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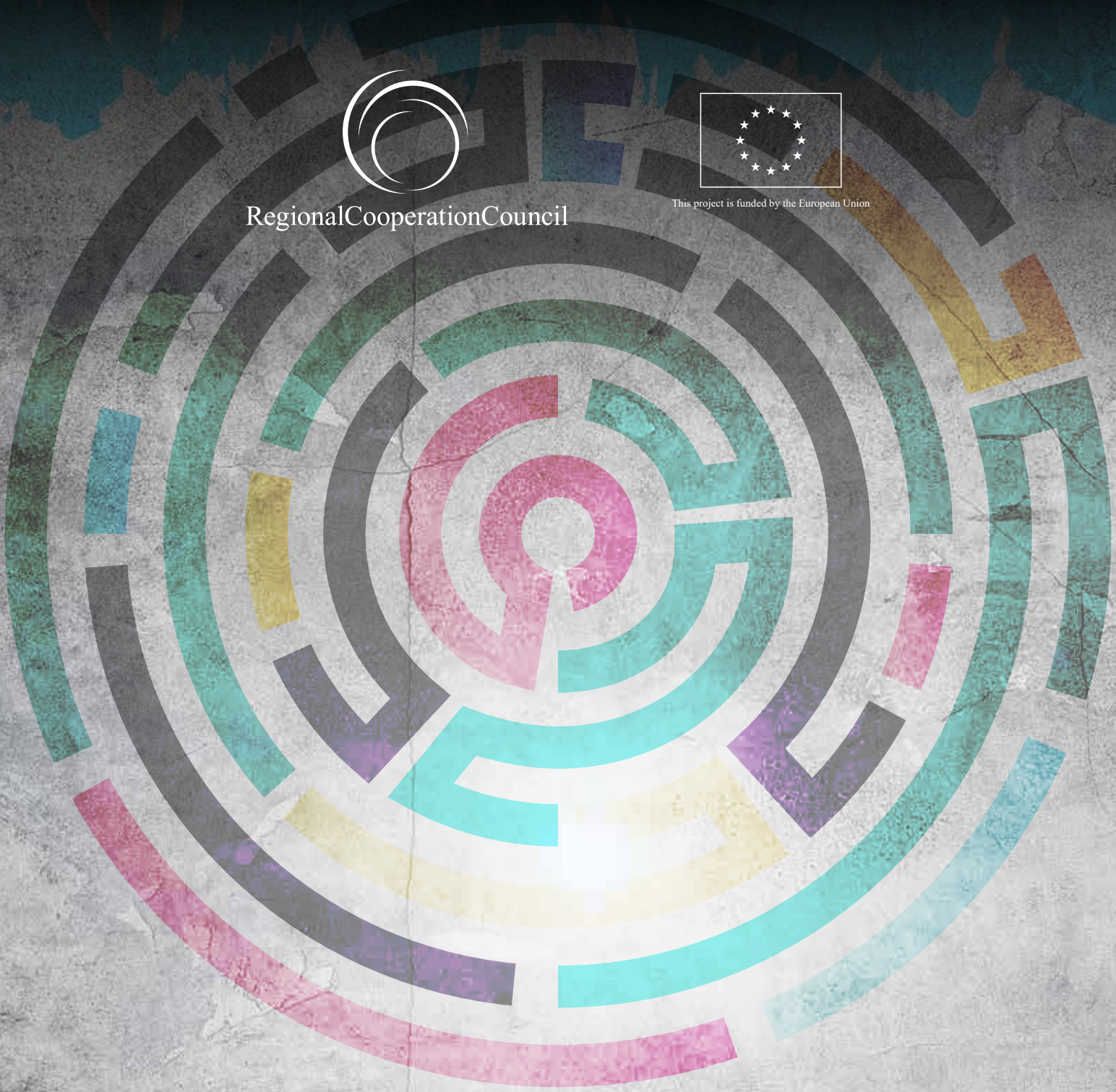

PROMOTING
CROSS-BORDER MEDIATION
IN RESOLVING CIVIL AND COMMERCIAL DISPUTES
IN THE WESTERN BALKANS

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PROMOTING CROSS-BORDER MEDIATION IN RESOLVING CIVIL AND COMMERCIAL DISPUTES IN THE WESTERN BALKANS

CONTENTS

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ADR Centre	ADR Centre Rome, Italy
CEFTA	Central European Free Trade Agreement
CRM AP	Common Regional Market 2021-2024 Action Plan
CSSP	Berlin Centre for Integrative Mediation
CoE	Council of Europe
EU Directive/ EU Directive 2008/52/EC	The EU Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
EC	European Commission
MoJ	Ministry of Justice
MAP REA	Multi-annual Action Plan for a Regional Economic Area
RCC	Regional Cooperation Council
SEE AM	South-East Europe Associations of Mediators Network
SCM	The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation)
SMEs	Small and Medium-sized Enterprises
Study	The study "Promoting Cross-border Mediation in resolving civil and commercial disputes in the Western Balkans"
WB6 CIF	Western Balkans 6 Chamber Investment Forum
WB6	Albania, Bosnia and Herzegovina, Kosovo* , Montenegro, North Macedonia and Serbia

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the UCJ Opinion on the Kosovo declaration of independence.

1. EXECUTIVE SUMMARY (SUMMARY OF KEY FINDINGS AND RECOMMENDATIONS)

The 2020 European Commission (EC) annual reports for the Western Balkan economies underlined that the use of alternative dispute resolution continues to be limited and needs to be further strengthened[1], as well as promoted and applied in line with European standards and best practices.[2] Even in Montenegro, where the European Union (EU) Commission recognised a positive trend in the development of alternative dispute resolution, the Commission underlined that this method has yet to be used systematically in order to maximise its overall impact.[3]

Mediation, as one of the primary alternative dispute resolution (ADR) methods, has been present in the six Western Balkan economies (WB6) for a number of years. Although applied through relevant laws and supporting bylaws, there are still a modest number of mediations in WB6 economies. An increase in the number of mediations is noticeable only in the economies which have introduced some form of mandatory mediation (Montenegro, Kosovo* and North Macedonia). However, the balanced relationship between mediation and court proceedings is far from being achieved in WB6 economies.

After analysing both international and European legal frameworks and best international mediation practices, as well as examining in detail both regulative portfolio and local mediation practices in the Western Balkans, the data obtained by this Survey show the following results.

Limited impact of the EU 2008 Directive on the recourse to mediation. The EU 2008 Directive on mediation has been a milestone in developing domestic legislations in the EU Member States in mediation in civil and commercial matters. However, although the Directive allowed different options for the Member States to achieve its goal of reaching a "balanced relationship between mediations and judicial proceeding", most of the EU Member States have adopted national legislation based on the purely voluntary recourse to mediation in civil and commercial dispute, which led to a very limited use of mediation, with few notable exceptions.

The Western Balkans reflects the same variegated situation among the EU Member States on the recourse to mediation compared with the recourse to courts. By calculating the Balanced Relationship Index as a percentage of the yearly number of mediations and judicial proceedings, Montenegro has the highest Index of 12% (albeit with a low success rate) thanks to the recently adopted law on "soft-mandatory mediation"[4] modelled after the Italian experience, while Serbia has the lowest index of 0.1%.

On the supply side of mediation, the estimated number of mediators and mediation centres in each of the Western Balkan economies shows a sufficient number of professionals able to begin offering mediation services in cross-border disputes. However, these mediation centres and mediators op-

1 Albania, Kosovo*and Serbia Report 2020
2 BiH and North Macedonia Report 2020
3 Montenegro Report 2020
4 The Law on Alternative Dispute Resolution of 22 July 2020, Official Gazette of Montenegro No. 01-1478/2

erate under different mediation rules and fees and have different standards for mediation training. In order to increase the use of mediation in cross-border commercial disputes in the region, a unified and coordinated approach is more than necessary.

Savings in time and cost due to the systematic recourse to mediation before litigation. In order to compare the cost and time of litigation and mediation among the six different Western Balkan economies, we used a methodology based on an estimation of the time and cost of a court process and compared it with an estimated mediation process on commercial dispute scenario, simplified and adapted from the World Bank - Doing Business 2021.[5] **By a systematic recourse of the two-step approach of mediation-then-litigation, the savings would reach an average of 68% in time and 62% in costs with an optimistic mediation success rate of 75%, and a savings of 45% in time and 41% in costs with a more conservative estimated mediation success rate of 50%.**

All data gathered for this study highlighted the heterogeneous situation on mediation within the WB6 economies both on legislative frameworks and consequently on mediation practice. Montenegro and Serbia are in the extremes of this heterogeneous landscape.

Conclusions:

To propose relevant, sustainable and easy to implement recommendations in the long period, the data and information gathered in this study led to the following conclusions:

1. Despite the importance of the 2002 Council of Europe (CoE) Recommendation on civil mediation and EU Directive 2008/52 on cross-border mediation, after 20 years, the data showed a negligible impact on the increase in the number of mediations in the WB6.
2. The recourse to mediation to resolve cross-border disputes relies heavily on effective domestic legislation and public policies that are very heterogeneous among the WB6.
3. All WB6 economies are far from reaching a balanced relationship with an equal number of mediations and judicial proceedings in their economies. Consequently, it will be a real challenge to use mediation in cross-border commercial disputes.
4. The results of the regional mediation survey among the main stakeholders show a strong interest in implementing effective public policies.
5. Montenegro can represent an excellent example as a Western Balkan economy that has increased the recourse to mediation significantly in a short period by customising and implementing a proven best practice of a "soft-mandatory approach" of the so-called "Italian Mediation Model".
6. In all WB6 economies, mediators and mediation centres are already present.

Recommendations:

Given the findings of the study and the need to promote an "easy to implement" ADR mechanism to resolve cross-border disputes within the Common Regional Market[6], the main recommendation is the creation of the **Western Balkans Dispute Resolution Centre** (WB-DRC) with the main missions to:

5 Methodology for Enforcing Contracts (doingbusiness.org)

6 https://www.rcc.int/pages/143/common-regional-market

- Promote and manage cross-border commercial mediation services within the CRM to contribute to the effective function of the regional market.
- Promote and manage international commercial mediation services between parties outside and inside the CRM to increase confidence in foreign investments in the CRM and international trades.
- Act as a regional reference point and best practice for the WB6 economies in their domestic public policies on mediation.

The WB-DRC should carry out different activities under three main functions:

I. Offer guidance on effective ADR/Mediation public policies

a. Adopt regional ADR/Mediation policy.
b. Adopt and implement regional ADR/Mediation Pledge.
c. Draft model contractual dispute resolution clauses for commercial contracts (directing disputes to the regionally accredited list of neutrals (see point III.c)).
d. Promote international agreements with major businesses and professional associations.
e. Promote agreements with the South East Europe Associations of Mediators Network established by the RCC[7] and other mediation centres outside the region.

II. Stimulate the demand for mediation with promotional activities

a. Create a visual identity and promote materials for the WB-ADR.
b. Build and maintain a website in all Western Balkan languages.
c. Run awareness workshops for users and stakeholders.
d. Run a promotional campaign offline and online.
e. Implement other activities that will progress the goal of gradually increasing the recourse to regional cross-border mediation.

III. Ensure high-quality dispute resolution services up to the best international standards

a. Draft common mediation rules.
b. Set-up an accreditation scheme for mediation centres and mediators.
c. Maintain a list of regionally accredited mediation centres and mediators.
d. Use a unified fee schedule.
e. Set up an online case management platform to manage cases.
f. Act as a case management regional office with one or two staff members.
g. Run periodic meetings with the network members.
h. Monitor progress and results.

7 Regional Cooperation Council | Network of Mediators in South East Europe (rcc.int)

How to implement the recommendations?

To quickly implement the above recommendations, it is advisable to:

1. Create and manage the Western Balkans Dispute Resolution Centre. It would be advisable that the Centre is hosted by the Regional Cooperation Council (RCC) at least for its first years of operation until it reaches financial and organisational autonomy.
2. Develop a detailed five-year business, financial and marketing plan for the establishment and operation of the Western Balkans Dispute Resolution Centre.
3. Develop detailed Terms of Reference to search for possible international institutional donors which can finance the centre's establishment and the first two/three years of activities.
4. Partner with one or a few established international mediation centre(s) to ensure quick start-up of operations and secure the transfer of proven, successful know-how.

2. INTRODUCTION (GOAL OF THE STUDY, METHODOLOGY, ASSESSMENT TEAM)

The Regional Cooperation Council (RCC) Secretariat commissioned the study: "Promoting Cross-border Mediation in resolving civil and commercial disputes in the Western Balkans" (hereinafter: the Study). The main aim of the Study was to provide a comprehensive analysis of the current situation in cross-border mediation in civil and commercial matters in the Western Balkans, and its potential for facilitating resolution of trade disputes between the parties in the region, particularly in the context of the creation of an efficient Dispute Settlement Mechanism envisaged by the Common Regional Market 2021-2024 Action Plan.

Western Balkan (WB) economies encompassed in this study include Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia and Serbia (hereinafter: the WB6).

This Study was implemented between April and July 2021 by a team of ADR experts: Mr. Leonardo D'Urso (Italy), Mr. Blažo Nedić and Ms. Ana Dešić (Serbia). The research work was supported by Partners Serbia[8] and researcher Ms. Milica Andrić (altogether: the Team).

Partners Serbia is a civil society organisation devoted to upholding the rule of law, supporting civil society and institutional development in Serbia and in the region, and building local capacity through a reliance on local expertise. Partners Serbia specialises in the fields of rule of law, alternative dispute resolution, change and conflict management, democracy, anti-corruption, and human rights.

Leonardo D'Urso is a leading European and international expert in the field of mediation and ADR. He is the managing director of the ADR Center Rome, an adjunct lecturer at the Straus Institute for Dispute Resolution, Pepperdine University School of Law, and a member of the board of the Weinstein International Foundation.

The Team would like to express special gratitude to Merita Bala and Rasim Gjoka (mediators from Albania); Smiljka Gavric (mediator from Bosnia and Herzegovina); Bekim Ismaili (mediator from Kosovo*); Marina Lutovac, executive director of the Centre for ADR (Montenegro); Slave Mladenovski, president of the Chamber of Mediators of North Macedonia (North Macedonia); and Dušan Korunoski, president of the Serbian National Association of Mediators (Serbia), for their contribution to this Study.

2.1. Overall objective

By 2024, the WB6 aim to build a Common Regional Market, based on EU rules, believing it would be a *catalyst for deeper regional economic integration and a steppingstone towards EU Single Market*. The Action Plan to be implemented encompasses four key areas, including *establishing a regional trade area with free movement of goods, services, capital and people*. Among other expected results, the WB6 are committed to take all necessary measures that will contribute to the adoption of *new, more efficient*

8 About us | PARTNERS-SERBIA (https://www.partners-serbia.org/en)

rules on dispute settlement and resolution of non-tariff barriers in the Central European Free Trade Agreement (CEFTA).[9]

Overwhelming evidence shows that mediation is a valuable method for resolving disputes, which is why it is a public policy priority in most economies, as well as regional and international organisations. The study prepared by Ecorys and ADR Centre for the European Commission notes that "*international firms may be less inclined to invest in or trade with countries which have an unstable legal framework and a suboptimal dispute resolution capacity. And by the same token, domestic investors will feel uncomfortable and take this into account in their trade/investment pattern*".[10]

Therefore, the overall objective of this Study was to draw conclusions based on the existing mediation experiences in the region and provide recommendations focused on the potential of mediation to become a primary method of resolution for cross-border commercial disputes in the Western Balkans. Additionally, the Study aimed to facilitate the creation of an efficient Dispute Settlement Mechanism envisaged by the CRM AP 2021-2024.[11]

2.2. Methodology

To achieve the overall objective of this Study, given a relatively modest recourse to mediation in the WB6 in the last two decades, the Team employed the following methodology:

- Identified EU and international standards and best practices in cross-border commercial mediation relevant for the WB6 commercial mediation reform policy.
- Conducted a thorough analysis of national institutional and legal frameworks for commercial mediation in the WB6.
- Defined other good practices (both legal and institutional) in the field of commercial mediation, within the WB6, and within other selected jurisdictions.
- Identified relevant preconditions, including the availability of qualified mediators needed for best practices to be implemented, taking into account the legal and cultural environment in question.
- Identified practices that were applied and were not effective, if any, indicating possible reasons for their failure.
- Evaluated the suitability of best practices indicated with regard to WB legal, institutional and cultural environment.

