geographical area as possible.

⁶ Recommendation Rec(2001)9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties adopted on 5 September 2001 [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2001\)9&Language=lanEnglish&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2001)9&Language=lanEnglish&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

⁷ Recommendation R (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters from 15 September 1999, [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(99\)19&Language=lanEnglish&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(99)19&Language=lanEnglish&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

- Member states should recognise and promote existing and new effective mediation schemes through **financial and other forms of support** and where successful mediation programmes have been established, the states are encouraged to expand their availability by information, training and monitoring.
- Since **judges** play an important role in the development of mediation, they should be able to provide information, arrange information sessions on mediation and, where applicable, invite the parties to use mediation and/or refer the case to mediation. Therefore, it is important that mediation services are available either through court-annexed mediation schemes or through referring parties to lists of mediation providers. In addition, judges play a crucial role in **fostering a culture** of amicable dispute resolution, so it is important that they have a full knowledge and understanding of the process and benefits of mediation. This may be achieved by organising information sessions and initial and in-service training programmes containing specific elements of mediation useful in the day-to-day work of courts in particular jurisdictions.
- The **codes of conduct for lawyers** should contain an obligation or a recommendation to consider, where appropriate, alternative methods of dispute resolution including mediation before initiating court procedures, and to provide their clients with relevant information and advice. Bar chambers and lawyers associations should have lists of mediation providers, which they should distribute to lawyers.
- The member states should **continually observe** their mediation schemes and on-going pilot projects and arrange for their **external and independent evaluation**. Certain common criteria containing both qualitative and quantitative evaluation aspects should be developed in order to compare the quality of mediation schemes.
- The legal guarantees regarding the **confidentiality of mediation** should be provided by the state while a breach of confidentiality by a mediator should be considered as a serious disciplinary fault and should be adequately sanctioned.
- Member states should be aware of the importance of setting up common criteria to allow **the accreditation** of mediators and/or institutions which offer mediation services and/or who train mediators. Due to increased mobility throughout Europe, measures could be taken to establish **common international criteria for accreditation** such as, for example, a certificate of European mediator, etc.
- Being generally recognised by various mediation stakeholders throughout Europe, **the European Code of Conduct for Mediators** in civil and commercial mediation is recommended to be promoted by the state as a minimum standard for civil and family mediation, taking into account the specific nature of family mediation. In case the Code is

breached, member states and mediation stakeholders should have in place an adequate complaints and disciplinary procedure.

- Due to the high costs of international mediation, states should encourage the use of **new technologies** instead of face-to-face meetings, such as video and telephone conferencing as well as on-line dispute resolution methods. In addition, member states should take measures to establish, support and promote international mediation in order to make it accessible.
- Member states should be encouraged to make **legal aid** available for mediation parties with limited financial means in the same way that it would provide for legal aid in litigation.
- Parties should not be prevented from using mediation by the risk of expiry of **limitation terms**.
- **Early information and advice** on mediation should be provided to the parties in the dispute by members of the judiciary, prosecutors, lawyers and other legal professionals as well as other bodies participating in dispute resolution.
- Member states may consider, in order to make mediation more attractive to users, diminishing, abolishing or reimbursing **court fees** in specific cases, if mediation is practiced either before going to court or during court proceedings.
- Member states may request from the beneficiaries and providers of **legal aid**, before receiving legal aid for the litigation, to think about an alternative settlement of the dispute, including mediation.
- Parties may be **sanctioned** if they do not actively consider the use of alternative dispute resolution methods. This may be done, for instance, by setting up a rule that they will not be fully reimbursed for their litigation costs in civil or family matters, if they have refused to go to mediation or if they failed to present the evidence on active consideration of the use of amicable dispute resolution.
- It is important to encourage both institutional and individual **links between mediators and judges**, which may in particular be achieved through conferences and seminars.
- Member States and Bar Chambers should take measures to create **legal fee structures** that do not discourage lawyers from advising clients to try with mediation in resolving their disputes.
- Mediation should be included in the curricula of initial and continuous training programmes for lawyers while the bar chamber and lawyers associations should have lists of mediation programme providers, which they would distribute to lawyers.

- Member states, universities, other academic institutions and mediation stakeholders should support and promote **scientific research** in the field of mediation and alternative dispute resolution in general as well as mediation and other forms of dispute resolution should be incorporated in schools national curricula.⁸

2.3.3 European Union

Directive 2008/52/EC of the European Parliament and of the Council of the EU on Certain Aspects of Mediation in Civil and Commercial Matters from 21 May 2008 aims to encourage the broader application of mediation and to ensure the legal framework for the parties using mediation methods. Its provisions are applicable both in internal and cross-border cases standardising the basic principles of mediation – **voluntariness, confidentiality, impartiality and neutrality**. States are obliged to set up mechanisms for the **control of quality** of the work of mediators, to regulate **referral mechanisms** and to **fulfill obligations** deriving from the mediation agreements, **to harmonise their legislation** with the provisions of the Directive and to take measures in order **to promote** as broad as possible the use of mediation.

The Directive also envisages the following:

- The courts should be enabled under the national law to set some **time-limits** for a mediation process.
- National legislation may make the use of mediation **compulsory or subject to incentives or sanctions** provided that such legislation does not prevent parties from access to the judicial system.
- Mediators should be made aware of the existence of **the European Code of Conduct for Mediators**, which should also be made available to the general public on the Internet.
- Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that fulfillment of mediation agreements would depend on the good will of the parties and therefore states should ensure that the parties can have the content of their mediation agreement **made enforceable** where appropriate.
- In order to encourage the use of mediation, the states should ensure that the national provisions on **limitation and prescription periods** do not prevent the parties from going to court or to arbitration if their mediation attempt fails.
- States should encourage the provision of information about mediation providers and should encourage legal practitioners to inform their clients of the possibility of mediation.

⁸ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters on 7 December 2007, CEPEJ(2007)14, <https://wcd.coe.int/ViewDoc.jsp?id=1223897&Site=CM>

- A mediator is defined as any third person who is asked to conduct mediation in an effective, impartial and competent way, regardless of his/her **denomination or profession**.
- States should encourage **the initial and further training of mediators**.⁹

2.4 The Judiciary in Serbia

The judicial infrastructure in Serbia has not been capacitated enough to support the large number of cases, originated from the past, as well as the huge number of those being a result of the serious socio-political and economic obstacles Serbia is facing as a country in transition. This is one of the reasons for the Government's longstanding efforts to perform **a comprehensive process of judicial reform**, which entered its final stage in the end of 2008 when the Judicial Package of Laws was adopted by the National Assembly. The Judicial Package of Laws was implemented during 2009 – the entire court and prosecutor offices system in the country was restructured, the position of judges and prosecutors was redefined and the re-election process of all judges, public prosecutors and public prosecutors' deputies in Serbia was conducted. It was hoped that implementation of all these components would lead to a more rationalised, efficient and transparent judicial system and procedures. However, the process is taking much longer than anticipated and has not been effectual in realising its objectives.

Apart from many assessments, reports and analysis establishing so, one of the additional indicators of the low-level efficiency of the Serbian judiciary is the large number of applications submitted to the European Court of Human Rights by citizens of Serbia in relation to the violation of the right to a fair trial, i.e. one of its components – right to a trial within a reasonable time. In addition to the **unjustified length of regular court proceedings**, which undoubtedly influence the whole image of access to justice in Serbia, the citizens who seek protection of their rights before the court also face **high court taxes and large amounts for legal counselling** which are commonly increased due to the length of the regular court procedures.

⁹ Directive 2008/52/EC of the European Parliament and of the Council of the EU on certain aspects of mediation in civil and commercial matters from 21 May 2008,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

3. COST/BENEFIT ANALYSIS

3.1 Stakeholders

For many reasons, **the whole of society** should be interested in the level of development of an efficient and sustainable system of ADR in Serbia. The main principle to be guided by is that the standard judicial mechanisms should not be the regular model of disputes and conflict resolution but a last resort for distributing justice to be addressed in cases when all other mechanisms are exhausted or inappropriate.

On the other hand, it is important to bear in mind that ADR has a different meaning for different groups of people and therefore **particular costs and benefits** may be attached to them. The particular groups of people involved or interested to be involved in the development of ADR (stakeholders) may be listed as follows:

- **Policy makers**
- **Judiciary**
- **Bar profession**
- **ADR providers**, i.e. organisations/institutions and individuals providing the ADR services
- **Beneficiaries**, i.e. natural and legal persons interested in resolving their disputes in the most appropriate manner

3.1.1 Policy Makers

The attitudes of policy makers with regard to the ADR concept are very important for the development of the ADR system. The remark made by Professor of Law Vibeke Videlov from the University of Copenhagen relating to the development of mediation in Denmark may be applied in a global approach to the development of ADR systems. According to Professor Videlov the development of mediation depends on whether it is viewed by policy makers and practitioners as another set of pre-trial procedures or rather as an altogether different system of quality dispute resolution that exists alongside the existing court structure.¹⁰

As judicial systems may be perceived as the principle vehicle for the implementation of ADR programmes, it is also recommended to consider the development of an ADR system as **one of the components** of the overall process of judicial reform. As already mentioned above, the

¹⁰ James Melamed, *A View of Mediation in the Future*, June 2009, http://www.mediate.com/articles/on_mediation_in_the_future.cfm

Serbian Government is fully committed to the judicial reform process in Serbia. However, this undertaking is huge and it is expected that it will last for a certain period of time, while monitoring the reform and some further adjustment steps should be taken. In addition, there are indications that the reform process itself had some deficiencies that cast a shadow on its overall success. **The success of the judicial reform** in Serbia would be more ensured if some other reforms were conducted such as the development of mediation services (and ADR in general), introducing the notary function as a new public service and building a system of subjects from the private sector who would be entitled to conduct enforcement procedures of the state bodies' decisions (the laws regulating these systems in Serbia are drafted and it is expected that they will enter parliamentary procedure by the end of 2010). Adequate implementation of these three systems would release the judiciary from **the huge case backlog** and would provide for **new employment opportunities** for judges who were not elected in the re-election process conducted in the framework of the judicial reform in Serbia. Some of these challenges are related to the question of whether the **lower number of judges** after the re-election process are capacitated enough to deal with the huge number of cases accumulated in the past and thus meet one of the most important objectives of the judicial reform process – increasing judicial efficiency.

The expenses for the state allocated in the budget for the functioning of an ADR system may include the costs for the **section/unit**, for example, within the Ministry of Justice that would deal with the ADR system development by monitoring its implementation, providing recommendations for improvement, initiating the amendments to the legislation and supporting the providers i.e. organisations/institutions dealing with ADR. As regards mediation in particular, the state should support **the Chamber of Mediators** that will be established under the new Law on Mediation to observe and ensure the quality of the mediation training programmes and the work of mediators in Serbia and to facilitate communication among all providers. In addition, the work of the Republic Agency for Peaceful Resolution of Labour Disputes in Serbia which showed very good results is currently **entirely state funded** and therefore completely free of charge for beneficiaries. The annual budget for the Agency is approximately 180,000 EUR. However, comparative experience shows that the sustainability of similar institutions may be ensured if their work is funded not only by the state but also by the representatives of other subjects interested in the efficient resolution of labour disputes – employers and employees – through the system of three-partism (state/employers/employees).¹¹

¹¹ Meeting with Mr. Vladimir Perić, deputy director of the Republic Agency for Peaceful Resolution of Labour Disputes, Belgrade, August 2010

In this regard, it should be noted that ensuring the **financial sustainability** of an ADR system is rather a long process and while ADR programmes tend to be less expensive, particularly at the local level, national efforts require resource commitment. ADR programmes are not free – in the short term they usually involve an expansion of funding or a diversion of funding from other resources. For example, comparative experiences in the field of court-annexed mediation shows that the parties do not expect that mediation would cause any additional costs to them and therefore it is essential to secure funds for such procedures at least in the initial period while this concept is not affirmed enough.¹² However, development resources should not be allocated to ADR at the expense of the comprehensive judicial reform process. The reasons for such recommendations are obvious due to the inter-relationship between ADR and efficient courts in terms of the system of referral, enforcement and other significant links.¹³

Therefore, it is important to identify and be aware of all **the values that ADR may offer** to justify these investments. Widely used ADR mechanisms which would undoubtedly lead to an increase in the efficiency of the system of the distribution of justice may relieve the state from the burden of constantly dealing with the functionality and quality of the judiciary, allowing them **to focus and reallocate financial and other resources** on many other issues that the Serbian society as a country in transition is facing.¹⁴

Some of the conclusions from the analysis conducted in the framework of the *Separation of Powers Programme* implemented by USAID in Serbia indicated that judicial bodies **received more than their fair share of the increase in budget resources** in four of the five year period from fiscal years 2005 through 2009. Over this period, the judicial bodies' budget grew at a faster pace than the overall budget for the Government (78 percent: 47 percent). The share of the judicial bodies' budget in the national budget increased from 1.99 percent in fiscal year 2005 to 3.48 percent in 2008 and dropped in fiscal year 2009 to 2.41 percent. Taking inflation into account, the judicial bodies' budget experienced real growth in fiscal years 2006, 2007 and 2008. In terms of budget resources, the major growth in both the court and prosecutor offices was for costs related to personnel, which represent around 70 percent of the budget in the courts. The increases could be

¹² Alan Uzelac, *Zakon o mirenju: Nastanak, izvori i osnovna načela*, [http://alanuzelac.from.hr/pubs/D02Nacela percent20zakona percent20o percent20mirenju.pdf](http://alanuzelac.from.hr/pubs/D02Nacela%20zakona%20o%20mirenju.pdf)

¹³ Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, Harvard Negotiation Law Review, Multidisciplinary Journal on Dispute Resolution, Vol. 5, Spring 2000

¹⁴ As to the financial resources, according to the Law on the State Budget for 2010 the amount of budget funds estimated for the judiciary is 13.187.627.000 RSD (approximately 131.876.270 EUR). Own revenues of the judiciary are anticipated as 6.199.862.000 RSD (approximately 61.998.620 EUR), which is approximately half of the sum allocated from the budget. The whole amount estimated necessary for functioning of the judiciary is 19.387.627.000 RSD (approximately 193.876.270 EUR).

explained by a combination of staffing enlargements and/or growing adjustments in compensation.¹⁵

The conclusion may be that one of the most important background conditions for the ADR system development is **political support**. High-level support may contribute to overcoming the scepticism and vested interests that oppose ADR. This support should include securing of the legal framework within which ADR will be legitimised and the positioning of ADR activities in such a manner that they are protected from losing resources, while public acceptance may be also facilitated by the support from prominent local leaders.¹⁶ The support of policy makers particularly involves the readiness of the state bodies to be a party in ADR procedures where appropriate.¹⁷ However, the support should not come only from the state but also from **all key stakeholders**, which will design, use and be held accountable for the ADR system. These stakeholders should be supportive or at least unlikely to block the system development success. Therefore, it is crucial to examine and validate their attitudes towards ADR and to include their representatives into the ADR system development process. Furthermore, this process should not be exclusively lawyer-driven and the assumption that lawyers can represent the full set of stakeholders' perceptions should be avoided.

3.1.2 Judiciary

The Judiciary in Serbia encounters **many challenges** during the court procedure and execution of their decisions. The above-mentioned judicial reform process introduced a completely new system of courts and procedure. In such an environment, the judiciary (even with a lower number of judges after the re-election process) is expected to quickly handle cases accumulated in the past, to travel and work outside of the place of their residence, etcetera. The length of time in which each citizen expects the resolution of their case and the quality of the work of the judge is almost always in contradiction, where the best possible balance is not easy to achieve in a situation where the judiciary is overburdened by cases. Therefore, it is important to perceive the development of an ADR system as one of the components of the overall judicial reform process or at least to be

¹⁵ Joseph Bobek, *Analysis of Financial and Related Information for the Judicial Bodies, Republic of Serbia*, prepared by East-West Management Institute, Separation of Powers Program, USAID, October 2009,

[http://ewmispp.org/archive/file/resources/For-the-Partners-Final percent20Bobek-Report.pdf](http://ewmispp.org/archive/file/resources/For-the-Partners-Final%20Bobek-Report.pdf)

¹⁶ Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, Harvard Negotiation Law Review, Multidisciplinary Journal on Dispute Resolution, Vol. 5, Spring 2000

¹⁷ Kiril Nejkov, *Mediation – Principles and Advantages and Few Limitations*, Mediation Almanac, International Finance Corporation, World Bank Group,

[http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/\\$FILE/IFC+Mediation+Almanac.pdf](http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/$FILE/IFC+Mediation+Almanac.pdf)

aware of **the positive role** an ADR system may have in supporting the entire process of judicial reform.

It may be assumed that the judiciary primarily sees ADR methods as an issue of **case management**, i.e. a tool for managing their caseload and thus this should be acknowledged as a primary benefit of an ADR system that relates to the judiciary. Therefore, one of the main recommendations in bringing the judiciary closer to the ADR idea should be to improve **the system of referral of cases** appropriate for mediation/ADR by judges. Actions to be taken in this field may be training of judges to identify cases appropriate for mediation/ADR or taking into account the number of successfully mediated cases referred by a particular judge when assessing the quality of his/her work.