The above methodology was chosen for several reasons. First, recommendations based on best, proven practices of other economies are more likely to be effective, as there is already a demonstrated example of their application. Second, recommending measures based on the best practices of other economies enables others to avoid mistakes in implementation already made in other jurisdictions. Third, the Team took into account wider national and international legal and cultural frameworks. Fourth, the reasoning found in the secondary data helped reality test the recommendations provided in the broader regional perspective, not limited to any national jurisdiction.

9 Common Regional Market 2021-2024 Action Plan

10 Ecorys and ADR CENTER, Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union: Final Report, 2012, available at: https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/ADR-Final-Report-151012-1.pdf., p. 12

11 1.2. Elimination of non-tariff barriers. 1. Adopt efficient and effective Dispute Settlement Mechanism

During the comprehensive desk research, the Team analysed and included the following international documents: the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters; and the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). The results of the analysis and applicability of these international instruments are included in the Study.

The Team also analysed: Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, and 2002 CoE Recommendation and Guideline on civil mediation and mediation tools. However, they found that these documents were not relevant for the purposes of the Study.

The methodology also includes contributions and in-depth interviews with mediation experts based in each of the WB6 jurisdictions and data gathered from a comprehensive questionnaire, which was completed by 254 relevant WB6 stakeholders. By completing this questionnaire, the relevant WB6 stakeholders (mediators, representatives of mediation centres and associations, lawyers, representatives of business entities, judges, academics, public servants, students, etc.) provided their views towards cross-border mediation and potential mechanisms in the WB6, as well as some barriers which should be overcome in order to assure a more universal use of mediation in the region.

Both questionnaires, the one used as a basis for in-depth interviews with local mediation experts, and the questionnaire distributed to relevant WB6 stakeholders, can be found in Chapter IX, Annexes (Annexes 2 and 3).

3. REGIONAL MEDIATION AND ECONOMIC BACKGROUND (OVERVIEW OF REGIONAL ECONOMIC AND INVESTMENT INITIATIVES

Regional economic integration: MAP REA and CRM

Regional economic integration is one of the key drivers of economic growth in the region. At the Trieste Summit held on 12 July 2017, the Western Balkans leaders endorsed the Multi-annual Action Plan for a Regional Economic Area in the Western Balkans (MAP REA).[12] The MAP REA, whose development was coordinated by the RCC upon request of the Western Balkans leaders and supported by the European Commission (EC), aimed to enable free flow of goods, services, capital and labour, making the region more attractive for investment and trade, and accelerating connection with the EU, thus bringing prosperity to Western Balkans citizens.

At the Berlin Process 2020 Sofia Summit held on 10 November, the leaders of the WB6, Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia and Serbia, continued their efforts in regional cooperation and endorsed the Common Regional Market (CRM) 2021-2024 Action Plan, built on the achievements of the Regional Economic Area (REA).

Common Regional Market, based on the EU rules and standards, aims to increase the attractiveness and competitiveness of the region and to bring the region closer to the EU markets.

The Action Plan is made up of targeted actions in the four key areas:[13]

- Regional trade area: free movement of goods, services, capital and people;
- Regional investment area;
- Regional digital area; and
- Regional industrial and innovation area.

The implementation of CRM 2021-2024 Action Plan remains in the domain of responsibility of public institutions in each of the Western Balkan economies, in particular line ministries and institutions leading the implementation effort at the economy level. The RCC and CEFTA[14] Secretariats are the leading regional organisations to facilitate the implementation of the Action Plan, while other regional and/or international structures are included in specific actions in line with their scope of work and programme. In particular, the RCC will support implementation of actions which seek to increase the attractiveness of the region for foreign investors, CEFTA Secretariat will support carrying out the actions which seek to implement CEFTA 2006 and extend commitments and benefits to the EU and other trading partners. The private sector perspective and contribution will be ensured through close cooperation with WB6 CIF[15], with a view to facilitating implementation of joint actions.[16]

12 Regional Cooperation Council | Multi-annual Action Plan for a Regional Economic Area in the Western Balkans - MAP (rcc.int)
13 More info on CRM AP Regional Cooperation Council | Common Regional Market (rcc.int)
14 CEFTA - Central European Free Trade Agreement (cefta.int)

At the regional meeting held in Poznan on 5 July 2019,[17] it was underlined that dispute settlement is considered as a corner stone of the multilateral trade. In addition to that, effective dispute resolution mechanisms are recognised as one of the main preconditions for the functioning free flow of goods, services, capital and labour, and making the region more attractive for investment and trade.

CEFTA

In 2006, Albania, Bosnia and Herzegovina, Bulgaria, Croatia, North Macedonia, Moldova, Montenegro, Romania, Serbia and the United Nations Interim Administration Mission in Kosovo on behalf of Kosovo* in accordance with United Nations Security Council Resolution 1244, expressed their preparedness to cooperate with each other in seeking ways and means to strengthen the process of economic integration in Europe and accede to the Central European Free Trade Agreement (CEFTA).[18] Upon becoming EU Member States, Bulgaria, Romania, and Croatia ceased their participation in CEFTA.

After adoption of CEFTA, the above economies negotiated and adopted six additional protocols (Albania and Serbia ratified Additional Protocol 6). The EU has a common trade and commercial policy towards third countries, based on multilateral and bilateral agreements and autonomous measures. In that regard, EC Annual Reports for 2020 in Chapter 30, dedicated to external relations, emphasised that economies should negotiate and conclude the CEFTA Additional Protocol 7 on dispute settlement.[19]

WB6 CIF

Western Balkans 6 Chamber Investment Forum (WB6 CIF) is a joint initiative of chambers of commerce and industry from Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia and Serbia, established in 2017 with the aim to provide a joint voice to the business community in the region and to facilitate inter-business contacts and promote the region as one investment destination.[20] WB6 CIF is the business community's response to political processes in the region, which represents around 350,000 companies, mostly small and medium-sized enterprises.[21] MAP REA adopted by Prime Ministers of the WB6 at the Summit in Trieste underlined the WB6 CIF prominent role in the continuous and interactive dialogue with the private sector, which has been one of the key commitments of the region in delivering the Regional Economic Area in the context of the Berlin Process.[22]

15 Western Balkans 6 Chamber Investment Forum - WB6 CIF (wb6cif.eu)
16 Regional Cooperation Council | Common Regional Market (rcc.int)
17 chairs_conclusions.pdf (berlinprocess.info)
18 CEFTA - Central European Free Trade Agreement (cefta.int/legal-documents/#1463498231136-8f9d234f-15f9)
19 Progress Reports for 2020 for economies are available at Strategy and Reports | European Neighbourhood Policy And Enlargement Negotiations (europa.eu)
20 who we are - WB6 CIF (wb6cif.eu/who-we-are)
21 Ibid
22 Consolidated-Multi-annual-Action-Plan-for-a-Regional-Economic-Area-in-the-Western-Balkans-Six.pdf (berlinprocess.info)

4. EU LEGISLATION AND PRACTICES RELATING TO CROSS-BORDER MEDIATION - IMPACT IN WESTERN BALKANS OF THE DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 MAY 2008, ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS

The CoE 2002 Recommendation on civil mediation[23] and the subsequent EU Directive 2008/52 on civil and commercial mediation[24] (EU Directive) have been milestones in developing domestic legislations to guide mediation in civil and commercial matters. There is no doubt that both European legislations encouraged the debate on ADR and brought significant changes in most of the 27 EU Member States and 47 CoE Member States. Other European legislations have been adopted in the field of mediation like the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on ADR for consumer disputes[25] and the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes[26].

It is relevant to consider the impact of the EU 2008 Directive on cross-border mediation in the EU Single Market, both on the demand and supply side of the mediation market, in this Study which aims to increase the use of mediation in the Common Regional Market in the WB6 as a stepping stone toward the EU Single Market.

23 Recommendation Rec(2002)10 on mediation in civil matters (rm.coe.int/16805e1f76)

24 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF)

25 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011&from=EN)

26 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF)

4.1. Impact of the 2008 EU Directive on mediation on the demand for mediation services

Article 1 of the EU 2008 Directive on mediation states that: "*The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by* ***ensuring a balanced relationship between mediation and judicial proceedings.***"

Further, Article 2 of the Directive states that: "*For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is* ***ordered by a court****; (c)* ***an obligation to use mediation arises under national law****; or (d) for the purposes of Article 5 an invitation [from the Court] is made to the parties*".

Finally, Article 5 of the Directive states that: "*This Directive is without prejudice to national legislation making the* ***use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started****, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.*"

In setting a goal aimed at "ensuring a balanced relationship between mediation and judicial proceedings" (Article 1), the EU Directive left the Member States to decide in Articles 2 and 5 on how to reach that goal with national legislation that can stipulate:

a. Parties agree to use mediation after the dispute has arisen (so-called voluntary mediation).
b. Mediation is ordered by a court.
c. An obligation to use mediation arises under national law (so-called mandatory mediation).
d. Without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started.

At the same time, the EU Directive made clear that a national legislation that includes a provision on mandatory mediation should not prevent the parties from exercising their right to access the judicial system.

Based on the variety of options available in the EU Directive, most EU Member States introduced national legislation in 2010 based on purely voluntary recourse to mediation in civil and commercial dispute, which led to a very limited use of mediation. The milestone study commissioned in 2014 by the European Parliament titled "*Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*[27]" arrived at very clear conclusions.

27 Giuseppe De Palo and Leonardo D'Urso - Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU - (europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

Abstract from the study: **Rebooting the Mediation Directive (2014)**

Five and a half years since its adoption, the Mediation Directive (2008/52/EC) has not yet solved the 'EU Mediation Paradox'. Despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1% of the cases in the EU. This study, which solicited the views of up to 816 experts from all over Europe, clearly shows that this disappointing performance results from weak pro-mediation policies, whether legislative or promotional, in almost all of the 28 Member States. The experts strongly supported a number of proposed non-legislative measures that could promote mediation development. But more fundamentally, the majority view of these experts suggests that introducing a 'mitigated' form of mandatory mediation may be the only way to make mediation eventually happen in the EU. The study therefore proposes two ways to "reboot" the Mediation Directive: amend it, or, based on the current wording of its Article 1, request that each Member State commit to, and reach, a simple "balanced relationship target number" between civil litigation and mediation.

Seven years after the publication of the "Rebooting the Mediation Directive", from the available statistics on the number of mediations, the EU Directive has not yet achieved its objective stated in Article 1 "*to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.*" In fact, only one country, Italy, has consistently reported mediations exceeding 150,000 annually. The Netherlands, Germany and United Kingdom (UK) probably exceed 10,000 only in civil and commercial disputes, while a significant number of EU Member States reported less than 1,000 mediations per year.

In the context of the present study, we have applied the same methodology developed by one of the authors of the "Rebooting the Mediation Directive" and asked the local mediation experts in the WB6 economies for their best and informed estimates on the yearly number of mediations in civil and commercial matters and their success rates.

The Balance Relationship Index has the scope to measure the achievement of Article 1 of the EU Directive by calculating the percentage of the number of mediations per year against the number of incoming judicial proceedings in court per year.

	Nr. of incoming civil and commercial cases per year[28]	Estimated nr. of civil and commercial mediations per year[29]	Estimated success rate[30]	Balanced relationship index
Montenegro	28.852	3.534	36%	**12%**
Albania	17.868	2.077	50%	**11%**
Kosovo*	11.655	1.000	88-95%	**8%**
North Macedonia	41.974	1.600	75-90%	**3.8%**
Bosnia and Herzegovina	113.177	2.000	95%	**1.7%**
Serbia	324.445	569	70%	**0.1%**

28 Data from the CEPEJ "European judicial systems - Efficiency and quality of justice" Report 2020. Country reports, question 91: Incoming first instance civil and commercial litigious cases.

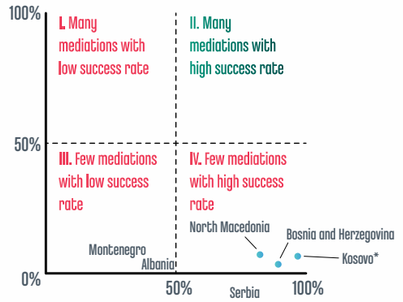
29 Estimated by the local mediation experts interviewed based on public data or on their knowledge.

30 Estimated by the local mediation experts interviewed based on public data or on their knowledge.

The table above reflects the same variegated situation in the Western Balkans as among the EU Member States. **Montenegro** has the highest Balanced Relationship Index of 12% (albeit with a low success rate of 36%) thanks to the recently adopted law on "soft-mandatory mediation" modelled after the Italian experience, while **Serbia** has the lowest index of 0.1%. From the analysis of the local legislations and the data of the previous table, it is clear that every WB6 economy needs a customised approach that can lead toward a uniformity of legislation and practices on mediation in the CRM.

In an ideal, effective model, the Balanced Relationship Index would be at least 50%, with one mediation for every two cases in court. A more effective public policy goal, however, could aim to have a majority of disputes resolved out of court, with this Index counting more than 100% in order to ensure that the scarce resources of judges and courts are dedicated only to disputes needing a court decision. The number of mediations is not sufficient alone to evaluate a system. On a system-wide level, an effective mediation policy should also account for the fact that unsuccessful mediations are a burden on the parties and delay them from accessing the courts. As a result, any public policy seeking to increase the number of mediations should also make sure that an enabling environment for mediation exists so that the chances are that a good percentage of them will result in an amicable settlement. Usually, a full-time professional mediator will reach an average 70% success rate.

The matrix below developed in the context of the Rebooting Study provides a useful visual tool for understanding mediation performance. The "X" axis represents the Mediation Success Index, while the "Y" axis sets out the Balanced Relationship Index of Mediations to Court Cases.



The matrix thus generates four performance quadrants:

Quadrant I: Many mediations with low success rate. This quadrant visually represents the main concern about full mandatory mediation systems. The concern is that mandatory systems may seek to generate high numbers of mediations through compulsion without sufficient attention being paid to providing effective, high-quality services, and without filtering to avoid mediating inappropriate cases. This may occur when the focus is purely on increasing the number of mediated cases without investing in quality control. In addition, systems that fall into this category may indeed not be adequately balancing mediation with access to justice.

Quadrant II: Many mediations with high success rate. This quadrant represents peak performance: a high number of mediations, a large percentage of which are successful. High scores in this quadrant can be expected to go hand in hand with a noticeable decrease in the number of cases in court, relieving the court system of unnecessary caseloads. In an ideal jurisdiction, the two indexes should be above 100% (more than one mediation for each case in court) with a conservative average success rate above 50%.

Quadrant III: Few mediations with low success rate. Performance in this quadrant represents the lowest level of effectiveness. Low number of mediations suggests low level of awareness among parties, while low success rates suggest very low capacity to deliver effective services. In these systems, we would expect to see that there has been very little investment in mediation infrastructure on either the supply or the demand side.

Quadrant IV: Few mediations with high success rate. This is a typical result of a completely voluntary mediation system or an "opt-in" system, which achieves a high mediation success rate — above 70% — but with a very low number of mediations.

In line with the findings of the 2014 Rebooting Study on the EU Member States, the findings of the present study showed that, in the absence of public policy measures to strongly encourage or require parties to at least attempt mediation, the WB6 economies will also result in a low number of mediations.

4.2. Impact of the 2008 EU Directive on mediation on the supply of mediation services

In order to evaluate the supply side of the mediation market, we have asked local mediation experts to estimate the number of active mediation centres and mediators in their economies. Based on these data, we have calculated the average number of mediations per single mediator (based on the previous estimation of the number of mediations). Further, we have calculated the number of mediators per 100,000 inhabitants compared with the same ratio of professional judges.