With the development of a referral system in mediation for instance, judges may become the gatekeepers of mediation and it may be expected that the awareness about their authority and reputation will guide the attorneys and their clients to follow the advice to conduct mediation. Moreover, the judiciary will probably take mediation more seriously if they are offered **the leading role in the referral system**. However, it is important to ensure that the parties in the dispute do not feel any pressure by the judge, but to really choose mediation. Judges should primarily assist the parties in evaluating the risks of their dispute, which is why they need trainings on how and when to refer the cases to mediation.¹⁸

The other important aspect of an ADR system from which the judiciary may benefit would be the opening of **new employment opportunities** for judges who may participate in an ADR system as future certified mediators/ADR providers.

3.1.3 The Bar Profession

It is frequently considered that the members of the bar profession will not benefit from the wider use of ADR mechanisms in resolving disputes. It is probably true that their earnings would be initially decreased, but in the longer-term they may undoubtedly benefit from an ADR system especially through participating as **legal counsel** in ADR procedures or as future **certified mediators/ADR providers**.

¹⁸ Ales Zalar, *Mediation in Slovenia, Lessons Learnt*, Mediation Almanac, International Finance Corporation, World Bank Group,
[http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/\\$FILE/IFC+Mediation+Almanac.pdf](http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/$FILE/IFC+Mediation+Almanac.pdf)

Some of the most popular statements regarding why mediation for instance is good for the members of bar profession are “because mediation is in the best interest of their clients and therefore in the interest of the lawyers” and that “happy clients pay their bills”. These slogans are undoubtedly very true but the context is much wider and an in-depth analysis surfaces **much more benefits** that the development of mediation or any other ADR mechanism attached to the bar profession members.

When the modern era of mediation began in the United States in the late 1970s, both courts and attorneys did not generally welcome mediation mostly because it represented **a big change**. Nowadays, the concept of someone other than an attorney mediating a case is quite strange to American lawyers.¹⁹ In the United States today over 90 percent of all court procedures are completed by out-of-court settlements and mediation procedures are successful in 80 percent of cases. These figures may, to a large extent, be attributed to lawyers’ initiatives and efforts. It is sometimes claimed that the American judicial system would even collapsed without this contribution accredited primarily to lawyers.²⁰

The practice in modern western countries, and particularly in the United States, shows that the largest number of mediators consider that the lawyer who files a complaint on behalf of a client to the court without prior discussion with the client about the possibilities to resolve the dispute by mediation or another ADR method is acting **unethically**. Such behaviour of an attorney may even be considered as a conflict of interests with the client.²¹ The duty of a lawyer is not only to inform the client about this possibility but also to invest all efforts to really realise this option.

In his article *Attorneys and Mediation, Why Mediation is Good for Attorneys and Their Clients?* Srđan Šimac, judge of the High Commercial Court of the Republic of Croatia, identifies **a number of benefits** which mediation brings to the members of bar profession:²²

- **Establishing and increasing of business reputation supported by satisfaction of clients** – a satisfied party will continue to cooperate with the lawyer and will recommend his/her services to other people (the surveys show that clients are more often ready to address a lawyer who achieved a settlement on their behalf, than one who resolved their case through a regular court procedure).

¹⁹ James Melamed, *A View of Mediation in the Future*, June 2009,

http://www.mediate.com/articles/on_mediation_in_the_future.cfm

²⁰ Srđan Šimac, *Odvjetnici i mirenje, Zašto je mirenje dobro za odvjetnike i njihove stranke?*, http://www.centar-za-mir.hr/uploads/Medijacija/Simac_Odvjetnici_i_mirenje.pdf

²¹ *Ibid.*

²² *Ibid.*

- **Faster realisation of the incomes** and avoiding the risk that the lawyer's fees and expenses will not be paid by an unsatisfied party or that they will be covered after a long period of time necessary for the court procedure – the lawyers therefore may earn more money from more cases in less time and with less concentrated work. This benefit opens possibilities for **more effective time management** because each successful agreement made in mediation leaves more time for the lawyer to work on other cases which are not appropriate for settlement and which may be more lucrative.
- Participating in mediation may be perceived by lawyers as a **new professional challenge** and therefore as the motive for gaining and acquiring new skills enriching their knowledge and experience. The mediation procedure offers the lawyer an opportunity for the **expression of creativity** in the process of searching for and achieving the best possible solution in their clients' interest while court decisions always offer only one usual solution.
- Mediation is characterised by the **exclusion and avoidance of tensions**, which usually follow any conflict in the court procedure.
- The lawyer may be satisfied because of **the contribution** given in the achievement of the best possible solution for both parties in the dispute.
- The mediation procedure offers the possibility for the lawyer to **get more familiar** with the client and the circumstances of the case because the client openly talks about all details in the dispute in front of the mediator in a confidential mediation procedure. The same applies for the other party and in case the dispute is continued in the litigation procedure this ensures savings of the lawyer's capacities and time.
- The mediation procedure is also characterised by the **exclusion of the risk of an unfavourable or uncertain decision** for the client in the court procedure leading to the client's dissatisfaction, which is in most cases channelled to his/her lawyer.
- Unlike in court procedures, mediation provides the opportunity of **selecting the mediator** by the parties and lawyers together. They can also replace a mediator if they are not satisfied with his/her work.
- Mediation offers the opportunity for providing advisory services to the parties before, during and after the mediation procedure as a **completely new and additional service** in the scope of a lawyers' profession. Mediation is a completely new forum for the professional competition of lawyers for higher quality of their services in which they have the possibility of realising new and faster incomes in addition to their usual services.
- The knowledge gained through mediation procedures may **increase a lawyers' efficiency** – particular skills on techniques of negotiation, mediation and communication acquired

through trainings for mediators, which they may complete would certainly assist lawyers in their efforts to achieve as many as possible out-of-court settlements.

- Achievement of out-of-court settlements and agreements in mediation procedures is a component of the **broader interest of the whole society** for building a more effective system of the distribution of justice. Lawyers share a great portion of responsibility for the functioning of the judicial system. Therefore they are also responsible for providing a contribution to the improvement of the system of the distribution of justice.

Legal counselling in mediation procedures is recommended especially in complex legal disputes demanding specialist legal knowledge or in cases where the claimant requests damages, where the role of the attorney should be to assist the client in estimating the realistic amount to claim and in all disputes where the party does not feel sufficiently capable to participate independently in the mediation procedure or to independently articulate their own positions and attitudes.²³ **A mediation advocate** – a legal counsel in mediation procedures - acts as an advisor to prepare client for their mediation session, identifies issues to mediate, serves mediation notices, selects or helps the client to select a mediator, assists in renewing the case and documents, prepares the client for negotiation, advises the client during the mediation meeting and assists in drafting the settlement agreement. Therefore, the attorney participating in mediation has a completely different role than in the court or even in an arbitration procedure. In approximately 80 percent of mediation procedures conducted in the Republic Centre for Mediation, the legal counsels of the parties were present and the Centre always advises the parties to hire legal counsel.²⁴

Attorneys may also benefit from ADR by being seen as **problem-solvers** rather than combatants in the procedure, which is more and more perceived mainly as a “competition of lawyering skills”. Dealing with mediation may be perceived by the bar profession members as satisfying the perspective of assisting people in resolving their own situations in the most suitable manner and to have a good feeling by “making a living while doing good”. As to the situation on the ground today we may say with a high degree of accuracy that attorneys have come to almost completely dominate the “legal mediation marketplace”, at least in profitable cases, and that it is obvious that a person will hire an attorney mediator in cases where there are a lot of legal issues to be resolved with legal drafting afterwards.²⁵

²³ *Ibid.*

²⁴ Meeting with Ms. Ksenija Maksić, director of the Republic Centre for Mediation, Belgrade, August 2010

²⁵ James Melamed, *A View of Mediation in the Future*, June 2009,
http://www.mediate.com/articles/on_mediation_in_the_future.cfm

3.1.4 ADR Providers

The benefits of the development of an ADR system for the ADR providers are **self-evident**. The ADR providers are undoubtedly interested in the improvement of the normative framework for their professional activities, in the quality of the trainings they are offered to complete and the quality of the mediation market in general, the development of the system which would effectively protect their rights and interests, etcetera.

3.1.5 Beneficiaries

As many times mentioned above, Serbia is a country in transition with many challenges in almost all areas of political, economic and social life. Citizens encounter **many problems and obstacles** in the enjoyment of their rights and they are often forced to seek protection before the courts. According to the most recent available report of the Supreme Court in Serbia for 2008, the number of cases submitted in 2008 increased for 6.46 percent in comparison with 2007.²⁶ The data for 2009/2010 is not yet available and it is hard to estimate whether this trend continues due to the economic crisis and overall lack of money, which probably prevents citizens from seeking the protection of their rights before the courts. On the other hand, due to the complex political, economic and social situation in a country it may be presumed that the number of cases, which need resolution did not decrease.