	Population	Nr. of active mediation centres[31]	Nr. of mediators[32]	Number of professional judges per 100,000 inhabitants[33]	Average nr. of mediations per mediator per year	Number of mediators per 100,000 inhabitants
Montenegro	622.345	1	150	50.0	23.5	24.1
Serbia	6.982.084	N/A	1.349	37.1	0.4	19.3
Kosovo*	1.845.300	1	187	17.1	5.3	10.1
Bosnia and Herzegovina	3.323.929					
Albania	2.866.376	1	88	12.1	23.6	3.0
North Macedonia	2.082.958	1	44	24.6	36.3	2.1
Total	**17.722.992**		**2.008**			

The estimated number of mediation centres and mediators confirm the presence of a sufficient number of professionals in each of the WB6 economies that are able to start to offer mediation services in cross-border disputes. However, these mediation centres and mediators operate under different mediation rules and fees and have different standards for mediation training.

31 Estimated by the local mediation experts interviewed based on public data or on their knowledge.
32 Estimated by the local mediation experts interviewed based on public data or on their knowledge.
33 Data from the CEPEJ "European judicial systems - Efficiency and quality of justice" Report 2020.

5. INTERNATIONAL INSTRUMENTS FACILITATING CROSS-BORDER MEDIATION

5.1. United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") & UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), and their effect on the Western Balkans

The UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation, the Convention, SCM) entered into force on 12 September 2020, six months after it was ratified in the parliaments of Singapore, Qatar and Fiji, the first three of the initial 46 states, which signed the Convention in August 2019 in Singapore. At the time of writing this Report, there are 53 signatories, while three additional parties (six in total) have ratified the Convention. Among the initial signatories are the three Western Balkan economies: Montenegro, North Macedonia and Serbia.

The Convention, signed, among others, by three of the world's largest economies, the US, China, and India, as well as Saudi Arabia, Qatar, and Singapore, represents a historic moment in the rise of mediation. It will enable cross-border enforcement of mediated settlements, provide businesses with greater certainty and assurance in international commercial transactions, and further facilitate international trade and commerce. In the future, mediated settlement agreements in international commercial disputes will be capable of enforcement in any of the economies that have ratified the Convention.

In Europe, the Convention was signed by Ukraine, Turkey, Belorussia, Montenegro, North Macedonia, and Serbia, while notable absentees include the EU and all of its member states. Although several EU MS were in favour of joining the Convention, by the time it opened for signing, the European Commission did not have a common position in relation to the 2008 EU Directive on Mediation, while the UK, following Brexit, is considering joining the Convention.

Significance of the Convention and Model Law for Cross-Border Trade

Cross-border trade is considered a core issue by the UN for peace and stability.[34] The development of a harmonised international trade law framework contributed to facilitating cross-border trade and investment.[35] After more than five years of preparation, consultation and negotiation within the UNCITRAL[36] Working Group, the final text of the Convention was adopted by the UN General Assembly Resolution 73/198 on 20 December 2018. UNCITRAL notes that "until the adoption of the Convention, the often-cited challenge to the use of mediation was the lack of an efficient and harmonised framework for cross-border enforcement of settlement agreements resulting from mediation. In response to that need, the Convention has been developed and adopted by the General Assembly…The Convention provides uniform and efficient international framework for mediation, akin to the framework that the New York Convention has successfully provided over the past 60 years for the recognition and enforcement of foreign arbitral awards".[37]

As with many other international conventions, SCM was also a result of compromise among the delegates, especially given that there is no universally adopted "standard of mediation", and that its practice can considerably differ from one region to another. As a result of such compromise among the delegates, UNCITRAL also adopted a Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (the Model Law). UNCITRAL recommended that all states consider adopting the text of the Model Law when enacting or revising their domestic legislation, "in view of the desirability of uniformity of the law of dispute settlement procedure and the specific needs of international commercial mediation practice".[38]

The development of both the Convention and Model Law will provide flexibility to the states to adopt either SMC or the Model Law, or both instruments together. A state which adopts SMC would be bound by its provisions under international law, while a state which decides not to adopt the Convention may choose to adopt the Model Law as part of its domestic legislation, with or without amendments.[39]

Key Provisions for (International) Cross-Border Commercial Disputes

In addition to the main aim of the Convention to ensure that a settlement reached by parties in international commercial mediation becomes binding and enforceable in accordance with a uniform and streamlined procedure, the provisions of the Singapore Convention on Mediation (and the Model Law) provide valuable guidance for developing mediation as an efficient mechanism for resolution of regional cross-border commercial disputes.

34 Mary Walker and Lim Tat, "Introduction of the UN Convention on International Settlement Agreements Resulting from Mediation – Third Piece in the International Framework of Dispute Resolution", International Bar Association, 3 June 2021, https://www.ibanet.org/un-convention-settlement-mediation-dispute-resolution

35 Corinne Montineri, 'The United Nations Commission on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation', Singapore Mediation Convention Reference Book (2019) 20(4) Cardozo Journal of Conflict Resolution 1,023

36 United National Commission for International Trade Law. See also UN General Assembly Resolution 2205 (XXI), 17 December 1966 establishing UNCITRAL www.jus.uio.no/lm/uncitral.2205-xxi/doc.html

37 https://uncitral.un.org/en/news/general-assembly-adopts-united-nations-convention-international-settlement-agreements-resulting

38 UN Commission on International Trade Law, Fifty-first Session (25 July–13 July 2018), Annex I, Art 1.1, A/73/17, page 11 https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/052/21/PDF/V1805221.pdf?OpenElement

39 Mary Walker and Lim Tat, 'Introduction of the UN Convention on International Settlement Agreements Resulting from Mediation – Third Piece in the International Framework of Dispute Resolution', International Bar Association, 3 June 2021

One of the key features, particularly relevant for this study targeting Western Balkan economies, is that the Convention keeps a narrow focus on **mediation**. It does not apply to any settlement agreements between commercial entities, but only to international commercial agreements achieved through mediation. It also excludes domestic settlement agreements, or agreements in consumer, family, inheritance or employment disputes. It does not apply to settlement agreements: "*(i) That have been approved by a court or concluded in the course of proceedings before a court; and (ii) That are enforceable as a judgment in the State of that court; and (b) Settlement agreements that have been recorded and are enforceable as an arbitral award.*"[40]

Therefore, only **settlement agreements concluded before a mediator** will be admissible for enforcement under the Convention. Not direct out-of-court settlements between the parties, not court-approved or concluded settlements, nor settlement agreements concluded within the arbitration process. This is a very important distinction that necessitates availability of credible and high-quality mediators, specialised in the resolution of commercial disputes.

This requirement is reinforced by another provision of the Convention, which prescribes that a party wishing to enforce a settlement agreement shall supply the competent authority with ***Evidence*** *that the settlement agreement resulted from mediation, such as*:

(i) *The mediator's signature on the settlement agreement;*

(ii) *A document signed by the mediator indicating that the mediation was carried out;*

(iii) *An attestation by the institution that administered the mediation; or*

(iv) *In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.*[41]

In the Convention, **mediation** is defined as "*a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.*"[42]

The term **Commercial** is not defined in the Convention, but there is an explanatory list in the footnote to Article 1 of the Model Law: "*The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.*"[43]

Mediation is **International** if, at the time of the conclusion of the agreement: "*At least two parties to the settlement agreement have their places of business in different States; or the State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which*

40 Article 1.3 of the Singapore Convention

41 Article 4 of the Singapore Convention

42 Article 2.3 of the Singapore Convention

43 Footnote to Article 1, Model Law

the subject matter of the settlement agreement is most closely connected."[44] Further definitions are set out in Article 2.1 of the Convention.

For the purposes of enforcement under the Convention, a mediated settlement agreement must be **concluded in writing**. "*A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.*"[45]

Among other notable provisions, the Convention sets grounds for the competent enforcing authority to refuse to grant relief[46], similar to the New York Convention on Arbitration.

Finally, the Convention allows the states to express reservations when adhering to this instrument, but prescribes that only two specific matters can be subject to reservations:

1. *That the state shall not apply the Convention to settlement agreements to which that state is a party, or to which any governmental agencies or any person acting on behalf of a government is a party, to the extent specific in the state's declaration.*
2. *That the state shall apply the Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.*

The last point represents a very important difference compared to the approach adopted by the New York Arbitration Convention that may have significant repercussions on the applicability of the Mediation Convention, both internationally and regionally, i.e. in the Western Balkans.

Namely, the Singapore Convention on Mediation, unlike the New York Convention, does not contain the possibility for declaring a reservation on the grounds of **reciprocity**. This means that a party to the Singapore Convention will have to enforce a mediated settlement agreement that satisfies the above requirements, regardless of the "origin" of the settlement agreement, the parties or even a mediator. Unlike court judgments and arbitral awards, settlement agreements resulting from mediation do not have a "nationality", so the enforcement under the Convention is not limited only to member states.

In practice, this means that once the three signatories from the Western Balkans (Montenegro, North Macedonia, and Serbia) ratify the Convention, they will be able to enforce international settlement agreements resulting from commercial mediation from anywhere in the world, including the three remaining Western Balkan economies. As long as a settlement is international and results from mediation, then (unless it falls within an excluded category) it will qualify for enforcement under the Convention, regardless of its place of origin.[47]

Convention as a mediation enforcement mechanism in the Western Balkans

Businesses involved in cross-border disputes are well aware of the benefits of mediation over arbitration of litigation. Adjudicative processes, arbitration and litigation are characterised by strict procedures resulting in final decisions capable of enforcement in cases of non-compliance. However, these processes usually take years to complete, require tremendous amounts of time and money, and often produce unsatisfactory results for one or both parties. Mediation as a consensual process is quicker, cheaper and ideal for preserving or improving the disputing parties' relationship. However, it can lack finality and is dependent on the will of the disputing parties to ensure implementation.

While it is true that well over 90% of mediated settlement agreements are compiled voluntarily, it is also true that the pure voluntary nature of the compliance and the prospect of another gruesome litigation following one party's refusal to honour its own mediated agreement has forced many businesses and their counsel in international commercial disputes into arbitration over mediation. Clearly, businesses have often disregarded the obvious advantages of speed and cost of mediation in favour of the finality and enforceability of arbitration.

The survey conducted among the mediation stakeholders in the Western Balkans as part of this Report showed that the biggest concern of the practitioners and businesses when considering mediation in a regional cross-border commercial disputes is **enforcement**. Over 60% of the respondents underlined the perceived problems with enforcing a mediated settlement agreement in another jurisdiction in the region, followed by the quality of mediators (47%) and costs of the mediation process (30%), as the biggest obstacles.[48]

The Singapore Convention on Mediation is one of the methods for achieving a streamlined and efficient method of enforcement of mediated settlement agreements, internationally, as well as within the Western Balkans. However, with only three of the regional economies signing and none of them ratifying the Convention at the time of writing, this enforcement mechanism still seems like an uncertain prospect.

Another possibility would be for each of the Western Balkan economies to adopt the text of the UN Model Law on Mediation, as domestic legislation, while a third option is a regional multilateral agreement among the WB6 for mutual enforcement of regional commercial cross-border settlements resulting from mediation, in accordance with the rules and principles defined in the Singapore Convention on Mediation and the UN Model Law.

44 Article 1. 1. (a) & (b), Article 2.1. (a) & (b) of the Singapore Convention

45 Article 2.2. of the Singapore Convention

46 Article 5 of the Singapore Convention

47 Jan O'Neil, "The new Singapore Convention: some practical issues to consider now", Thomson Reuters Dispute Resolution Blog, 18 September 2019.

48 See Annex 4.

6. LEGAL FRAMEWORK AND MEDIATION PRACTICES IN THE WESTERN BALKANS

Before going into the overview of the mediation systems in the Western Balkans, in line with the objective of this Study, the focus of our examination would have to be the cross-border potential of mediation in resolving commercial disputes. Therefore, we would first need to direct our attention to the meaning of cross-border or regional mediation, and then examine how each of the WB6 mediation systems regularise mediation with an international element.

Laws on mediation in some of the WB6 economies (Serbia, Kosovo*, Montenegro and North Macedonia) contain provisions on cross-border mediation which refer to cross-border mediation in accordance with the EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.[49] On the other hand, other economies recognise "mediation with foreign element". In that regard, the project Team relied on the definition from the EU Directive 2008/52/EC.

Recital 6 of the Directive's preamble states that agreements, resulting from mediation, are more likely to be complied voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. Moreover, the Directive underlines that these benefits become even more pronounced in situations displaying cross-border elements.

According to Article 2 of the Directive, a cross-border dispute is one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

a. the parties agree to use mediation after the dispute has arisen;

b. mediation is ordered by a court;

c. an obligation to use mediation arises under national law; or

d. for the purposes of Article 5[50] an invitation is made to the parties.

In order to have a universal definition of an "international" settlement agreement, the project Team relied on the definition from the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention)[51]. As already stated in Chapter V of this Study, according to Article 1 of the Convention, a settlement agreement is "international" if, at the time of the conclusion of the settlement agreement:

49 Available at EUR-Lex - 32008L0052 - EN - EUR-Lex (europa.eu)

50 Article 5 of the Directive - 1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. 2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

51 Available at UN Convention on International Settlement Agreements Resulting from Mediation (uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf)

a. At least two parties to the settlement agreement have their places of business in different States; or

b. The State in which the parties to the settlement agreement have their places of business is different from either:

   i. The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

   ii. The State with which the subject matter of the settlement agreement is most closely connected.

If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement; and if a party does not have a place of business, reference is to be made to the party's habitual residence.[52]

6.1. Albania

In recent Albanian history, like in other WB6 economies, the mediation of disputes was conducted by various institutions and mainly by assemblies, elders, the village leader, courts of villages and neighbourhoods, religious institutions, social organisations, committees for reconciliation of blood feuds, offices for reconciliation in the field of labour disputes, etc.[53]

Albanian Law on Mediation in Dispute Resolution[54] of 2011[55] is approximated to the Directive 2008/52/EC43 and the recommendations of the CoE on certain aspects of mediation in civil and commercial matters.[56] According to Article 1, mediation is an extrajudicial activity whereby the parties seek resolution of a dispute with the assistance of a third neutral party (mediator) in order to reach an acceptable agreement on the resolution of the dispute, which is not contrary to the law. However, amendments to the Law from 2018 added a definition of mediation as the procedure of out-of-court dispute resolution, whereby two or more parties to a dispute, on a voluntary basis, attempt by themselves to settle their dispute with the assistance of a mediator.[57]

The conciliation procedure is regulated by various provisions of the Civil Procedure Code (CPC)[58], which recognise the duty of the different instances of judicial system to resolve initially the disputes between the parties through conciliation.[59] Article 25 of the Civil Procedure Code provides that "it is the duty of the court to make an effort to reconcile the parties in a dispute".[60] Article 158/ç of the CPC states that the role of the judge is to settle the dispute amicably during the preparatory stage

52 Ibid, Article 2, for the purposes of article 1, paragraph 1

53 Mediterranean Journal of Social Sciences, MCSER Publishing, Rome-Italy, October 2013, Alternative Dispute Resolution and the Albanian Legal Reality, Phd Candidate, Artan Spahiu, pg. 147

54 Unofficial translation in English available at Mediation_2018_06_12_EN.pdf (mediationalb.org)

55 Law No. 10 385/24.2.2011, amendments no. 81/2013, dated 14.02.2013 and Law No. 26/2018, dated 17.05.2018

56 Mediation Practices in WB, Arta Mandro, RCC, December 2020, pg.14

57 Article 1-2 Law on Mediation in Dispute Resolution

58 Code of Civil Procedure, Law No.8116, articles 25, 108, 158/b, 361, 362, 461

59 Mediterranean Journal of Social Sciences, MCSER Publishing, Rome-Italy, October 2013, Alternative Dispute Resolution and the Albanian Legal Reality, Phd Candidate, Artan Spahiu, pg. 146

60 Ibid

when the nature of the case allows for that. The same Article also provides for the active role of the judge and foresees that the judge will inform the parties about the possibility of dispute settlement through mediation and, if the parties give their consent, the case is transferred to mediation at any stage of the trial.[61]

Regarding the scope of application of the Law on Mediation in Dispute Resolution, Article 2 states that "mediation applies for the resolution of all the disputes in civil law, commercial, labour and family law, intellectual property, consumer rights, as well as disputes between public administration bodies and natural persons."