Even when a court procedure is undertaken, the time and money the parties have to spend for seeking justice are usually **not proportional** with the value of the right they seek to protect. Furthermore, after the court procedure is completed, the frequent situation is that both parties are **unsatisfied with the result** of the procedure or with the work of their legal counsels or the judge or all three.

Comparing such indications with the characteristics of mediation for instance, where parties undoubtedly spend less time and money for a less formal procedure over which they both have complete control and which leads to the agreement that both of them are satisfied with, it is obvious that using ADR mechanisms may be **beneficial** for the parties in the dispute, i.e. beneficiaries of the ADR services.

²⁶ *Report on the Work for 2008*, Supreme Court of Serbia,
http://www.vrh.sud.rs/upload/documents/izvestaji/2008_I_izvestaj.pdf

3.2 Quantitative Costs and Benefits

The costs and benefits criteria related to regular court procedures and ADR mechanisms that may be quantified and are visible at first sight are – **money and time**. One of the objectives of this paper is to identify the amount of money and time that may be spent on dispute resolutions through regular court procedures and by ADR mechanisms and to compare them.

In Serbia, litigations are in the most number of cases undertaken for **damages** (for vehicle insurance, omission in the work of the state organs and for slander and defamation). The citizen initiating the litigation should take into account the following costs: court taxes, expenses and per diem for witnesses, expenses for expertise if needed (it is always necessary in procedures for damages) and compensation for the lawyer for drafting each written submission and for each appearance before the court. In addition, the expenses of the other party are also important to bear in mind because the party that loses the litigation should cover the expenses of both sides.

The number of necessary **submissions and appearances** of the lawyer before the court is impossible to estimate in advance because both of them increase as the procedure lasts longer. Therefore, the citizens should also include the long period of time they will lose for the procedure.

The citizens that would like to initiate litigation should also bear in mind that litigation may be beneficial only when it is certain that the case would be won. However, this assessment depends on the expertise and good faith of the lawyer, which is not always the case. Therefore, it is essential for the citizen to select the lawyer who is an **expert in the relevant field**. On the other hand, the total certainty that the case would be won does not exist. Namely, the regular court procedure always carries the risk for both sides that they will lose the litigation. Regardless of who is right and who is wrong in the litigation, **the result of the procedure depends on many aspects**, such as availability of the evidence, corruption, etc.

The assessment of expenses for litigation for damages depending on the amount of money the party is seeking was given by one of the famous Belgrade lawyers in an article in the daily newspaper *Blic*.²⁷

²⁷ *Sudski spor može da košta i milion dinara*, Blic Online, 14 May 2009, <http://www.blic.rs/Vesti/Drustvo/92427/Sudski-spor-moze-da-kosta-i-milion-dinara>

The Expenses	Value of the dispute is higher than 100.000 RSD (approximately 1.000 EUR)	Value of the dispute is 500.000 RSD (approximately 5.000 EUR)
Court tax for initiation of procedure	5.300 RSD	24.000 RSD
Expert analysis (the least expensive)	30.000 RSD	60.000 RSD
Witnesses (at least two of them, minimum 2.000 RSD for travel expenses and per diem)	4.000 RSD	4.000 RSD
Services of the lawyer per one submission	10.000 RSD	26.000 RSD
Services of the lawyer per one appearance before the court	10.000 RSD	26.000 RSD
The court tax for decision	5.300 RSD	24.000 RSD
TOTAL	64.600 RSD (approximately 646 EUR)	164.000 RSD (approximately 1640 EUR)

As it is indicated, the amount of 64,600 RSD (approximately 646 EUR) should be allocated for the procedure where the value of the dispute is higher than 100,000 RSD (approximately 1.000 EUR) and 164,000 RSD (approximately 1,640 EUR) should be allocated for the procedure where the value of the dispute is 500,000 RSD (approximately 5,000 EUR). Furthermore, this assessment was made for the best possible situation when it is necessary to write only one submission and there is a need for only one appearance of the lawyer before the court, which is a rare case. Also, the expenses of the party that won would be covered by the party that lost the case, meaning that one party would in most of the cases pay **almost double the sum**.

The conclusion may be that as the value of the dispute increases, **the expenses proportionally decrease**, meaning that initiating a court procedure for small value disputes is not rational and that the amount that both parties should allocate for the procedure may exceed the amount of the dispute value.

The charges for mediation services are stated in the **tariff of the Republic Centre for Mediation**, and depend on the value of the dispute. Compensation for mediation varies from 115 to 1.000

points where 1 point equals 1 EUR in RSD currency on the day of payment. In more complex matters the compensation may be determined at a higher amount but not more than three times the amount determined by the tariff. The assessment of the complexity of the particular matter is conducted by the mediator and the director of the Centre for Mediation.

The following table lists the compensation amounts for a mediator in civil and administrative matters:²⁸

Value of the dispute (in RSD – 1 EUR is approximately 100 RSD)	Compensation (in points – 1 point equals 1 EUR in RSD currency on a day of payment)
The disputes which value may not be estimated	115
Under 45.000	160
45.001 – 135.000	225
135.001 – 270.000	280
270.001 – 450.000	340
450.001 – 900.000	405
900.001 – 1.800.000	490
1.800.000 – 3.600.000	585
3.600.001 – 7.200.000	695
7.200.001 – 14.400.000	790
Over 14.400.000	1.000

It may be seen from the table that the compensation amount for mediation in matters for which estimated litigation costs are listed above is the following: for value of the dispute more than 100,000 RSD it varies from 225 to 405 EUR while for 500,000 RSD it is 405 EUR. It is important to emphasise that this amount is **the expense of both sides** in the dispute, which they mostly cover in equal parts or they may agree to distribute expenses otherwise. Compensation for mediation is shared by the mediator and the Centre. For example, if the gross amount for a mediation procedure is 115 EUR, after the allocation of 18 percent for VAT, 80 EUR is allocated for the mediator’s fee and 7 EUR is allocated for the Centre.²⁹

²⁸ *The Tariff on Compensation in Mediation Procedure*, Republic Centre for Mediation, Belgrade, www.medijacija.rs

²⁹ Meeting with Ms. Ksenija Maksić, director of the Republic Centre for Mediation, Belgrade, August 2010

The issue of money is not only related to the expenses the party should pay for the litigation costs but it may be perceived in a broader sense. Namely, mediation allows for the cheaper and faster resolution of cases of commercial disputes and therefore assists in **unblocking assets**, which may be caught up in litigation for years. This benefit is particularly important for owners of small business who may not have enough additional funds to rely on. Results of the work of the Republic Centre for Mediation in Serbia from 2006 to 2009 showed that the successful completion of 2,002 out of 2,468 mediation procedures (related to various legal matters) released the amount of 41,420,768,36 EUR.³⁰

As already mentioned above, the procedure before the Republic Agency for Peaceful Resolution of Labour Disputes is completely **free of charge** for the parties to the dispute. The Agency showed very good results during its five year period of work through releasing the judiciary from the case backlog with 3,664 individual labour disputes resolved, to improvement of social dialogue with 45 collective labour disputes resolved, to decreasing of number of strikes with 28 collective labours resolved in businesses of common interest in which they were involved as the prevention of strike or during the strike, to improvement of continuous communication with social partners by excellent cooperation with trade unions and to saving resources from the state budget by initiatives for amending legislation.³¹

As to arbitration, the decision on expenses in the procedure before the **Permanently Elected Court (Arbitrage)** in Serbia is taken by the competent body of the Commercial Chamber. These expenses include fees and other compensations for arbiters, administrative expenses, evidence procedure expenses, etc. The registration tax, which should be paid for initiating arbitration is equal to 200 EUR and the costs of the procedure where the value of the dispute is 5,000 EUR would be equal to 200 EUR.³²

Some empirical studies in the United States using data collected during the past decade have found that arbitration programmes actually tended to increase the time necessary to resolve the dispute and tended not to have any effect on costs. Still the same studies found that litigants perceive arbitration as a fairer **and more satisfactory procedure** than the formal court procedure.

³⁰ *Results of Mediation, Mediation in Serbia 2006 – 2009*, Republic Centre for Mediation, Belgrade
<http://www.medijacija.rs/img/rezultati2009.pdf>

³¹ *Report on the Work*, Republic Agency for Peaceful Resolution of Labour Disputes, Belgrade,
<http://www.ramrrs.gov.rs/informator-lat.html>

³² *Permanent Elected Court*, Commercial Chamber of Serbia,
<http://www.pks.rs/PrivrednakomoraSrbije/Sudoviiarbitraže/Stalniizbranisud/tabid/1839/language/sr-Latn-CS/Default.aspx>

An explanation for the lack of positive effect on costs and time necessary for the non-binding arbitration procedure may be that in the United States most cases are usually settled rather than brought to trial. On the other hand, litigants consider ADR procedures fairer and more open than the settlement process, which they perceive as mainly consisting of back-room deals between lawyers.³³

According to the data from the Ministry of Justice the average length of litigation in Serbia is **three years**.³⁴ The Law on Mediation prescribes that the mediation procedure may last for **30 days** and it may be prolonged by the decision of the court or other body upon the request of the mediators or parties, if there are legitimate reasons for continuance. It is rare that the mediations conducted in the Republic Centre for Mediation are prolonged over 30 days – and then only for one or two days if there is a specific need for continuation. The average number of meetings during the mediation procedure is approximately 5-6 meetings.³⁵

The results of the **projects implemented in the Netherlands in the field of court-annexed mediation** showed that the duration of mediation was from one day to four months, the average amount of “contact hours” between the parties was 6.3 hours and in 50 percent of cases two sessions were sufficient, while in only 20 percent of cases more than three sessions were held.³⁶

The evaluation survey of projects introducing mediation in Bosnia and Herzegovina, Macedonia and Serbia in the period 2004 – 2006 supported by the International Finance Corporation, showed some impressive results in this respect, where in Banja Luka for instance, 93 percent of clients completed mediation within two weeks. It is important to stress that in the beginning of the implementation of ADR programmes the clearest cases are often first mediated which may lead to high trust among the clients. However, since these cases are usually resolved quickly, people may expect short mediations or may think that all mediations are short, which is not necessarily the case, particularly in family law disputes, which usually take more time. The projects supported by

³³ *Alternative Dispute Resolution Workshop, Workshop Report*, 6 January 2000, The World Bank, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf>

³⁴ *Sudski spor može da košta i milion dinara*, Blic Online, 14 May 2009, <http://www.blic.rs/Vesti/Drustvo/92427/Sudski-spor-moze-da-kosta-i-milion-dinara>

³⁵ Meeting with Ms. Ksenija Maksić, director of the Republic Centre for Mediation, Belgrade, August 2010

³⁶ John Bosnak, *Mediation, A General Outline*, Mediation Almanac, International Finance Corporation, World Bank Group, [http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/\\$FILE/IFC+Mediation+Almanac.pdf](http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/$FILE/IFC+Mediation+Almanac.pdf)

the IFC, showed that mediation is very suitable for solving multiple cases of similar nature, for example, labour cases in one company.³⁷

ADR procedures are not immune from **abuse and prolonging the procedure** by the defendant, which often happens in litigation resulting in procedures, which last for several years. Namely, the defendant, as the party the most interested in maintaining the status quo may agree to ADR simply to delay the final resolution of the case. In such cases the defendant hopes that the claimant will become tired and will abandon the claim or that the inflation will devalue the worth of any recovery. Therefore, some **time limits** should be imposed, either those in strict deadlines determined for the procedure or those prescribing that the mediator/ADR provider should ensure that the procedure is conducted with no delays or in a reasonable period of time. It goes without saying that capacities of ADR providers to facilitate this problem are crucial for the latter case. The ADR provider has a general duty to ensure a balanced negotiation and **to prevent manipulative or intimidating negotiation techniques** by the parties. The Recommendation of the Council of Europe on Mediation in Civil and Commercial Law from 2002 as well as the European Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law from 2002 also emphasise the need to avoid the possibility that mediation is used for unnecessary delays and as the tactic of parties interested to prolong the procedure.

It may be concluded in the end that, although there are no reliable and comprehensive statistics on particular numbers in relation to time and money spent for both ADR and litigation procedures, a large number of surveys and analyses demonstrate the same pattern, i.e. that these numbers are mostly **in favour of ADR methods**.

3.3 Qualitative Benefits of ADR

Quantitative assessments of the impact of ADR are not easy to conduct due to the lack of hard figures indicating improvements in efficiency or other performance indicators and the expansion of ADR is therefore mostly based on qualitative assessments such as the surveys that show that lawyers and litigants like or prefer ADR. Therefore, there is a need to establish a **comprehensive database system** for monitoring ADR system outcomes. On the other hand, as ADR systems are frequently introduced and developed along with other reforms, it cannot be precisely clear how much improvement may be attributed to ADR specifically. However, according to existing data,

³⁷ *Alternative Dispute Resolution in Southeast Europe*, Monitor, Measuring Development Results in IFC, Issue No. 11, January 2007, International Finance Corporation, World Bank Group, [http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/monitor_issue11/\\$FILE/Monitor_issue11.pdf](http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/monitor_issue11/$FILE/Monitor_issue11.pdf)

although ADR does not necessarily reduce costs, it may meet objectives other than costs in satisfying society and litigants' preferences.³⁸

The most acknowledged and frequently repeated **qualitative benefits** that ADR procedures bring **for the parties in the dispute** are that they are:

- Confidential,
- Impartial,
- Voluntary,
- Less stressful,
- Less formal,
- A solution-based and results-oriented problem-solving approach,
- They enable parties to resolve the problem by agreement they are both satisfied with at an early stage of the dispute,
- They provide parties with the control over the procedure,
- They result in agreements, which are more likely to be followed.

However, there are some qualitative elements, which are very important from the point of view of the **general development of society and the welfare of citizens**, which may be considered benefits of a comprehensive and functional ADR system in a country.

a) Increasing confidence in the legal system and the system of the distribution of justice

The above mentioned research conducted within the pilot projects implemented in the field of mediation with the support of the IFC showed that in 95 percent of cases mediating parties reported **increased trust in the legal system**.³⁹ In his article *A View of Mediation in the Future*, James Melamed indicates the data that even among those people that did not reach an agreement in mediation, over 90 percent still **recommend this procedure** to a friend in a similar situation.⁴⁰ The report on projects implemented in the Netherlands in the field of court-annexed mediation showed that even when mediation was not successful there is a satisfaction rate of approximately 80 percent among the parties and attorneys.⁴¹

³⁸ *Alternative Dispute Resolution Workshop, Workshop Report*, 6 January 2000, The World Bank, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf>

³⁹ *IFC and Alternative Dispute Resolution, A Successful Pilot in Southeast Europe*, International Finance Corporation, World Bank Group, August 2006

⁴⁰ James Melamed, *A View of Mediation in the Future*, June 2009,

http://www.mediate.com/articles/on_mediation_in_the_future.cfm

⁴¹ John Bosnak, *Mediation, A General Outline*, Mediation Almanac, International Finance Corporation, World Bank Group, [http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/\\$FILE/IFC+Mediation+Almanac.pdf](http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/$FILE/IFC+Mediation+Almanac.pdf)

Increased confidence of the beneficiaries may be explained by the **synergy effect of all ADR advantages**. Apart from saving their time and money and holding control over the procedure and the outcome, the important component to emphasise here is the **informality of ADR procedures**. Namely, the beneficiaries, especially persons of lower educational background or with no previous experience in resolving legal matters, would probably find ADR more appropriate, less stressful and would feel more comfortable when they do not have to address formal courts and meet strict procedural requirements and that they would prefer easily approachable and less formal ADR providers. If policy makers recognise such indicators and support this kind of concept it may lead to an increasing of citizens' confidence in readiness of the state to truly address their needs.

b) Contribution to the cohesion and solidarity among the citizens

This may be one of the most important ADR benefits for a country in transition with a number of political, economic and social challenges such as Serbia. The development of an ADR system and building of a **global approach to resolving conflicts in a peaceful manner** in the longer term should undoubtedly contribute to more cohesion and solidarity among the citizens in local communities, in families, at working places and in society as a whole. ADR proponents think that justice is not something that people get from the government but something that people give to one another.⁴²

Mediation for instance is based on the principle that the future relations among the parties are equally important, if not more important, than the dispute between them.⁴³ ADR methods deal with **the roots of the conflict** encouraging parties to think about the basic reasons of the dispute and to address them. Through ADR **people learn new skills**, which help them in facilitating their future conflicts. ADR has particular values in maintaining friendships, family or neighbourly relations and business partnerships. The above-mentioned survey of the IFC showed that in 78 percent of cases, business relations were re-established after the mediation.

c) Opening new professional profiles and employment opportunities

This benefit is particularly significant in Serbia as a country in transition suffering from a **very high unemployment rate**. As already mentioned above, the ADR practice may offer new

⁴² 94, *Yale Law Journal*, 1985

⁴³ Kiril Nejkov, *Mediation – Principles and Advantages and Few Limitations*, Mediation Almanac, International Finance Corporation, World Bank Group, [http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/\\$FILE/IFC+Mediation+Almanac.pdf](http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/$FILE/IFC+Mediation+Almanac.pdf)

professional and employment opportunities for the members of the judiciary who were not re-elected in the course of the judicial reform in Serbia. Furthermore, members of the bar profession perceiving ADR programmes as competition and feeling jeopardised because of a possible reduction of their incomes may enlarge their professional operations by dealing with legal counselling in ADR procedures or by providing ADR services.