The court, or the respective state body, within the competences foreseen by the law, shall notify, guide and, as applicable, clearly and understandably inform the parties to resolve disputes through mediation, in particular, but not limited only to disputes: a) in civil and family cases, which involve interests of the minors; b) in conciliation cases in the instances of dissolution of marriage, foreseen in Article 134 of the Family Code; c) of a pecuniary character related to the rights of ownership or co-ownership, division of property, lawsuits for soliciting of the thing, denying lawsuits and lawsuits for the cessation of the adverse effect on possession, disputes arising from the breach of contractual obligations, as well as those that have as the subject matter the compensation for non-contractual damages.[62] If the parties have foreseen by the contract or written agreement the condition that mediation will be the preliminary first alternative of conflict resolution, prior to the judicial route, the court shall not take into consideration the case without this contractual condition being fulfilled.[63]

The number of mediations in Albania, according to data from the 2019 EC Annual Report, was 2,077[64], while the number of mediators, according to the MoJ Register, is 88.[65]

Regulations related to cross-border disputes/mediation with a foreign element

The Law on Mediation in Dispute Resolution, in Article 2, paragraph 8 states that the provisions of the Law shall apply, to the greatest possible extent, even to the mediation procedure for the resolution of disputes in the cases when at least one of the parties resides outside Albania.

The Albanian Law on Mediation does not give a definition of a cross-border dispute. On the other hand, the Private International Law provides a definition of the 'foreign element', meaning any legal circumstance related to the subject, content or object of a legal-civil relationship which becomes the connecting factor of this relationship with a certain legal system (Article 1, point 2).[66]

According to Article 5 of the Law on Mediation, the license for performing the profession of mediator is granted also to foreign citizens that have been licenced in their jurisdictions as mediators. The rules and procedure for recognition of the title of mediator earned in a foreign jurisdiction shall be defined by an order of the Minister of Justice.

61 Mediation Practices in WB, Arta Mandro, RCC, December 2020, pg.22
62 Article 2, paragraph 4 of the Law on Mediation in Dispute Resolution
63 Article 2, paragraph 6 of the Law on Mediation in Dispute Resolution
64 20190529-albania-report.pdf (europa.eu)
65 Ndërmjetësit - Ministria e Drejtësisë (drejtesia.gov.al)
66 Mediation Practices in WB, Arta Mandro, RCC, December 2020, pg.15

Institutional Mediation through Chambers/Associations of Mediators

The National Chamber of Mediators[67] is established by Law 10385/2011.

According to Article 7, the National Chamber of Mediators is a legal entity, which exercises its activity independently from the Government. The steering bodies of the National Chamber of Mediators are the General Meeting of Mediators, which is the highest decision-making body (Article 7-1); the Steering Council, which is the executive body (Article 7-2); and the Chairperson, who represents the NCHM in all relations with third persons (Article 7-3).

Conditions for becoming a licenced mediator

Article 5 of the Law on Mediation in Dispute Resolution stipulates criteria for licencing. The Albanian citizens must fulfil simultaneously these requirements in order to be licenced as mediators: a) to have completed study programmes of the second cycle, according to the specifications of the legislation on higher education; b) to be over 28 years of age; b/1) to have work experience of not less than three years; c) to have not been convicted for the intentional commission of criminal acts, by final court decision; c) to have successfully passed the mediator qualification exam, after completion of the initial training programme.

The Law also sets out that mediators, for cases relating to children and commercial cases, shall have the proper qualification and specialisation in these fields.

6.2. Bosnia and Herzegovina

The Law on Mediation Procedure (OG Bosnia and Herzegovina, No. 37/04)[68] defines mediation as a process where a mediator, as the third, neutral party assists two parties in disputes to conclude a dispute with mutual agreement (Article 2). The Law supports parties to resolve dispute in an amicable way and parties can agree to refer their dispute either before or during litigation, until the conclusion of the main trial (Article 4, Paragraph 1). If before litigation, the parties have not attempted to resolve the dispute in the mediation procedure, the trial judge in the procedure, if he/she deems it appropriate, may at the preparatory hearing propose to the parties to resolve their dispute in the mediation procedure (Article 4, Paragraph 2). Mediation in Bosnia and Herzegovina (BiH) is a voluntary process, having considered that mandatory mediation before going to court or mandatory mediation ordered by a judge do not exist in BiH's legal system.[69]

Despite the fact that a settlement agreement is binding and enforceable (Article 25), the demand for mediation in BiH is not significant. According to the data from the CEPEJ Questionnaire for Evaluation of the Judicial Systems (2018 - 2020) for Bosnia and Herzegovina, 778 mediations were conducted in 2018.[70] In explanation of the data, it is stressed that the Association of Mediators of Bosnia and Herzegovina produced the statistics on mediations, and that following the increase of the mediation procedures in 2016, the number of mediations has decreased over the last couple of years due to the lack of cases put forward for mediation procedures by the relevant creditors (e.g. the state-owned

67 The National Chamber of The Albanians (dhkn.gov.al)
68 Available at Microsoft Word - zakon o medijaciji BiH.doc (umbih.ba)
69 CEPEJ Evaluation Report 2020, Part 2, Country Profiles, pg. 21, available at https://rm.coe.int/evaluation-report-part-2-english/16809fc059
70 CEPEJ Questionnaire for Evaluation of the judicial systems (2018 - 2020), available at Questionnaire (coe.int)

enterprises providing utility services), which have recorded the decrease in terms of the number of incoming cases deemed eligible for mediation procedures. There is no available official data for 2019 or 2020.

Conditions for becoming a licenced mediator

Requirements for conducting mediation are listed in Article 31. The mediator may be a person meeting general requirements for employment. In addition to this requirement, the mediator shall meet the following requirements: a) a university degree; b) completed training in mediation according to the programme of the Association or according to another training programmes recognised by the Association; c) entry into the registry of mediators held by the Association. The person who is successful in completing the training programme for mediators shall be issued an appropriate certificate serving as a basis for entry into the registry of mediators in BiH. The Association of Mediators regulate its training curriculum by the Rule on the Training Curriculum for Mediators (Official Gazette of BiH No. 21/06).

It appears that requirements for mediators are not set too high, having considered that the training curriculum consists of 40 hours of theoretical and 16 hours of practical training (Article 2 of the Rule on the Training Curriculum for Mediators).[71] 190 mediators are registered in BiH for providing court-related mediation.[72]

Regulations related to cross-border disputes/mediation with a foreign element

The Law on Mediation Procedure does not include specific provisions on cross-border mediation or mediation with a foreign element, however, Article 1 states that this Law governs the mediation procedure on the territory of BiH. Some authors raised a question regarding the meaning "on the territory of Bosnia and Herzegovina"- is this requirement fulfilled only if a mediation agreement is concluded in BiH; or one or more meetings with parties take place in BiH; or only settlement is concluded in BiH; etc.[73]

Secondly, according to Article 32 of the Law on Mediation Procedure "a foreign citizen, authorised to conduct mediation activities in another jurisdiction may in specific cases, under the condition of reciprocity, conduct the mediation procedure in Bosnia and Herzegovina, provided that he/she obtains a prior approval from the Ministry of Justice and the Association of Mediators of Bosnia and Herzegovina". The foreign nationals who are licensed as mediators outside their jurisdiction of origin can conduct mediation in BiH under the following conditions, which have to be met aggregately: a) they are authorised to conduct the mediation in another economy; b) there is reciprocity; c) they have obtained prior approval by the Ministry of Justice and the Association of Mediators for each individual case. It appears that the specified conditions are set too high, particularly concerning the necessary approval by two authorities.[74]

71 Available at Microsoft Word - Pravilnik o registru medijatora.doc (umbih.ba)

72 The Association of Mediators of Bosnia and Herzegovina produced the statistics on mediations, available at Lista medijatora (umbih.ba)

73 Paths of Mediation in Bosnia and Herzegovina, IFC, 2009, Comments on Law on Mediation Procedure of Bosnia and Herzegovina, Alan Uzelac, pg. 22, available at A25-2MediationBIH.pdf (alanuzelac.from.hr)

74 Ibid, pg. 56

Institutional Mediation through Chambers/Associations of Mediators

Article 1, paragraph 2 of the Law on Mediation Procedure states that, by a special law, mediation activities are transferred to an association or associations according to the procedure established by that law. In that regard, the Law on Transfer of Mediation Affairs to the Association of Mediators was adopted in 2005.[75] This Law regulates the transfer of mediation affairs to the association of mediators and stipulates that mediation affairs shall be performed in accordance with the Law on Mediation Procedures.[76] This Law does not regulate further the role of the Association of Mediators.

The laws and bylaws that allow broad use of mediation before and after the court procedure are: the Law on Mediation Procedure, Law on Transfer of Mediation Affairs to the Association of Mediators, Rule on the Training Curriculum for Mediators, Rule on the Registry of Mediators, Rule on the Liability of the Mediator for Damages Inflicted during Performing of Mediation, Rule on Disciplinary Liability of Mediators, Rule on Fees and Compensation of Mediators' Costs, Rule on the List of Mediators, Rule on Referring to Mediation and Mediator's Code of Ethics as well as Civil Procedure Law and Criminal Procedure Law. Under these laws and rules, the Association of Mediators adopts rules related to mediation affairs, hence there is no control of the state over it.

6.3. Kosovo*

Mediation was introduced as a legal instrument in Kosovo* in 2008 through the Law on Mediation, coinciding with the finalisation of the Directive 2008/52/EC. The Law on Mediation has been completely amended in 2018[77] tackling the gaps identified during implementation. Article 1 underlines that this Law is in compliance with the Directive 2008/52/EC.

The Ministry of Justice (MoJ) regularly publishes the data on cases referred to mediation procedure. The MoJ statistics are introduced based on monthly reports reported by managers of mediation centres, and by references assigned to mediation. In 2019, 4,938 mediations were conducted.[78] According to the MoJ register of mediators, there are 187 certified mediators.[79]

The regulations related to mediation: Regulation on Licencing of Mediators, Regulation on training and certification of mediators, Regulation on the responsibility and disciplinary procedure for mediators, Regulation on registration of mediators, Regulation on the selection of participants in the mediation training, Decision for announcing a public vacancy for the selection of candidates for the mediation training, and Code of conduct for mediators.[80]

Legal provisions on mandatory mediation

The Law on Mediation stipulates mandatory mediation in Article 9, in the following cases:

- When parties submit a statement of claim before the court regarding disputes deriving from family relations, such as alimony, custody, visits, child support and division of marital property, the

75 Available at Microsoft Word - ZAKON O PRENOSU POSLOVA MEDIJACIJE.doc (umbih.ba)

76 Ibid, Jagoda Ribica and Aleksandar Zivanovic, pg. 138

77 The Law on Mediation No. 03/L-057 revised in 2018, Law No. 06/L-009, available at 078A2A69-F572-4826-AC20-61937AADD2FA.pdf (rks-gov.net)

78 Ministry of Justice (rks-gov.net)

79 https://md.rks-gov.net/desk/inc/media/0284D2EC-42BD-43DC-AE73-76C1DC8E74DC.pdf

80 Available at Ministria e Drejtësisë (rks-gov.net)

judge in the preliminary hearing, after the preliminary review, is obliged to inform and direct the parties to a mediation procedure.

- When parties file a statement of claim before a court regarding ownership contests related to rights and obligations deriving from the rights of servitudes and compensation of expropriated properties, the judge in the preliminary hearing, after the preliminary review, is obliged to inform and direct the parties to a mediation procedure.

However, this mandatory model is used only by the courts.[81]

Conditions for becoming a licenced mediator

The person who successfully completes the training for mediators shall be equipped with a certificate, which shall serve as the basis for entry in the registry of mediators. Certification of mediators shall be conducted by the MoJ. Trainings for mediators are organised by the MoJ.[82]

The MoJ licenses mediators who fulfil the following criteria:

- Are certified as a mediator.
- Have not been convicted of a criminal offense.
- Have a high professional reputation and moral integrity.

Regulations related to cross-border disputes/mediation with a foreign element

According to Article 25 of the Law on Mediation, a foreign national can serve as a mediator in Kosovo* on individual cases and under the condition of reciprocity, after receiving prior consent from the MoJ. Reciprocity is assumed to exist, as one party in the proceedings objects the foreign mediator based on lack of reciprocity. If this occurs, the party objecting has the burden of proof for the lack of reciprocity related to the jurisdiction of origin of the mediator.

Despite the fact that the law does not contain a provision related to cross-border mediation, Article 1 underlines that: "This Law is in compliance with the Directive 2008/52/EC of the European Parliament and of the Council dated 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters".

Institutional Mediation through Chambers/Associations of Mediators

Mediation centres began opening in 2012, first in Pejë, Gjilan, Gjakovë dhe Ferizaj, followed by Prishtinë, Prizren and Mitrovicë.[83]

With the aim of sustaining the mediation system in Kosovo*, in 2017 the Judicial Council and the Prosecution appointed officials responsible for dealing with cases which are referred to mediation in courts.[84]

81 Mediation Practicies in WB, Arta Mandro, RCC, December 2020, pg.16

82 Article 23 of the Law on Mediation. Regulation on training and certification of mediators in Article 3 stipulates that in order to be certified as a mediator, the candidate should have finished forty (40) hours of basic training and thirty-six (36) hours of specialised training offered by a trainer or training organisation certified by the Mediation Commission. Each candidate should have completed at least six sessions of supervised mediation by the certified mediator. Supervised mediation session can be simulated mediation or real session of mediation.

83 Ministry of Justice (rks-gov.net)

84 Ibid

In Article 3, point 1.7. the Law on Mediation defines the Chamber of Mediators as an independent non-profit legal person that acts in compliance with this Law and whose statute is adopted by the General Assembly of the Chamber of Mediators and approved by the MoJ. The manner of organisation and functioning shall be regulated by the internal act of the Chamber (Article 21, paragraph 2). The Chamber was established in late 2019 and there is no available data on its work.[85]

6.4. Montenegro

The goals and benefits of mediation are defined by government regulation, strategies and action plans and by professional codes. In September 2019, Montenegro proposed a Programme for Development of ADR for the period 2019-2021,[86] containing many sound proposals. Montenegro adopted the new Law on ADR in July 2020[87], underling that the Law is in alignment with the 2008 Directive. Article 1 of the new Law on ADR explains that this law regulates ADR in civil law relations through mediation, early neutral dispute assessment and other means of ADR, in accordance with internationally accepted legal standards. ADR involves resolving these disputes with the assistance of a neutral third party to the parties before or after the initiation of a court or other proceeding (Article 3), while Article 8 closely defines mediation as a procedure where parties try to resolve, with mutual agreement, their dispute with the assistance of one or more mediators.

The Law on ADR provides a very notable incentive. The costs of mediation in family disputes, and disputes in which one party is Montenegro, are financed from the budget of Montenegro.[88]

According to the Centre for Alternative Dispute Resolution, 150 mediators are registered to provide mediation[89]. In 2019, 1,908[90] mediations were conducted, while in 2020, after legislative amendments, the number increased to 3,567 mediations.

Legal provisions on mandatory mediation

In Article 12, the Law established a mandatory first meeting with a mediator before filling a lawsuit in cases of: small claims cases, disputes for compensation of damages where one party is an insurance company, and other disputes prescribed by other special laws.

The amended CPC, Article 329, also sets a mandatory first meeting with a mediator after filling a lawsuit.[91] Moreover, the court is obliged to issue a decision in order to refer parties to the first meeting with a mediator within 15 days of the submission of the claim response or after the deadline for responding to the claim expires:

a. if one of the parties is the State of Montenegro, city or a municipality;

b. in commercial disputes (except in international, status, and where the party is referred to litigation from bankruptcy)

c. in other cases that are prescribed by a special law.

85 Mediation Practicies in WB, Arta Mandro, RCC, December 2020, pg.28

86 http://www.posredovanje.me/me/publikacije/strateska-dokumenta/file/146-program-razvoja-alternativnog-rjesavanja-sporova-2019-2021?tmpl=component

87 Available at Zakon-o-alternativnom-rjeavanju-sporova.pdf (centarzaars.me)

88 Article 27, Paragraph 2 of the Law on ADR

89 Izvještaj_o_radu_Centra_2020.g.pdf (centarzaars.me)

90 Izvjestaj-o-radu-Centra-za-posredovanje-za-2019.godinu.pdf (centarzaars.me)

91 Available at 2191-13762-23-1-19-10-5.pdf (skupstina.me)

No special appeal is allowed against this decision.

The amended CPC includes a provision which obliges the court to introduce parties to the possibility of resolving their dispute through mediation, or any other ADR method on the preparatory or first hearing (Article 329, Paragraph 1). The court can recommend mediation during court proceeding if it finds that the dispute could be resolved in mediation (Article 329, Paragraph 2). The court can issue a decision in order to refer parties to the first meeting with a mediator, if it finds it justified, until the final termination of proceedings (Article 329, Paragraph 3). The amended Family Law[92], in Article 326, stipulates a mandatory first meeting with a mediator after filling a lawsuit in family disputes on child custody after divorce and the division of matrimonial assets.

In the case of a mandatory meeting with a mediator, the mediator is appointed by the Centre for Mediation from the list of mediators (Article 12, Paragraph 2 of the Law on ADR). However, the referral to a meeting with the mediator does not preclude the scheduling of a preparatory hearing or a first hearing for the main hearing. The court shall not refer the parties to a meeting with the mediator in the event that the parties provide evidence that they have attempted to resolve the dispute through mediation or otherwise amicably before initiating court proceedings.[93]

Regulations related to cross-border disputes/mediation with a foreign element

The Law on ADR, Articles 28 and 29, stipulates mediation with an international element and mediation in cross-border disputes.

Article 28 states that mediation with an international element is mediation in which one of the parties at the time of the commencement of the mediation procedure has a permanent or habitual residence, in the sense of the law governing private international law, that is seated outside Montenegro. The provisions of this Law shall apply to the mediation referred to in paragraph 1 of this Article, unless the parties have agreed that the proceedings are to be conducted in accordance with the regulations of the other State and with the participation of mediators who are authorised to conduct mediation in accordance with the other State regulations.

If mediation with an international element is conducted in accordance with the regulations of another jurisdiction, the concluded settlement acquires the status of an executive document in accordance with this Llaw or provisions of the applicable law of another jurisdiction, subject to reciprocity.

According to Article 29 of the Law on ADR, mediation in the case of a cross-border dispute is mediation in which one of the parties at the time of the commencement of the mediation procedure has a permanent or habitual residence in an EU Member State. In the procedure referred to in paragraph 1 of this Article, the mediator shall, during the mediation, take into account the provisions of EU acts relating to civil and commercial mediation disputes. This means that this Article only relates to mediation in cross-border disputes when one of the parties has EU residence, and this Article shall apply from the date of Montenegro's EU accession. The citizen of an EU Member State may be a mediator or evaluator of a dispute in accordance with this Law from the day of Montenegro's accession to the EU.

92 Available at 2190-13760-23-3-19-8-4.pdf (skupstina.me)

93 Law on ADR, Article 14, paragraph 6

Institutional Mediation through Chambers/Associations of Mediators

All work related to mediation, early neutral assessment of disputes and other ADR methods, as well as encouraging and improving the availability of ADR is performed by the Centre for Alternative Dispute Resolution (the Centre), as a holder of public authority (Article 4).

The Centre was established in 2012 by a decision of the Government of Montenegro, based on the Law on Mediation, adopted in 2005 and amended in 2012. The Centre was established as a separate organisation, with the status of a legal entity for the purpose of performing professional and administrative tasks related to mediation. With the adoption of the Law on ADR in July 2020, the Centre was transformed into the Centre for Alternative Dispute Resolution. The Centre may have organisational units in other places in Montenegro and is predominately financed by the State budget and its own sources.[94]

In Article 12, the Law established obligation for the party to contact the Centre regarding the mandatory first meeting with a mediator before filling a lawsuit in cases of: small claims cases, disputes for compensation of damages where one party is an insurance company, and other disputes prescribed by other special laws.

Conditions for becoming a licenced mediator

The conditions for issuing a license to work as a mediator are set out in Article 39 of the Law on ADR. The license for the work of a mediator can be issued to the person who is a Montenegrin citizen or a citizen of an EU Member State.

The training for mediators shall be conducted by the Centre, and the Centre shall issue a certificate on the completed training. The training programme and the form of certificate on completed training are prescribed by the Ministry. The Rulebook on the basic training programme for mediators envisages 40 training hours divided across 5 days.[95]

The citizen of an EU Member State can be a mediator in accordance with this Law from the day of Montenegro's accession to the EU (Article 77).

6.5. North Macedonia

The general purpose of mediation, as described in Article 2 of the Law on Mediation[96], is to conclude a dispute by a mutually acceptable solution for the parties. One of the strategic directions of the government, set in the Strategy for Reform of the Judicial Sector for the period 2017-2022[97] is to promote the benefits of mediation in accordance with the EC Directive 2008 on Mediation in Civil and Commercial Disputes and the Directive on Mediation in Consumer Disputes.

Mediation is allowed in property and legal disputes, family disputes, workplace disputes, trade disputes, consumer disputes, insurance disputes, disputes in the field of education, environmental pro-

94 O centru – Centar za alternativno rješavanje sporova (centarzaars.me)

95 Pravilnik_o_programu_obuke_za_posrednike.pdf (centarzaars.me)

96 Law on Mediation of the Republic of [North] Macedonia (Official Gazette of the Republic of [North] Macedonia no. 188/13, 148/15, 192/15 and 55/16), available at Закон за медијација („Службен весник на Република Македонија" бр (xsoftstatic.com)

97 Strategija i akciski plan_ANG-web.pdf (pravda.gov.mk), pg. 17

tection, disputes regarding discrimination and other disputed relations where mediation is appropriate to the nature of the disputes and can help to resolve them. Mediation is also allowed in criminal cases, if its application is not excluded by a special law (Article 1 of the Law on Mediation).

If the mediation procedure is conducted before the court procedure begins, and the parties want the agreement to have the force of an enforcement document, the content of the agreement in written form, signed by the parties, is solemnised by a notary public in accordance with the Law (Article 22, Paragraph 1). If the mediation procedure is conducted after a referral to the court, the mediator is obliged to inform the court within three working days of completion of the mediation procedure on the manner of completion of the procedure. The mediator is obliged to submit the signed agreement to the court, as the basis for court settlement, within three working days of the signing of the agreement, reached as a result of referral to mediation during the termination of court proceedings (Article 22, Paragraph 2).

The Law on Mediation, in Article 28, states that "for the purpose of development of mediation in the Republic of [North] Macedonia, the State shall subsidise part of mediation costs" following conditions listed in that Article. Article 30 envisages exemption from court fees "if in the court procedure, before the first hearing for the main hearing, the parties initiate a mediation procedure, they shall not pay the court fees laid down by the Law."

According to the data from the CEPEJ Questionnaire for Evaluation of the Judicial Systems (2018 - 2020) for North Macedonia, 293 court related mediations were conducted, and 44 mediators are registered for providing court-related mediation. According to an interview with the President of the Chamber of Mediators of the Republic of North Macedonia, approximately 1,600 mediations were conducted in 2019.

Arbitration is also available in the legal provisions as an alternative measure of judicial procedures in the field of commercial law. As part of the Economic Chamber, the Permanent Court of Arbitration was established where business partners may settle mutual business-related disputes, if they have foreseen that possibility for dispute resolution in their contracts. Arbitration in North Macedonia has existed since 1993. The value of disputes resolved through arbitration varies from a few thousand to several million Euros.[98]

Legal provisions on mandatory mediation

According to the data from the CEPEJ Questionnaire for Evaluation of the Judicial Systems (2018 - 2020) for North Macedonia[99], the judicial system provides mandatory court-related mediation procedures for small commercial cases up to EUR 15,000. More specifically, according to the Law on Civil Procedure[100]: "In the commercial disputes for financial claim the value of which does not surpass the amount of 1,000,000 denars, and upon which a lawsuit in front of a court is initiated, the parties are obliged, before submitting the lawsuit, to try and solve the dispute through mediation. When submitting the lawsuit, the plaintiff is due to show evidence given by a mediator that the attempt to solve the dispute through mediation failed. The lawsuit that does not have attached evidence to it, as stated in Article (2) of this Article, will be rejected"[101].

98 Available at ПОСТОЈАН ИЗБРАН СУД - АРБИТРАЖА (mchamber.mk)

99 CEPEJ Questionnaire for Evaluation of the judicial systems (2018 - 2020) for North Macedonia, pg.97, available at Questionnaire (coe.int)

100 Official Gazette of the Republic of [North] Macedonia no. 124/15, Article 461

101 Available at Associations in the Chamber (mchamber.mk)

Article 272 of the Law on Civil Procedure regulates the institutional cooperation of judges and mediators: "The court is obliged in cases where mediation is allowed, along with an invitation to the preparatory hearing to the parties, to submit a written indication that the dispute can be resolved through mediation. Along with the invitation to the preparatory hearing the parties will be required to bring all documents that serve as evidence, and any items to be considered in court. In the invitation, the court shall instruct the parties about the consequences of not appearing at the preparatory hearing, as well as that they are required to present all facts on which they base their allegations, to present all the evidence that prove the facts, to submit all documents and items they intend to use as evidence and to state whether they agree to settle the dispute in mediation procedure".[102]

Conditions for becoming a licenced mediator

According to Article 46 of the Law on Mediation, a mediator shall be a capable person who holds a license to perform mediation. A license for mediation shall be issued to a person who has passed an exam to test the theoretical knowledge and practical skills of mediation in front of the Commission for ensuring, monitoring and evaluating the quality of mediation work[103], and shall present a contract for damage liability insurance.

The Law on Mediation regulates in detail both the programme and examination for mediators. The North Macedonia sets higher standard for mediators in comparison with other WB economies.[104] The MoJ Strategy for Reform of the Judicial Sector for the period 2017-2022 emphasised that there is still a lack of licenced mediators, primarily due to the complex and inadequate exam for mediators.[105]

Regulations related to cross-border disputes/mediation with a foreign element

The Law on Mediation, Article 4, recognises international mediation, which in the sense of this Law is mediation in disputed relations with a foreign element, and in particular:

1. if the parties at the time of reaching an agreement on mediation have a domicile or seat in another jurisdiction;
2. if any of the obligations from the obligation agreement between the parties is to be performed in another jurisdiction; or
3. if the party having a disputed relationship suffers the consequences of the disputed relationship in another jurisdiction.

When the mediation in the disputed relation referred to in paragraph 1 of Article 4 is conducted in North of Macedonia, the provisions of this Law shall apply, unless the parties have agreed otherwise in writing.

102 Mediation Practices in WB, Arta Mandro, RCC, December 2020, pg.26

103 Official Gazette of Republic of North Macedonia no. 188 of 31 December 2013

104 The mediator examination can be taken by people who have submitted an application for examination to the Commission for Examination along with a proof of : a) university education; b) completed training by an accredited training programme for mediators of at least 70 hours in the Republic of North Macedonia or abroad , or a decision adopted by the Commission recognising the proper training completed abroad; c) at least three years of work experience after graduation ; d) followed at least four mediation procedures implemented by the mediator for which the mediators certificate is issued and confirmed with an certificate from the Records Registry of procedures for mediation for the appropriate procedures; e) a psychological test shall be conducted and a test of integrity issued by a licensed professional; f) Certificate of Citizenship of the Republic of North Macedonia; and g) at least five references from people who know the applicant professionally (Article 47).

105 Strategija i akciski plan_ANG-web.pdf (pravda.gov.mk), pg. 17

Institutional Mediation through Chambers/Associations of Mediators

The licensed mediators registered in the Directory of Mediators must be organised in the Chamber of Mediators (Article 32, Paragraph 1).

The Chamber has the capacity of a legal entity. The Chamber's role is to protect the reputation and honour of the mediators and ensure that they conduct mediation in accordance with the principles established by the Law and the Code of Ethics of Mediators, as well as ensure the promotion and advancement of mediation in North Macedonia (Article 32, Paragraph 2).

The Chamber is entrusted with the following public authorisations: keeping a Directory of Mediators; issuing certificates for facts for which it keeps records; and determining the membership fee amount for Chamber members (Article 33). The supervision of Chamber's work, relevant to the implementation of the provisions of the Law, is performed by the MoJ (Article 38). It can be said that the Chamber has the role of a mediation centre.[106]

6.6. Serbia

The Law on Mediation in Dispute Resolution[107] is aimed at harmonisation in accordance with the EU legal framework and international standards of the CoE and UNthrough explicit reference to these standards in Article 4 of the Law.

The Law on Mediation in Dispute Resolution 2014 encourages the use of mediation in a broader range of disputes so that, compared to the 2005 Law, mediation can be applied in environmental and consumer disputes, as well as in criminal and misdemeanour matters regarding property claims and damage compensation.

The MoJ statistics show that greater demand for mediation must be made in order to achieve the objective of the 2008 Mediation Directive. Out of 411 mediators who filed their Annual Reports to the MoJ for 2019, 124 stated that they conducted meditation in 2019, 34 of which conducted mediation in cooperation with a co-mediator. Based on these reports,569 agreements to mediate were concluded in 2019 (agreements to enter into mediation), while 403 cases successfully finished with a settlement agreement. By 30 December 2019, the MoJ had registered 1,349 mediators: 277 lawyer-mediators (1/4th of all mediators), 29 judges, 6 judicial associates, 10 enforcement officers, 832 graduate lawyers and two Ombudspersons. With respect to training, 17 organisations received licenses for conducting training for mediators, but only 12 organisations conducted training for a total of 2,941 participants.[108]

In 2017, the Supreme Court of Cassation, High Judicial Council, and MoJ issued joint "Guidelines for enhancing the use of mediation in courts" through adoption of systematic measures which would substantially support mediation as an ADR. The Guidelines emphasised that in accordance with "Article 9 Paragraph 2 of the Law on Mediation in dispute resolution, the court is obliged to provide all necessary information to the parties in dispute about the possibilities of mediation, which can also be done by referring the parties to the mediator; however, these provisions were essentially never applied. The courts should, in the early phases of proceedings, solve disputes by referring the parties to mediation or by encouraging them to reach a court settlement, to alleviate the burden on the court and allow for more efficient procedure in other cases where amicable resolution is not possible."[109]

The Law on Amendments to the Law on Court Fees[110] applicable from 1 January 2019 encourages parties to resolve their disputes by amicable means, through mediation, negotiated settlement, court settlement or any other amicable way. *The parties shall be exempted from paying the fee if the civil proceedings are completed by the end of the first session for the main hearing by mediation, court settlement, recognition of a claim or renunciation of the claim.*[111]

Legal provisions on mandatory mediation

In Serbia, regulations do not envisage any area of disputable relations or proceeding in which mediation is a precondition for court or other proceeding, and therefore in practical terms, mediation in Serbia is absolutely voluntary. However, the Law explicitly provides for the possibility of introducing special mediation by means of other laws as a condition for conducting court or other proceedings. In addition, Article 9 provides for the obligation of a court or other body before which the proceeding is conducted to introduce the parties to the possibility of a mediation procedure.

Additionally, judges do not have an option to sanction unjustified refusal of mediation through decision on court fees, which in combination with a lack of information by the parties (and other factors presented in the text below) lead to few mediation cases. Judges are not authorised to "order" mediation. In accordance with the voluntary principle, judges in Serbia can only "recommend", meaning encourage parties in a court proceeding to try to resolve a dispute by means of mediation. Moreover, they are required to do so in accordance with the Law on Civil Procedure, but judges do not have the option to sanction the decision of the parties on whether to accept this recommendation or not. More specifically, according to Article 11, the court shall direct the parties to mediation or to an informative hearing for mediation or instruct the parties on the option of pre-trial settlement of dispute by mediation or through another amicable manner; and according to Article 305, paragraph 3, the court shall inform the parties of their right to have the procedure performed through mediation.