One of the controversial issues in the field of mediation is related to **the question of the professional and educational background** of future mediators. Namely, the question is whether this profession should be available only to lawyers and other professions linked to the conflict resolution work (e.g. psychologists, in the wider sense of interpretation) or it should be opened to every person of any educational background capable and skilled to facilitate conflicts among people. In the initial phase of development of mediation, requiring mediators to have a university degree may assist in developing **the confidence in mediation** among clients and lawyers but from a longer-term perspective, university education does not necessarily guarantee that the mediator would be successful. Somewhat similarly, mediation conducted by judges may increase the credibility of mediation. However, it is important to be aware of the fact that the judges are trained to decide disputes and not to serve as facilitators, that they are more evaluative by the nature of their profession and therefore some judges may find it difficult to switch from one task to another. In this case mediation may not offer an effective alternative but may only substitute or bypass the court procedure, which may eventually weaken the legal system.⁴⁴ In Croatia, for instance, the mediation profession is available to all professions and not only to lawyers.

d) Adaptability of ADR methods to the circumstances of the particular case and to changes in society

ADR methods have the remarkable flexibility for **adapting to new contexts** in a new and creative manner. In the United States, for example, very effective mediation programmes for mass casualty claims were developed in a short period of time in response to hurricanes Katrina, Rita and Ike. Somewhat similarly, with development of the housing and economic crisis in the United States, “foreclosure mediation” programmes appeared and were established in approximately 20 states while the recent U.S. Mayor’s Conference has called for foreclosure mediation in every state. In such situations and due to the caseloads, expenses and

⁴⁴ *Alternative Dispute Resolution in Southeast Europe*, Monitor, Measuring Development Results in IFC, Issue No. 11, January 2007, International Finance Corporation, World Bank Group, [http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/monitor_issue11/\\$FILE/Monitor_issue11.pdf](http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/monitor_issue11/$FILE/Monitor_issue11.pdf)

delays that would be involved, traditional legal and adversarial processes probably would not be functional while the measure of facilitative help and mediation provided the answer. Another example is the recent development of “marital mediation” where it was recognised that conflict remains even when the couple decides to stay married and therefore the new service to provide couples with help in reaching and drafting their agreements is available now.⁴⁵

An interesting example of spreading the concept of ADR into the relations in which there is no conflict present is the programme implemented by the Belgrade City Centre for Social Work where young, unmarried couples are participating in workshops in order **to learn and understand all aspects of partnerships** and to prevent or to easily handle any possible future conflict.⁴⁶

The flexibility and adaptability of ADR may also be perceived in the sense of using some positive developments in other fields to improve ADR methods. This is primarily the case with **information and communication technology**. Namely, while it is unlikely that the court hearings and sessions are adaptable to be held by using technology such as internet, electronic mail, Skype or conference calls, ADR methods, due to their informal character, may utilise these resources while saving a considerable amount of time and money for the parties in the dispute as well as for the ADR provider.

The adaptability of ADR is also valuable for piloting new initiatives and examining innovative methods of approaching conflicts. For instance, the local authorities may work on **early mediation** in their communities trying to mediate the conflicts before they end up as court cases. This may be particularly important due to the fact that facilitation at an early stage of the dispute more likely preserves the ongoing relations among the parties and saves time, money and many other resources.

There are many examples of how ADR procedures or some of their elements **may be developed** in order to find the most appropriate methods to approach people in conflict. In the United States, comprehensive programmes are implemented, which are sometimes referred to as “multi-door courthouses” in which disputants are advised on the variety of

⁴⁵ James Melamed, *A View of Mediation in the Future*, June 2009, http://www.mediate.com/articles/on_mediation_in_the_future.cfm

⁴⁶ Meeting with Ms. Vera Despotović, representative of the Belgrade City Centre for Social Work, Advisory Centre for Marriage and Family, and member of the Association of Mediators of Serbia, Belgrade, August 2010

options they have in seeking to resolve a dispute.⁴⁷ The Irish Equality Tribunal, which also provides mediation services may leave the parties to a “cooling-off” period before they are asked to sign a mediation agreement in order to ensure that both sides can give informed consent on the agreement.

The benefits of ADR procedures are also visible through their flexibility, meaning that parties have **as much time as they need** to discuss the issues, while in front of the judge they are bound by certain time limits (sometimes only five to ten minutes) in presenting their side of the story. They can also discuss **all the issues they would like**, even those that are not relevant for the court procedure and therefore would not be allowed in the court room. Furthermore, sometimes the parties are able to agree only on certain aspects of the dispute. In that case, the parties may decide to submit the portion on which they cannot achieve the agreement to an expert for a binding or non-binding opinion or to use some other creative methods. The case can also be handed over or returned to the court. Even in these cases, the mediation process assists the parties in moving toward a final settlement.

In the end, it should be noted that now, more than ever, all the benefits of mediation become increasingly visible and more important for the **globalised economies**. The presence of international or cross-border elements in numerous disputes occurring in commercial matters today makes the resolution of such cases more complicated, while contemporary formats of commercial activities, through new and fast communication models require new and fast ways of dispute resolution, where mediation undoubtedly provides an appropriate response.⁴⁸ A well-designed and developed ADR system in a country along with a functional judiciary may also encourage financial investments by more foreign and international companies.

There are many **other qualitative benefits** that ADR brings into society. Some of them are the following:

- a) Increasing confidentiality and greater protection for the right to privacy;
- b) Decreasing corruption and other illegal methods of resolving the disputes;
- c) Decreasing psychological and emotional costs for litigants, which is valuable for the general health of society;

⁴⁷ *Alternative Dispute Resolution Workshop, Workshop Report*, 6 January 2000, The World Bank, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf>

⁴⁸ Kiril Nejkov, *Mediation – Principles and Advantages and Few Limitations*, Mediation Almanac, International Finance Corporation, World Bank Group, [http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/\\$FILE/IFC+Mediation+Almanac.pdf](http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/$FILE/IFC+Mediation+Almanac.pdf)

- d) The less money the citizens are spending for their disputes, the more money they will invest in education, business and other developing areas.

An ADR system may also provide a contribution to **other development objectives**⁴⁹ such as:

- a) Strengthening of civil society;
- b) Increasing of public participation in various policy debates through capacity building in ADR methods in the form of negotiation and conflict management trainings;
- c) Empowering individuals belonging to marginalised and vulnerable groups by increasing and improving their access to justice.

One of the most repeated slogans related to mediation applicable also for other ADR methods, is that **there is nothing to lose by trying the mediation and there is much to gain.**

4. Issues for Consideration

a) Limitations of ADR programmes. – Theory and practice in the field of ADR point to some important limitations of ADR programmes:

- They cannot substitute for the reform of corrupt or severely inefficient judicial systems;
- They cannot set up precedents, standards or establish rights;
- They cannot reverse long-standing discrimination even though they can assist in increasing access to justice for traditionally disadvantaged groups. ADR may even be inappropriate in cases where there is a genuine need to protect individual or group rights.⁵⁰
- They cannot redress pervasive injustice or human rights problems that may demand policy changes and probably some kind of restitution;
- They cannot always adequately resolve cases between parties with **power asymmetries** so huge or of such substance that it would be extremely difficult if not impossible to be handled by the ADR provider. This concern is related, for example, to cases in which the state is a party in the dispute, particularly when state agencies and government organs do not have a history of compliance with judicial rulings or even submitting to judicial procedures. Furthermore, when government agencies or influential state-connected entities traditionally impose their will by means of violence or bribery, it is difficult to imagine their participation in consensus-based methods used in ADR. Russell Engler

⁴⁹ Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, Harvard Negotiation Law Review, Multidisciplinary Journal on Dispute Resolution, Vol. 5, Spring 2000

⁵⁰ *Alternative Dispute Resolution Workshop, Workshop Report*, 6 January 2000, The World Bank, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf>

emphasises the importance of considering these facts when ADR is introduced and developed in **countries in transition**. Namely, these societies often suffer from huge disparities of power between the common citizens and state organs, between businesses and other parties, including foreign corporations and international organisations. When power asymmetries are embedded in social policy, laws, customs or other normative frameworks of society it is hard to believe that ADR programmes will stay resistant to them. These are some of the important background conditions to be aware of and therefore it is crucial to develop well-designed ADR programmes with particular emphasis on **the protection of the rights of marginalised and vulnerable groups**.⁵¹