Conditions for becoming a licenced mediator

Article 33 of the Law on Mediation in Dispute Resolution establishes criteria for a mediator who shall be a natural person (an individual with legal capacity) that must fulfil specific requirements.[112]

In certain areas, special requirements for conducting mediation may be prescribed by law. In disputes with a foreign element, a mediator can be a foreign citizen, if he/she is authorised to perform mediation in another economy, subject to reciprocity. Judges may conduct mediation solely outside working hours and free of charge.

The Rulebook on the basic training for mediators[113] stipulates the training curricula and duration. The basic programme contains both theoretical and practical training components. The programme is conducted over the course of 5 days, including five 45-minute classes each day. This means that the total duration of the basic training of mediators is slightly less than 19 hours. The conditions for

106 Statue of the Chamber of Mediators, available at statut.pdf (xsoftstatic.com)

107 Law on Mediation in Dispute Resolution, Official Gazette no. 55/2014, available at Zakon o posredovanju u rešavanju sporova (paragraf.rs)

108 Revidirani AP23 2207.pdf (mpravde.gov.rs)

109 Instructions for enhancing the use of mediation_0_1.pdf (sud.rs)

110 Official Gazette of Republic of Serbia, no. 95/2018

111 Article 9, paragraph 6 of the Law on Court Fees

112 have legal capacity; be citizen of Serbia; have completed the basic mediation training; have university degree; that no measure of prohibition of performance of his/her profession, activity or duty has been imposed against him/her in accordance with the law; have a valid mediation licence; be listed in the Register of Mediators.

113 Official Gazette 146/2014

becoming a training provider are set in the Rulebook on detailed conditions and procedure for issuing a licence for conducting basic and specialised training for mediators and training supervision.[114] The Rulebook sets conditions for facilities and trainers/staff for performing theoretical and practical training. Trainers are required to be listed in the Register of Mediators or meet the conditions for registration in the Register of Mediators prescribed by the Law on Mediation in Dispute Resolution, and have acquired knowledge in the field of mediation in accordance with the basic and specialised programme for mediators.

Institutional Mediation through Chambers/Associations of Mediators

The Serbian Law on Mediation does not establish a legal entity which will have a main role in institutional mediation, such as a chamber of mediators or association. Moreover, the Law does not stipulate the existence of mediation centres responsible for the organisation of mediation. However, there are several associations of mediators based on membership in Serbia.

Regulations related to cross-border disputes/mediation with a foreign element

Serbian Law recognises international mediation and mediation in cross-border disputes.

According to Article 5, international mediation is mediation in dispute with a foreign element, and especially:

1. if the parties at the time of reaching an agreement to mediate have permanent residence or a registered office in different states;
2. if the jurisdiction in which the parties have permanent residence or place of business is not the state where an essential part of the obligations resulting from the business relationship should be enforced, nor the state with which the subject matter of the dispute is most closely connected.

Provisions of the Law shall apply when mediation in disputes, referred to in paragraph 1 of Article 5, is carried out in Serbia, unless the parties have agreed otherwise.

According to Article 6, a cross-border dispute is a dispute in which at least one of the parties is domiciled or has habitual residence in an EU Member State, while the other party is not, on the date on which:

- the parties agree to use mediation after the dispute has arisen;
- mediation is ordered by a court;
- an obligation to use mediation arises under national law; or
- a court where a petition was filed has referred the parties to mediation.

A cross-border dispute shall also be a dispute where, after the mediation of the dispute has been settled, legal proceedings or arbitration have been initiated between the same parties in an EU Member State, other than those where the parties had habitual residence on dates referred to above.

In deciding whether the party is domiciled on the territory of Serbia where a court proceeding has been initiated, the court will apply the law of Serbia. If a party is not domiciled in Serbia, and in order to determine whether a party is domiciled in another jurisdiction, the court shall apply the law of that jurisdiction. A company or other legal entity has its registered office in the place where it has its registered seat, the seat of the management body or the main place of business. In order to determine whether a company has its registered office in the EU Member State where the court proceedings have been conducted, the court shall apply the law applicable to the resolution of conflicts of laws (Article 7).

Regarding enforcement of an agreement reached through mediation in a cross-border dispute, Article 8 stipulates that if a Member State, in accordance with its regulations, guarantees the possibility of a party or one of them, with the express consent of the other party, to reach a written agreement through mediation in a cross-border agreement, the court in Serbia will recognise and execute such agreement.

According to the Law, in these disputes, a mediator may also be a foreign citizen if he/she is certified to carry out mediation procedure in another jurisdiction, subject to reciprocity, which was not envisaged by the previous Law.[115] However, this Article and articles related to cross-border disputes shall apply from the date of Serbia's accession to the EU.[116]

114 Official Gazette 55/2014 and 1/2021

115 Article 33 Paragraph 4 of the Law (2014)

116 Article 51 of the Law on Mediation in Dispute Resolution

7. RESULTS OF THE REGIONAL MEDIATION SURVEY (BASED ON THE INTERVIEWS WITH LOCAL EXPERTS AND THE FEEDBACK FROM THE QUESTIONNAIRE DISTRIBUTED AMONG WB6 MEDIATORS, LAWYERS, JUDGES, PUBLIC AND PRIVATE ENTITIES, NGOS, ACADEMICS, AND OTHER RELEVANT STAKEHOLDERS)

7.1. Interviews with local experts

7.1.1. Savings in time and cost of the systematic approach to use mediation before court

An examination of the potential savings in costs and time in resolving a commercial dispute by mediation is necessary and important in light of the objective of the present study.

In order to compare the time and cost of litigation and mediation among the six different Western Balkan economies, we have used the methodology developed by the ADR Centre in the context of the study "*Quantifying the cost of not using mediation – a data analysis*"[117], commissioned by the Directorate General for Internal Policies Policy Department: Citizens' Rights and Constitutional Affairs of the European Parliament.

The methodology is based on a comparison of the estimated **time and the cost of the court process and mediation process** on the following commercial dispute scenario, simplified and adapted from the World Bank Doing Business Index 2021[118].

117 ADR Centre, Quantifying the cost of not using mediation – a data analysis (2011) https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf

118 Enforcement Contract index of the Doing Business 2020 report developed by the World Bank https://www.doingbusiness.org/en/methodology/enforcing-contracts

The commercial dispute scenario

A seller sells goods to a Buyer who alleges that the goods are of inadequate quality and refuses to pay. The Seller, however, insists that the goods are of adequate quality. Moreover, because the goods were custom-made for the Buyer, the Seller cannot sell them to anyone else. The Seller therefore demands full payment and threatens to sue the Buyer. The value of the dispute equals 200% of the economy's income per capita as indicated in the table.

One-step approach: only litigation

A One-step approach is when businesses proceed directly to the courts to solve a commercial dispute. This approach is one-step in the sense that it does not utilise mediation to resolve the dispute before attempting litigation. For this approach, we took the cost and time estimated by World Bank experts on the commercial dispute scenario. Doing Business 2020 data represents the World Bank experts' estimate of the time in days it took to resolve a dispute and the cost to litigants to resolve the dispute in the WB6 economies. Time is recorded in calendar days, beginning from the moment the plaintiff files the lawsuit in court until enforcement of the judgment. The total cost paid by the plaintiff includes court costs, enforcement costs, and the average cost of attorney's fees converted into Euro.

The data gathered by the World Bank is remarkable in the range of time and costs. The average length of the judicial proceeding is 542 days, ranging from 330 days in Kosovo* to 634 days in North Macedonia. The average cost of the judicial proceedings is € 3.183, ranging between € 2.441 in Kosovo* and € 3.790 in Albania.

Two-step approach: mediation-then-litigation

Using the same dispute scenario, we asked local mediation experts to estimate time and cost of mediation procedure the parties initiate, before going to court, with the most popular mediation provider in the capital city. The time was estimated from the day of the request to mediation to its conclusion. The total costs include both the mediation fee and the lawyer's fee for assisting during the mediation process.

The average length of the mediation procedure is 49 days, ranging from 30 days in Albania to 90 days in Kosovo*. The average cost of mediation is € 566, ranging between € 237 in Montenegro and € 1.070 in Albania.[119]

	Claim value (200% of income per capita)	**Litigation in Court**[119]		**Mediation**		**Savings**	
		Time in days	**Total cost in litigation**	**Time in days**	**Total cost in mediation**	**Time**	**Costs**
Albania	€ 8.875	525	€ 3.790	30	€ 1.070	495	€ 2.720
Bosnia and Herzegovina	€ 9.204	595	€ 3.313	20	€ 400	575	€ 2.913
Kosovo*	€ 7.097	330	€ 2.441	90	€ 900	240	€ 1.541
Montenegro	€ 13.898	545	€ 3.572	50	€ 237	495	€ 3.335

119 Data from the Enforcement Contract index of the Doing Business 2020 report developed by the World Bank https://www.doingbusiness.org/en/methodology/enforcing-contracts

	Claim value (200% of income per capita)	Litigation in Court[119]		Mediation		Savings	
		Time in days	Total cost in litigation	Time in days	Total cost in mediation	Time	Costs
North Macedonia	€ 9.321	634	€ 2.666	60	€ 480	574	€ 2.186
Serbia	€ 10.098	622	€ 3.313	45	€ 307	577	€ 3.006
Average		**542**	**€ 3.183**	**49**	**€ 566**	**493**	**€ 2.617**

Calculation of the Two-step Approach

It would be too simplistic to calculate the savings by the difference between the costs and time in court and in mediation. For a more accurate calculation of the time and costs based on a systematic use of the two-step approach for an entire economy, the average success rate needs to be taken into account in order to consider the extra time and costs of the mediation failed. In this case, with a certain estimated mediation success rate, the formula is the length of time (in days) it takes to use mediation, multiplied by the percentage of success in mediation, plus the length of time it takes to use mediation and then proceed to court multiplied by the percentage of failure in mediation.[120] In the same manner, to calculate the weighted average costs for an entire economy to resolve a dispute using a certain estimated mediation success rate, the formula is the cost (in Euros) to use mediation, multiplied by the percentage of success in mediation plus the costs incurred to use mediation and then proceed to court multiplied by the percentage of failure in mediation.[121]

If we apply the calculation described above both on time and costs, we see that the Two-step approach results are much improved from the One-step approach results, as the additional step of attempting mediation lowers the time spent and increases the costs saved. Using a baseline of 100 disputes, the table below considers the first, more optimistic scenario of a 75% success rate of mediation and a 25% failure rate of mediation, after which the disputes proceeded to court. The second scenario is more conservative, with a 50% mediation success rate.

By applying the formulas described above, the following table shows the time and costs in both the optimistic and conservative scenarios of the Two-step approach.

Two-step approach: mediation-then-court	Optimistic scenario with 75% success rate		Conservative scenario with 50% success rate	
	Average duration in time (days)	Average cost	Average duration in time (days)	Average cost
Albania	154	€ 1.750	278	€ 2.430
Bosnia and Herzegovina	164	€ 1.128	308	€ 1.857
Kosovo*	150	€ 1.285	210	€ 1.671
Montenegro	174	€ 1.071	298	€ 1.905
North Macedonia	204	€ 1.027	347	€ 1.573
Serbia	189	€ 1.059	334	€ 1.810
Average	**172**	**€ 1.220**	**296**	**€ 1.875**

Further, by subtracting the time and costs of the Two-step approach from the One-step approach, the following table shows the average time and cost savings in absolute terms and percentages.

120 Duration in time formula = (Mediation time x Mediation success rate) + (Litigation time x Mediation failure rate)

121 Duration in costs formula = (Mediation costs x Mediation success rate) + (Litigation costs x Mediation failure rate)

On average, in the six Western Balkan economies the savings achieved with 75% mediation success rate would be 370 days (542:172), representing a 68% decrease in time compared with litigation and € 1.963 in cost savings, equalling to 62% savings compared with litigation costs. In a more conservative scenario of 50% mediation success rate, the average time saving would be of 246 days (542:296), which equals to 45% decrease in time, while cost savings would be € 1.308, which equals to 41% decrease in costs.

Two-step approach: mediation-then-court	Optimistic scenario with 75% success rate				Conservative scenario with 50% success rate			
	Savings in time (days)	in %	Saving in cost	in %	Savings in time (days)	In %	Saving in cost	In %
Albania	371	71%	€ 2.040	54%	247	47%	€ 1.360	36%
Bosnia and Herzegovina	431	72%	€ 2.185	66%	287	48%	€ 1.456	44%
Kosovo*	180	55%	€ 1.156	47%	120	36%	€ 770	32%
Montenegro	371	68%	€ 2.501	70%	247	45%	€ 1.667	47%
North Macedonia	430	68%	€ 1.639	61%	287	45%	€ 1.093	41%
Serbia	433	70%	€ 2.254	68%	288	46%	€ 1.503	45%
Average	**370**	**68%**	**€ 1.963**	**62%**	**246**	**45%**	**€ 1.308**	**41%**

Finally, achieving a 75% or 50% success rate of mediation would be a very high achievement. However, it is important to note that mediation is a cost and time-effective dispute resolution mechanism at almost every level of success rate. What is the success rate percentage at which mediation is not a financially viable or time-saving option?

Applying the calculation described above and using a progressively lower success rate of mediation to find the savings break-even point, the data shows that the break-even point would be a mediation success rate less than 5% with a 95% failure rate.

7.2. Questionnaire for WB6 stakeholders

The questionnaire was distributed to stakeholders in the WB6 economies as part of the RCC's efforts to provide a comprehensive regional analysis of cross-border mediation in civil and commercial matters, and its potential for creating an efficient dispute settlement mechanism envisaged by the WB6 CRM 2021-2024 Action Plan.

The aim of the questionnaire was to obtain comprehensive feedback from as many WB6 stakeholders as practically possible on the current state of mediation and potential of certain proposed measures to improve cross-border mediation for commercial disputes in the region.

The questionnaire had two parts of 14 questions each. To enable easy access for the targeted participants, the questionnaire was prepared for online use, via Google, and was distributed through various channels: national chambers and associations of mediators, chambers of commerce, bar associations, individual mailing lists, and social networks.

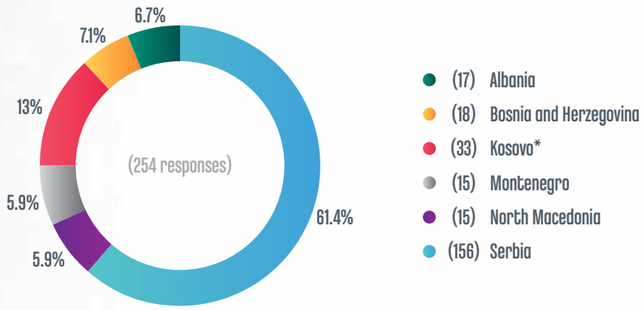
In total, 254 participants completed the questionnaire. Although the survey was anonymous, the respondents had the option of leaving their contact details, and 129 of them choose to do so. Although only the first two questions of Part I of the questionnaire were required (mandatory), a great major-

ity of the respondents completed the entire questionnaire (except for one question specifically targeting the mediation practitioners). Hence, a number of responses are indicated for each question.

The results and statistics of the survey are presented below.

PART I

1. Where are you from?



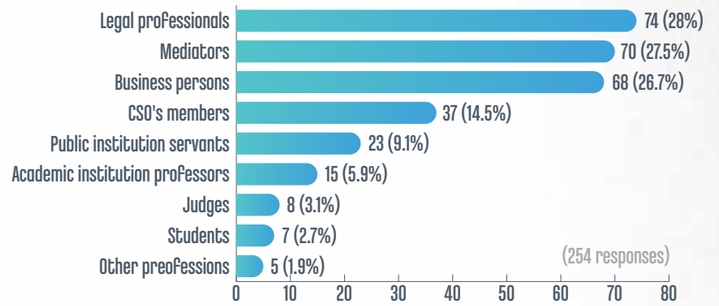
2. Please indicate your profession?