- They cannot provide demonstrative justice in cases that demand public sanction. ADR methods by their definition rely on cooperative procedures rather than punitive measures and **they cannot provide punishment**. ADR may be valuable in providing conciliation services once a criminal procedure is completed. However, domestic violence or other violent crimes always produce a situation where there are victims in need of some kind of restitution and therefore these cases require sanction by an impartial system of justice.⁵²
- Finally, a conflict that reached **a certain stage of escalation** may be completely unsuitable for ADR methods. According to Friedrich Glasl's model there are three phases of conflict escalation – in the first phase the parties perceive the conflict as a problem which they may resolve together, in the second phase the parties see conflict as a battle to be won while in the third phase parties understand conflict as a total war. All phases consist of sub-phases. The first phase begins with a sub-phase in which parties are still able to resolve the conflict without intervention of a third party but further down the first phase as well as in the second phase mediation is beneficial. However, as conflict escalation increases, the odds for successful mediation decrease. It is generally believed that in the third phase other instruments of conflict management, such as crisis intervention, are more appropriate.⁵³

b) Efficiency challenges. – The fact, very often overlooked by ADR proponents when they speak in favour of ADR, is that increasing the **efficiency in the procedure of dispute resolution** is neither universally desired nor desirable at any expense. Namely, there are cases where efficiency is unequally treated by the two parties to the dispute (e.g. a company which would like to prevent

⁵¹ Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, Harvard Negotiation Law Review, Multidisciplinary Journal on Dispute Resolution, Vol. 5, Spring 2000

⁵² *Ibid.*

⁵³ John Bosnak, *Mediation, A General Outline*, Mediation Almanac, International Finance Corporation, World Bank Group, [http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/\\$FILE/IFC+Mediation+Almanac.pdf](http://www.ifc.org/ifcext/pepse.nsf/AttachmentsByTitle/IFC_Mediation_Almanac/$FILE/IFC+Mediation+Almanac.pdf)

its employees from submitting complaints would probably prefer inefficiency) or, sometimes, efficiency may result in a decline of fairness.⁵⁴

Introducing ADR methods into wider use without additional attention to **the case flow management** may result in even worse inefficiency. In Tanzania, for instance, the initial introduction of ADR created another level of procedure in courts and caused even more delay than before. Therefore, there is a need to develop ADR along with strong data collection and to continue with piloting new solutions in order to indicate the sources of delay and best models to prevent such problems.⁵⁵

c) Qualitative elements in ADR promotional campaigns. – ADR promotional strategies always insist on quantitative benefits that may be attached to ADR – their intention is to persuade the natural and legal persons to use ADR mechanisms with the argument of saving their time and money. On the other hand, these campaigns very often marginalise the obvious fact that the wider use of ADR mechanisms brings **more qualitative benefits** to a society and relations among the parties in the dispute. Furthermore, the assumption that the parties in the conflict always conduct rationally and that their decisions are always the result of reasonable choice may lead ADR proponents to the wrong conclusions. Every human being negotiates at some point over some issue – however, many of them address negotiation and mediation methods only as their last resort and not as their first preference. In some cultures the willingness to negotiate may be viewed as a weakness of character and as readiness to opportunistically compromise one’s principles. In some cases, such as divorce for example, one or both parties may be afraid that they will be played for a fool and the argument of saving their time and money or having a control over the outcome by using ADR will not liberate them from that fear. People in the dispute may be afraid of being taken advantage of, they may be suspicious about the motives and rationality of the other party’s decision to suggest ADR or they may simply believe that they need a legal expert to protect their rights. These can be among the reasons why after so many years of availability of ADR services, people still prefer to address lawyers or they hesitate or even refuse to go to mediators. Holding mediation for a “cooperative problem solving process” probably sounds very nice to professionals but means nothing to people caught up in a conflict and feeling angry or frightened. Therefore, the ADR promotional strategies trying to access reasonable and to minimise emotional arguments in the decision-making process of possible beneficiaries may have an

⁵⁴ *Alternative Dispute Resolution Workshop, Workshop Report*, 6 January 2000, The World Bank, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf>

⁵⁵ *Ibid.*

unsatisfactory effect. It is thus recommended to target the emotions and fears of parties along with their sanity.⁵⁶ The parties to the dispute may also desperately wish to defeat or humiliate the opposite party and would rather challenge their opponents than come to terms with them. In such cases, **individual approaches** to the particular cases may be more successful than the general approach of addressing people's rationality in decision-making processes in which they assess the availability of their financial and time resources.

d) Voluntary v. Mandatory Mediation/ADR. – The debatable issue related to mediation, as one of the most represented ADR methods, is a question of whether mediation should be prescribed by law as mandatory or it should be voluntary. Many mediation proponents always speak in favour of **voluntary mediation** due to the fact that the voluntariness is the essence of mediation and that it is linked to many of its features. They also emphasise the fact that prescribing mediation as a procedural requirement for filing the complaint to the court may prevent citizens from access to courts and justice. In addition, it often appears that in cases where there is no willingness to negotiate by one or both sides, mediation or any agreement is impossible. On the other hand, many countries apply the system of **mandatory mediation** in some or all cases or they establish particular measures to stimulate the use of mediation. Still, this is a controversial topic for many reasons. As to arbitration in the United States, for instance, many contractual agreements envisage binding arbitration and provide that cases are never brought to trial. Consumers or employees may be requested to give their consent to such agreement provisions without understanding the agreement or having a real alternative to reject it. In addition, there are observations that in the United States, mandatory mediation programmes are used more than voluntary programmes, because one party's suggestion to initiate voluntary mediation might be understood as a signal of a weak position or reluctance to litigate.⁵⁷ Yet, there are some examples where relying on voluntariness has led to less successful results of mediation. For example, the systems in the Philippines and Venezuela require mediation before litigation in employer-employee disputes. However, whereas Venezuela required both parties to be present at the ADR session, the Philippines required neither to do so. The difference in success of such mediations was huge – while in Venezuela nearly 95 percent of such cases were resolved through mediation in Philippines the figure was closer to 5 percent.⁵⁸

⁵⁶ Robert Benjamin, *Selling Mediation: The 9 ½ Best Guerrilla Marketing Strategies and Techniques Drawn From Neuroscience*, April 2010, www.mediate.com

⁵⁷ *Alternative Dispute Resolution Workshop, Workshop Report*, 6 January 2000, The World Bank, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf>

⁵⁸ Richard E. Messick, *Alternative Dispute Resolution – When It Works, When It Doesn't*, Premnotes, Public Sector, No. 99, September 2005, The World Bank, <http://www1.worldbank.org/prem/PREMNotes/premnote99.pdf>

Finally, the focus should be moved from the dilemma whether mediation or any other type of ADR should be mandatory or voluntary to the question, which are **the best possible methods in stimulating people to opt** for such mechanisms, at least in the initial period while the ADR is not widely accepted as a completely new system of approach to legal and other conflicts in a society. The answers offered by the experts and comparative practice are numerous: the court may leave a certain period of time to the disputed parties during which they may try to mediate the case and if it is not successful the court may continue with the regular litigation procedure; the mediation may be prescribed as mandatory for particular types of disputes, like in Croatia for instance, where this obligation is envisaged for all disputes related to concluded, amended or renewed collective agreement or any other labour dispute that may end up in industrial action, i.e. strike as well as for all disputes initiated due to the non-payment of salaries; the party that refuses to try mediation prior to litigation may be obliged to cover all the procedural expenses irrespective of the success in the dispute (the United Kingdom) or the litigation procedure rules may envisaged that each party in any case covers its own expenses, again regardless of the success in the dispute (the Netherlands); certain legal subjects may be obliged themselves to mediation generally and in advance, like in the case of the Commercial Chamber of Croatia, which recommended to all companies to adopt the Policy of Peaceful Dispute Resolution by which the company informs its partners, employees and public that in the case of dispute it would be ready to discuss the possibility of mediation (to date around 20 companies signed this policy in Croatia), etcetera.

e) Benefits of Arbitration. – As already mentioned above, arbitration is an alternative technique for the resolution of disputes, but also, because of its certain elements, it is considered a method closest to the institutional procedures of dispute resolution. In any case, it is valuable to comprehend arbitration by the global approach to the ADR system development while bearing in mind some of its particularities. The benefits of arbitration are **mostly the same** as those attached to mediation – the procedure is less formal and therefore more efficient and faster, the autonomy of the parties in the dispute is completely expressed, the parties may select the arbiter from the determined List of Arbiters in whom they have most confidence that would decide their case in good faith, impartially, lawfully and just, the dispute may be resolved before the arbitrage through reasonable compromise in a peaceful manner which satisfies both sides in the dispute. Arbitration is the best choice in cases where the parties want another person to decide their dispute but would like, on the other hand, to avoid the formalities, delays and expenses of litigation. It may be also appropriate when complex matters are involved and when the parties want a decision-maker trained or experienced in the subject matter.

f) ADR programmes' oversight and evaluation. – Finally, one of the important considerations in designing ADR programmes that appear under-emphasised is a programme for oversight and evaluation. Namely, most programmes claim they include some kind of mechanism for supervising mediators and other practitioners but not many among them examine the results of such supervision. Some of the important oversight tools are mechanisms for the observation of ADR sessions, for receiving beneficiaries' complaints, conducting exit interviews with beneficiaries and the continuing education of ADR practitioners.⁵⁹ The relevant strategies and action plans should include adequate oversight and evaluation mechanisms related to all these aspects, tracks, steps and phases in their implementation in order to ensure ADR programmes are sustainable and to provide grounds for the genuine ADR system development.