By occupation or profession, the questionnaire was completed by:

- 74 legal professionals (practicing attorneys, lawyers, law trainees, etc.) (28.3%)
- 70 mediators (27.5%)[122]
- 68 businesspersons (company managers, economists, business consultants, etc.) (26.7%)
- 37 civil society organisation members (14.5%)
- 23 public institution servants (9.1%)
- 15 academic institution professors, teachers and staff (5.9%)
- 8 judges (3.1%)
- 7 students (2.7%)
- 5 other professions (1.9%)

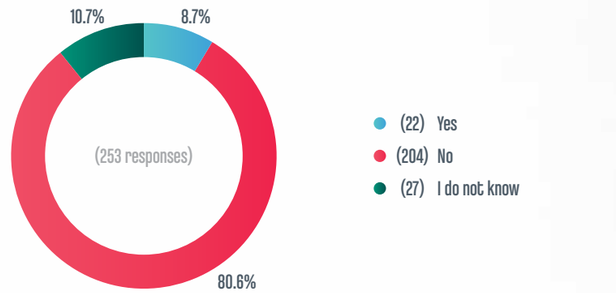
A fairly even distribution of the surveyed occupations guarantees a balanced view across range of the professions most commonly involved in the mediation process.

122 Practicing mediators had an option of selecting another profession, therefore the total number of all selected professions is 307



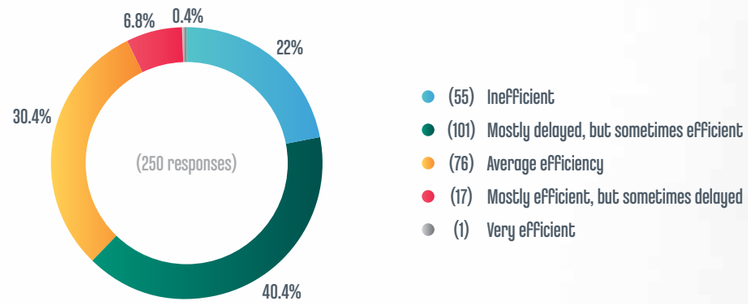
3. Do you think that a 'balanced relationship between mediation and judicial proceedings' exists (in terms of the total number of disputes mediated, compared to the number of disputes litigated, annually, in your economy)?

As many as 80% of the survey participants feel that a balanced relationship between mediation and judicial proceedings has not been achieved.



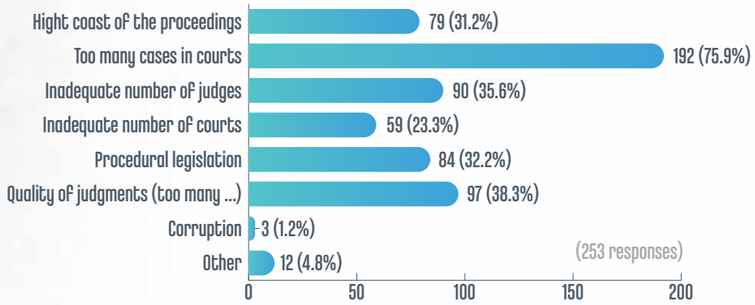
4. How would you assess the efficiency of commercial courts in your economy?

About 40% of the survey participants believe that commercial courts in the Western Balkans are mostly delayed, 30% think that their efficiency is average, while 22% believe that the courts are mostly efficient.



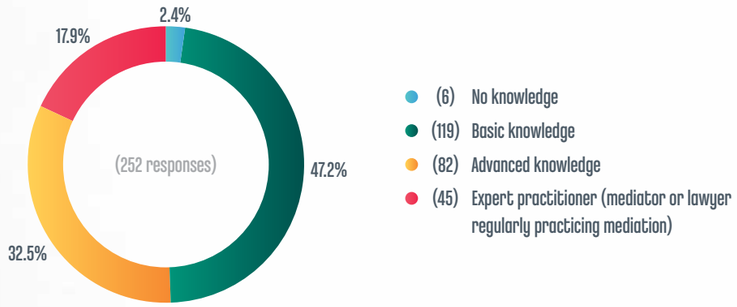
5. What do you think is the biggest obstacle to achieving greater judicial efficiency in your economy?

As many as 192 survey participants (76%) believe that the biggest obstacle to achieving greater court efficiency is **too many court cases**. About 36% of the participants feel that the **number of judges is inadequate**, while 33% believe that the main obstacle is **procedural legislation**. For some 38% of participants a **low quality of judgements (too many appeals)** is a contributing factor, while about 31% feel that one of the obstacles to a higher efficiency is the **high cost of judicial proceedings**.



6. How would you assess your own level of knowledge about mediation?

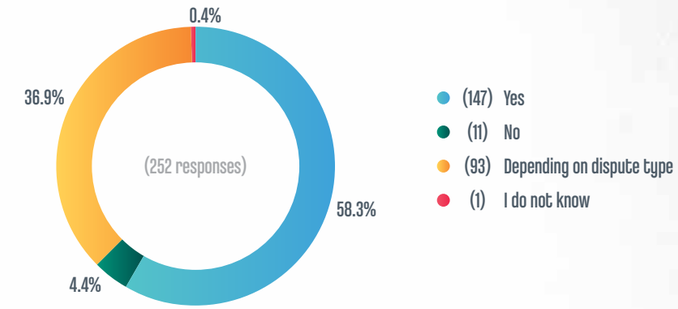
About 50% of the surveyed participants declared none (2.6%) or only basic knowledge of mediation (47.2), while some 33% feel that they are advanced. Interestingly, only about 18% of the participants stated that they have practical experience either as mediators or lawyers in mediation.



This number testifies to a relatively low number of mediation cases practiced throughout the region. Additional interviews revealed that there are a number of trained mediators without any practical experience among those who declared advanced knowledge.

7. Do you think that some disputes should be automatically referred to mediation before accessing the courts?

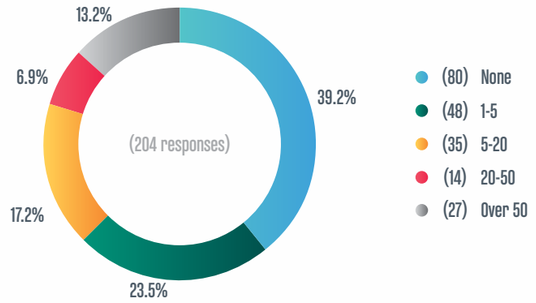
Around 58% of the surveyed participants believe that some disputes should be automatically referred to mediation before going to the court, while 37% feel that it should depend on a particular dispute. However, total of 95% of respondents stated that in certain cases disputes should be referred to mediation before going to the court.



8. If you are a mediation practitioner, how many mediations did you conduct/participate in?

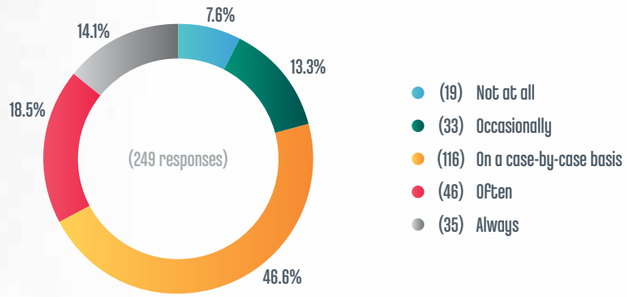
A total of 39% of surveyed participants stated that they did not have an opportunity to participate in mediation (either as a mediator or a lawyer). Another 24% of the participants have conducted/participated in 1 to 5 mediations, 17% have conducted/participated in 5 to 20 mediations, 7% have conducted/participated in 20 to 50 mediations, while 13% have conducted/participated in over 50 mediations.

It should be noted that 204 respondents provided replies to this question, while 50 chose to skip this question, which indicates that they did not have an opportunity to participate in mediation.



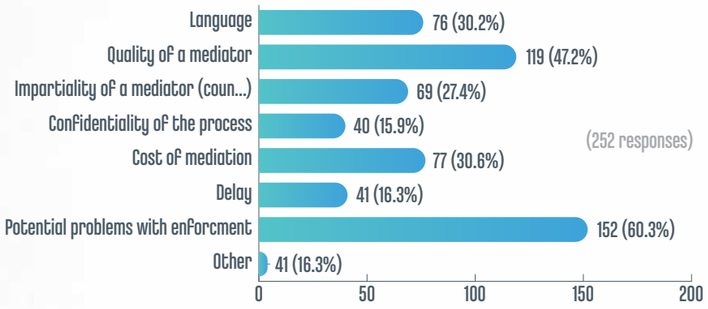
9. How likely would you be to attempt mediation before the court to resolve a regional cross-border commercial dispute?

About 33% of the survey respondents stated that they would attempt mediation before going to court often (19%) or always (14%), while 22% would do so occasionally, or not at all. Given that another 47% of respondents stated that they would attempt mediation before going to court on a case-by-case basis, it can be concluded that almost 83% of the participants would in some cases consider mediation before initiating a court process.



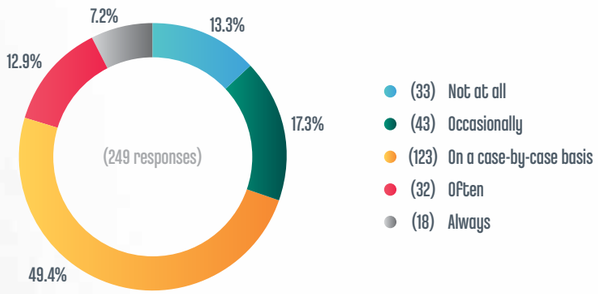
10. What would be your main concern when considering using mediation in a regional cross-border commercial dispute?

When considering mediation for a cross-border commercial dispute most respondents (60%) would be concerned with potential problems with enforcement, and 47% would be worried by the quality of a mediator. The cost of mediation may be a concern for some 31% of respondents, language for 30% of the respondents, impartiality (economy of origin) of a mediator for some 27% of respondents, while the delay might be a relevant concern for some 16% of respondents.



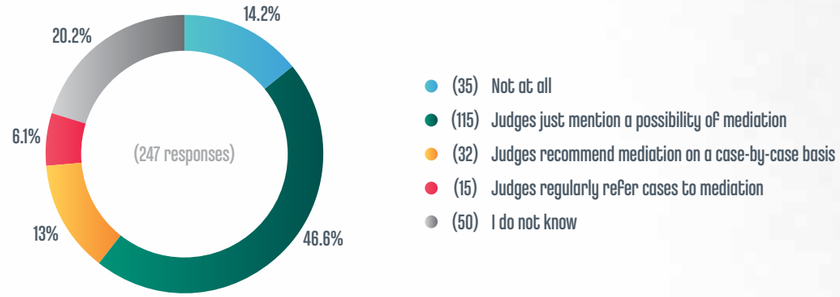
11. How likely would you be to consider "online mediation" to resolve a regional cross-border commercial dispute?

When it comes to "online" mediation, the responses are similar to those in Question 9. About 20% of respondents would consider online mediation often or always, and 50% on a case-by case basis. Some 30% of respondents would consider online mediation only occasionally or never.



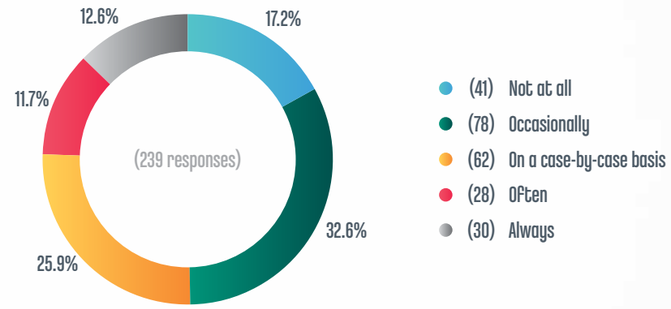
12. To what extent do the commercial courts refer cases to mediation in your economy?

Almost 47% of the respondents feel that judges in commercial courts usually only mention a possibility of mediation during the court proceedings. A total of 13% feel that judges recommend mediation on a case-by-case basis, while only 6% stated that judges regularly refer cases to mediation.



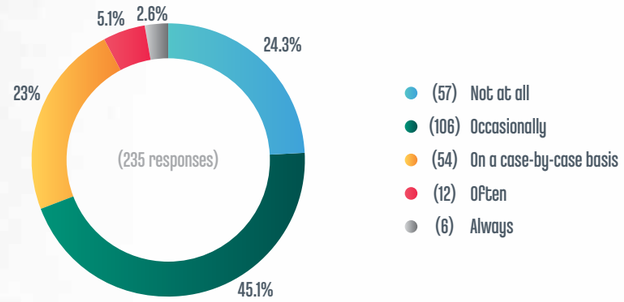
13. How often do you utilise dispute resolution clauses in commercial contracts?

Some 24% of survey respondents claim that commercial contracts include dispute resolution clauses often or always, while 26% think that it is done on a case-by-case basis. Interestingly, almost 50% claim that commercial contracts in the Western Balkans include dispute resolution clauses only occasionally (33%) or never (17%).



14. How often the attorneys inform the parties in a dispute of mediation as an alternative to litigation?

Respondents stated that in their experience attorneys often or always inform the parties of mediation as an alternative to litigation in only 8% of cases, while 23% do that on a case-by-case basis. Regretfully, according to the survey, as many as 69% of lawyers do so only occasionally (45%) or never (24%).



PART II

Taking note of the survey results and conclusions of Part I of the questionnaire, the respondents were asked, on a scale of 1 to 5, to assess the likely level of impact that certain solutions and measures might have on the development of mediation in their economy and/or in the Western Balkans.

The respondents were instructed to apply the following linear scale (1-5):

1 = EXTREMELY NEGATIVE IMPACT

2 = NEGATIVE IMPACT

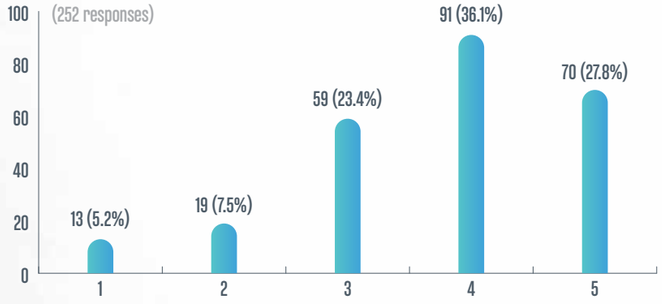
3 = NO SIGNIFICANT IMPACT

4 = POSITIVE IMPACT

5 = EXTREMELY POSITIVE IMPACT

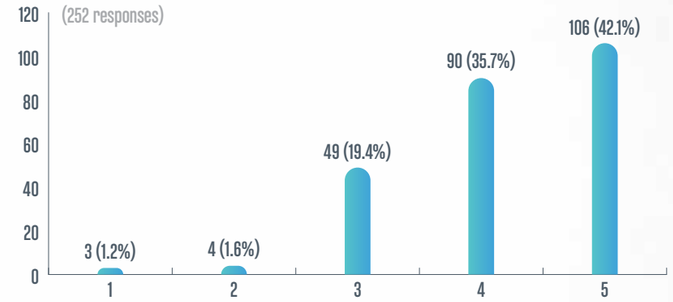
1. Require counsel to inform their clients of mediation as an alternative to litigation and enforce penalties for lawyers who fail to do so.

Almost 64% feel that introducing a formal requirement that counsel (lawyers, attorneys) must inform their clients of mediation as an alternative to litigation and penalties for the failure to do so would have a positive or extremely positive impact. Another 23% feel that such a measure would not have a significant impact, while some 13% stated that such a measure would have a negative or extremely negative impact.



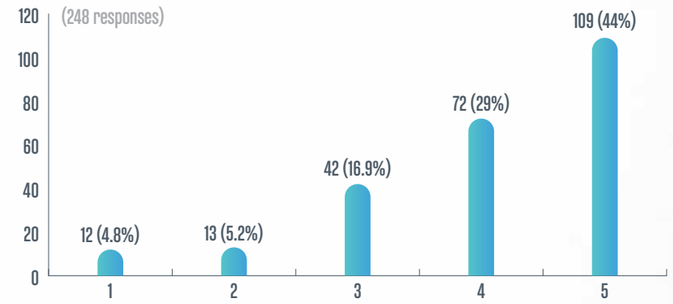
2. Require an initial mediation session with a mediator before litigation proceedings with easy opt-out at little or no cost.

As many as 78% of the surveyed participants feel that a formal requirement to undertake an initial session with a mediator before litigation, with easy opt-out, and at little or no cost, would have a positive or extremely positive impact on the development of mediation. Some 19% feel that such a measure would have no significant impact, while only 3% feel that the impact would be negative or extremely negative.