5. Conclusions and Recommendations

5.1 Conclusions

(i) The creation of an effective and sustainable ADR system in Serbia is far away from an easy, short and cheap task with immediately visible results. On the contrary, it should be perceived as some kind of reform with all elements typical for such a process. These elements are, *inter alia*, the following:

- Need for a clear and firm commitment and support for the reform by the policy makers,
- Need for a systematic approach,
- Need for including all stakeholders into the process from the very beginning in order to avoid any obstacles and secure support,
- Possibility for appearance of groups of stakeholders who are not satisfied with the suggested approach or solutions,
- Possibility for appearance of opposite views among various groups of stakeholders on how to address some issues and the need to facilitate or mediate these attitudes in the process of defining the best models,
- Need to coordinate the reform actions with the actions conducted in other reform processes and to be aware of their positive or negative inter-influence,
- Need to deal with the awareness of stakeholders and society as a whole when introducing new concepts and changes,
- Need to design capacity development programmes,

⁵⁹ Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, Harvard Negotiation Law Review, Multidisciplinary Journal on Dispute Resolution, Vol. 5, Spring 2000

- Need for allocating a considerable amount of money from the budget for innovations assumed by the introduction and development of the new system,
- Need to conduct a cost/benefit analysis of the introduction of the new system.

(ii) Recent novelties in Serbian legislation introduced various forms of ADR methods, but there are no **visible strategic guidelines** for the joint development of all aspects of an ADR system (normative, professional, educational, promotional, quality controlling, etc), which are justified by many common features of ADR methods.

(iii) There are no **network connections or at least continuous communication** among the stakeholders or ADR providers and there is no institutional exchange of information.

(iv) There is no **source of knowledge and information** in one place about ADR in general and about the current ADR situation in the country. For these reasons, there is concern for the possible overlapping in some actions or for the absence of necessary actions in certain fields and therefore an inefficient allocation of resources.

(v) Apart from the political support required for the development of an ADR system, the support coming from all other **key stakeholders** who will design, use and be held accountable for the system is also crucial. Their representatives should be involved in the system development and their attitudes should be recognised and equally validated. It is important to bear in mind that ADR has a different meaning for different stakeholders and therefore particular costs and benefits of ADR may be attributed to them.

(vi) It is crucial to **identify, discuss and explain the role and realistic place for each of the stakeholders in the future system**, in communication with them – as ADR providers, legal counsel in ADR procedures, important members of a referral network, vehicles of ensuring the quality and development of the system and of the process of improving **access to justice** in the country.

(vii) In order to introduce the ADR concept in to society in the most efficient manner, this process should be harmonised with **other reform processes** in particular with judicial reform. The development of an ADR system should be considered as one of the components or at least as a supporting initiative in the overall process of improving access to justice in the country. On the

other hand, judicial reform, development of the free legal aid system and other related initiatives should take into account all the possibilities offered by the ADR concept.

(viii) The main principle to be promoted is that the standard judicial mechanisms should not be the regular model of disputes and conflict resolution but a last resort for distributing justice to be addressed in cases when all other mechanisms are exhausted or inappropriate. Therefore, **promotional and educational programmes** explaining the essence, nature and benefits of the ADR concept should be widely and continuously available.

(ix) As with any other reform, the introduction of an ADR system assumes allocating a **considerable amount of financial resources**, which should be, at least in the first period, predominantly secured by the state. ADR programmes in the short term usually involve an expansion of funding or a diversion of funding from other resources. Therefore, the ADR concept should be designed in a manner to justify these investments.

(x) The most visible and emphasised costs and benefits criteria related to regular court procedures and ADR mechanisms are – **money and time**. Although there are no reliable and comprehensive statistics on the particular numbers in relation to time and money spent for both ADR and litigation procedures in Serbia as well as elsewhere, a large number of surveys and analyses demonstrate the same pattern, i.e. that these numbers are mostly **in favour of ADR methods**.

(xi) The most acknowledged and frequently repeated **qualitative benefits** that ADR procedures bring **for the parties to the dispute** are the following: the ADR procedures are confidential, impartial, voluntary, less stressful, less formal, a solution-based and results-oriented problem-solving approach, they enable parties to resolve the problem by an agreement that they are both satisfied with at an early stage of the dispute, provide parties with control over the procedure and result in the agreements which are more likely to be followed.

(xii) In addition, there are some other qualitative benefits very important from the point of view of the **general development of society and the welfare of citizens** such as:

- a) Increasing confidence in the legal system and the system of the distribution of justice;
- a) Contribution to the cohesion and solidarity among citizens;
- b) Opening of new professional profiles and new employment opportunities;
- c) Adaptability of ADR methods to the circumstances of the particular case and to changes in society;

- d) Increasing confidentiality and greater protection for the right to privacy;
- e) Decreasing of corruption and other illegal methods of resolving disputes;
- f) Decreasing psychological and emotional costs for litigants, which is valuable for the general health of society;
- g) The less money citizens are spending for their disputes, the more money they will invest in education, business and other developing areas;
- h) Strengthening of civil society;
- i) Increasing of public participation in various policy debates through capacity building in ADR methods in the form of negotiation and conflict management trainings;
- j) Empowering individuals belonging to marginalised and vulnerable groups by increasing and improving their access to justice.

(xiii) The designers of a future ADR system should be aware of **some limitations** of ADR programmes, the fact that **efficiency** is neither universally desirable nor desirable at any expense, that promotional ADR strategies should insist also on **qualitative benefits** for the parties in the disputes and society as a whole, that **the best possible models for stimulating people to opt for ADR mechanisms** should be carefully considered and that **the programme oversight and evaluation** are very important considerations in designing ADR programmes.

5.2 Recommendations

Being aware of the level of development of the ADR system in Serbia and bearing in mind all conclusions and recommendations described above, **general recommendations regarding the establishment of the ADR system in Serbia** are the following:

1. **All the ADR stakeholders** should be involved in all aspects and phases of the process from the very beginning. In this way, the policy makers would ensure the **quality and functionality** of the system through consultative processes as well as very important **support** from all the current and future ADR providers, the members of the referral network, academic institutions, non-governmental organisations, media and all other institutions capacitated to support the process. These efforts would also enable the facilitation of opposite attitudes towards certain aspects of the ADR system and finding of the least common denominator in opinions among the stakeholders, as well as reducing the concerns of the members of professions who may feel jeopardised by the broader development of ADR, such as the bar profession.

2. In order to approach the topic systematically, it is necessary to develop **the database** containing cumulative and comprehensive review of information about ADR in general (principles, rules of procedure, possible outcomes), about the ADR services available in Serbia, the number and type of ADR services presently provided in Serbia, the legal or other field in which the ADR services are mostly requested and provided, the numbers and profile of the beneficiaries, the expenses of services in the ADR market in Serbia, time necessary for ADR procedure, successfulness of ADR providers in particular issues, etc. This tool may also be important for the educational, informative and promotional side of the development of an ADR system.
3. Due to the general observation on the lack of awareness and understanding of the ADR concept, methods and benefits, even among members of professions mostly connected to the functioning of ADR mechanisms, **the additional spreading of knowledge and information** among the practitioners is recommended. The means to achieve this goal may be through organising meetings, seminars, conferences, trainings, but the regular school curricula may be also complemented by appropriate subjects elaborating the ADR concept, at least in the educational system for members of professions who mostly deal with or participate in ADR programmes.
4. **The promotion of ADR** is one of the most important activities in this process emphasised by all ADR stakeholders. The promotion should be well prepared and grounded and it should be continuous, systematic and pointing to the most relevant and interesting data.
5. In the initial period, while the ADR system is not capacitated enough to be self-regulated and self-monitored, **state support** is crucial. This support assumes financial, informative, consultative and promotional aspects and particularly involves the readiness of the state bodies to be a party in ADR procedures where appropriate. The support of policy makers is also important due to the fact that the incorporation and development of the ADR concept in society demands action in various policy areas. This is also one of the reasons for the systematic approach meaning that only joint and coordinated efforts implemented in all relevant areas of intervention continuously may ensure a functional and sustainable ADR system in Serbia.