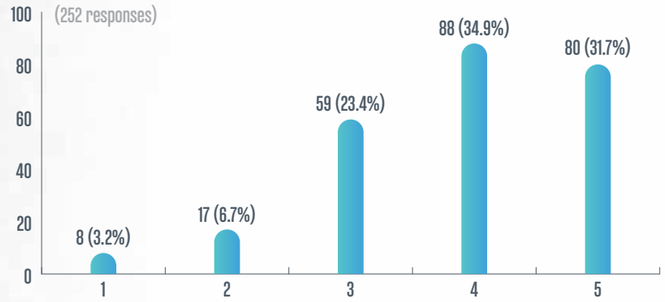
3. Make full mediation mandatory in certain categories of cases

Almost 74% of the respondents feel that making full mediation mandatory for certain types of cases would have a positive or extremely positive impact. Some 17% feel that such a measure would not have a significant impact, while some 10% were of the opinion that such solution would have a negative or extremely negative impact.



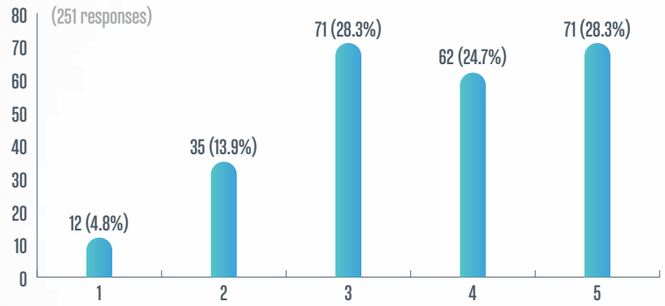
4. Grant judges the power to order litigants to mediation in some pending cases.

Some 67% of the participants feel that granting judges the power to order mediation in some cases would have a positive or extremely positive impact. Another 23% believed it would have no significant impact, while about 10% stated that it would have a negative or extremely negative impact.



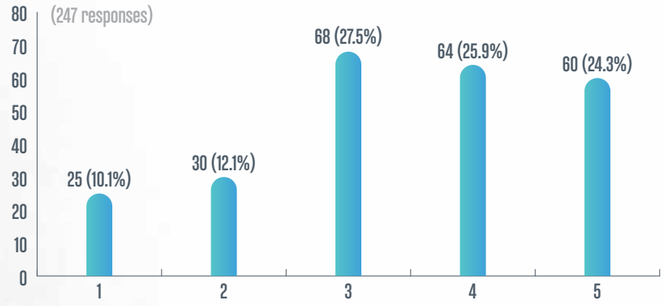
5. Assess the productivity of judges based in part on the number of cases referred to mediation.

Some 53% of the participants are of opinion that the productivity of judges should be in part based on the number of cases referred to mediation. Another 28% believe it would have no significant impact, while some 19% stated that it would have a negative or extremely negative impact.



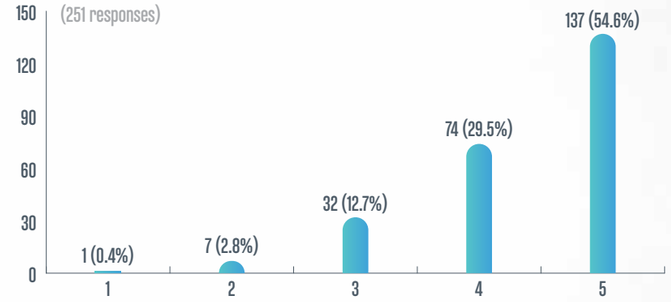
6. Impose sanctions for parties' refusal to attend mandatory mediation proceedings, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case.

About half of the surveyed stakeholders feel that imposing sanctions on the parties who refuse to attend a mandatory meeting with a mediator, such as paying litigation costs even if they prevail in the subsequent case, would have a positive (26%) or extremely positive impact (24%). About 27% believe it would have no significant impact, while about 22% stated that it would have a negative or extremely negative impact.



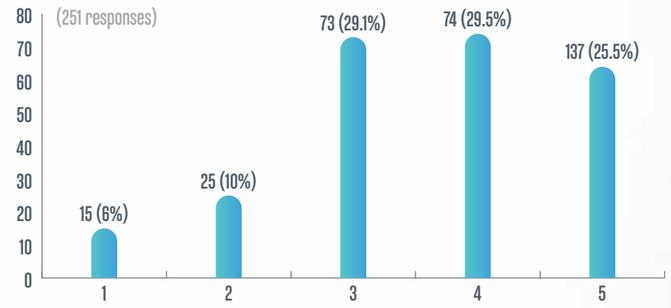
7. Provide incentives for parties who chose to mediate, such as providing refunds of court fees or tax credits.

However, almost 85% of the respondents stated that providing incentives to the parties that choose to mediate, such as a refund of court fees or tax credit, would have a positive (30%) or extremely positive (55%) effect. Almost 13% feel that it would have no significant impact, while only about 3% stated that it would have a negative or extremely negative impact.



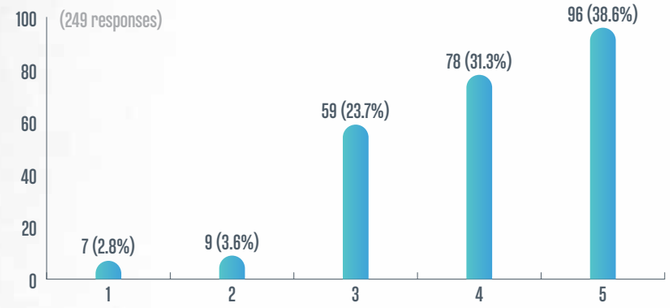
8. Require that legal assistance (legal representation by a lawyer) be made mandatory to parties in mediation.

A total of 55% of the participants feel that making legal representation by a lawyer in mediation mandatory would have a positive or extremely positive impact. Some 29% believe it would have no significant impact, while some 16% stated that it would have a negative or extremely negative impact.



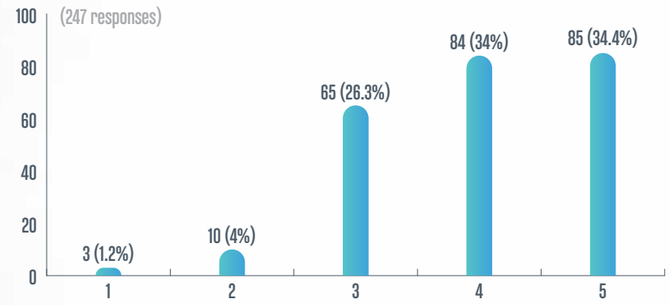
9. Create an independent Alternative Dispute Resolution Board/Agency to promote and regulate mediation at WB6 level.

In terms of the institutionalisation of mediation in the Western Balkans, almost 70% of respondents stated that creating a regional independent alternative dispute resolution body would have a positive or extremely positive impact. Almost 24% believe it would have no significant impact, while some 5% stated that it would have a negative or extremely negative impact.



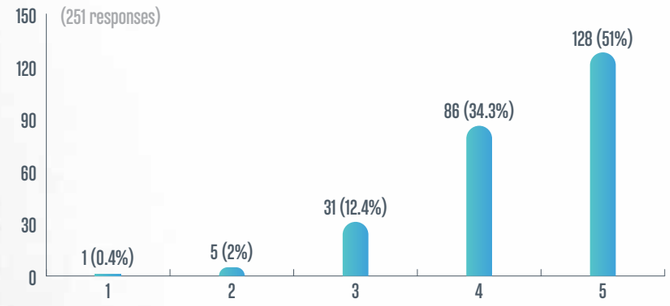
10. Introduce a "Mediation Pledge" for WB6 stakeholders, committing to attempt mediation before accessing the court in cross-border commercial disputes.

In terms of a voluntary "mediation pledge", whereby the stakeholders in the Western Balkans would commit to attempt mediation before litigation in every appropriate case, almost 69% of respondents stated that it would have a positive or extremely positive impact. Some 26% believe it would have no significant impact, while some 5% stated that it would have a negative or extremely negative impact.



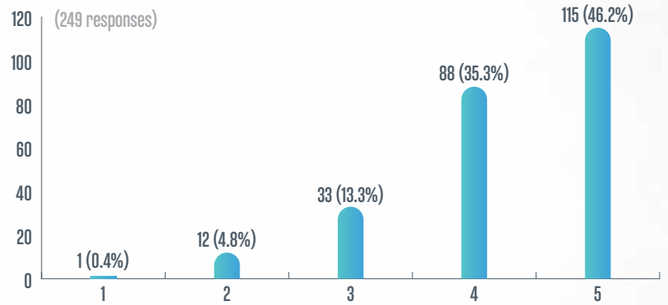
11. Create a list of regional mediators and mediation centres, with uniform certification and quality control requirements, to mediate cross-border commercial disputes within WB6 region.

About 85% of respondents feel that creating a list of regional mediators and mediation centres to mediate cross-border commercial disputes would have a positive (34%) or extremely positive impact (51%). Another 12% feel it would have no significant impact, while only about 2% of the respondents feel that it would have a negative or extremely negative impact.



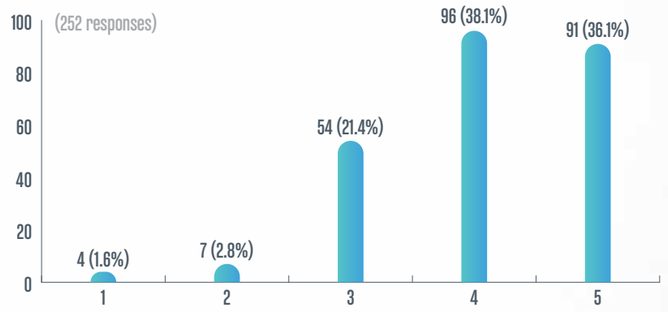
12. Introduce standard ADR/Mediation Clauses for cross-border commercial contracts within WB6 region.

Introduction of standard ADR/Mediation clauses in cross-border commercial contracts within the Western Balkans region would have a positive (35%) or extremely positive (46%) effect. Some 13% of the respondents are of the opinion that such a measure would have no significant impact, while about 5% feel that it would have a negative or extremely negative impact.



13. Promote "online mediation" for all cross-border commercial disputes within WB6 region.

Finally, 74% of the respondents believe that the promotion of online mediation for all cross-border commercial disputes within the Western Balkans region would have a positive or extremely positive impact. About 21% stated that it would have no significant impact, while 4% feel that it would have a negative or extremely negative impact.



Average Score (AS) - Level of Impact of the Proposed Measures (scale 1 – 5)

The following chart represents a weighted average score[123] assigned by the questionnaire respondents to each of the proposed measures, listed from the highest score to the lowest. In other words, on average the questionnaire respondents were of the opinion that the proposed measures would have the following impact on the development of cross-border mediation, on a scale from one to five (1 = extremely negative impact, 5 = extremely positive impact):

123 Formula: ((Score 5 x number of responses*) + (4x*) + (3x*) + (2x*) + (1x*) / total number of respondents)

8. CONCLUSIONS AND RECOMMENDATIONS

The data and information gathered during the present study illustrated in the previous chapters led to the following conclusions and recommendations.

8.1. Conclusions

All data gathered for this study highlighted the heterogeneous situation on mediation within the WB6 economies, both on legislative frameworks and consequently on mediation practice, as the data demonstrates. Montenegro and Serbia are in the extremes of this heterogeneous landscape.

Montenegro recently introduced in its legislation a mandatory attempt to increase resource to mediation based on the first mediation session of the "Italian mediation model" that suddenly increased the number of mediations, reaching a good 12% of the balanced relationship index between the number of mediations and judicial procedures. However, the low mediation success rate of 36% indicates room for improvement in the quality of the services with more training for mediators and lawyers and capacity building for mediation centres. On the other side of the spectrum, **Serbia** shows the lowest balanced relationship index of 0.1% with only 569 mediations in 2019 compared with 324.445 of incoming commercial and civil cases in courts. At the same time, Serbia ranks second in the number of accredited mediators per inhabitants.

Albania is on the right track in the recourse of mediation - especially in consumer disputes - with a balanced index of 11% despite a low number of mediators per inhabitants, followed by **Kosovo*** with 8% of the balanced index. **North Macedonia** and **Bosnia and Herzegovina** position in the lower part of this mediation ranking with 3.8% and 1.7% respectively of the balanced indexes.

To propose relevant, sustainable and easily implementable recommendations in the long run, the data and information gathered for the present study led to the following conclusions:

1. Despite the importance of the 2002 CoE Recommendation on civil mediation and EU Directive 2008/52 on cross-border mediation, after 20 years, data showed a negligible impact on the increase in the number of mediations in the WB6.
2. The recourse to mediation to resolve cross-border disputes relies heavily on effective domestic legislation and public policies that are very heterogeneous among the WB6.
3. All six economies are far from reaching a balanced relationship with an equal number of mediations and judicial proceedings in their economies. Consequently, it will be a real challenge to use mediation in cross-border commercial disputes.
4. The results of the regional mediation survey among the main stakeholders show a strong interest in implementing effective public policies.
5. Montenegro can represent an excellent example as a Western Balkan economy that has increased the recourse to mediation significantly in a short period by customising and implementing a proven best practice of a "soft-mandatory approach" of the so-called "Italian Mediation Model".

6. In all six WB economies, mediators and mediation centres are already present.

In conclusion, the recourse to cross-border mediation for resolving commercial disputes is strictly related to the development of effective domestic mediation based on a gradual introduction of a "soft-mandatory" attempt to mediate. It is improbable that companies that operate in the WB will refer to mediation to resolve cross-border disputes if they have never experienced a high-quality mediation service to resolve a domestic commercial dispute in their economies. In that regard, according to the 2021 Balkan Barometer[124] business opinion survey, 9 in 10 companies in the WB6 economies have not had any case in mediation. Only a few cases in civil or commercial matters were solved through mediation, with some intraregional variation (which is based on a small number of cases and firm conclusions cannot be derived). Some 55% of companies found mediation to be an effective mechanism for dispute resolution, and 35% do not have an opinion on whether they would consider mediation even in cases of cross-border conflict resolution for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

On the other hand, the creation and promotion of an institutionalised regional mediation infrastructure can be of example for domestic public policies on mediation and lead to more homogeneous legislation in mediation within the WB6 economies.

8.2. Recommendations

Given the findings of the Study and the need to promote an "easy to implement" ADR mechanism to resolve cross-border disputes in the WB and also in the context of the CRM, the main recommendation is the creation of the **Western Balkans Dispute Resolution Centr**e (WB-DRC) with the main mission to:

- Promote and manage cross-border commercial mediation services within the CRM to contribute to the effective function of the regional market.
- Promote and manage international commercial mediation services between parties outside and inside the CRM to increase confidence in foreign investments in the CRM and international trade.
- Act as a regional reference point and best practice for the WB6 economies in their domestic public policies on mediation.

In the light of the above recommendations, the WB-DRC would have three functions that can constitute the three main divisions:

I. Offer guidance on effective ADR/Mediation public policies.

II. Stimulate the demand for mediation with promotional activities.

III. Ensure high-quality dispute resolution services up to the best international standards.

I. Offer guidance on effective ADR/Mediation public policies

a. **Adopt a regional ADR/Mediation policy**. Most importantly, on the demand side, the WB-DRC will need strong support from RCC participants. This is essential for sustainable development of ADR and mediation in the Western Balkans. It can be achieved by way of governmental cooperation for the use of ADR and enabling domestic policies and legal frameworks. The RCC participants will have to promote the use of mediation for disputes involving public institutions to demonstrate the belief and support for mediation. This way, citizens and the private sector will be strongly encouraged to use mediation and will follow the example set by public institutions. The alternative is not ideal because public statements of policymakers supporting mediation are not enough for mediation to get started in the private sector, not without a model based on the first mandatory meeting backed by the judiciary and the legal profession.

b. **Adopt and implement regional ADR/Mediation Pledge**. The following should be considered:

- ADR/Mediation Pledge promoted within the WB6, whereby the stakeholders will adopt a public pledge to consider and use alternative dispute resolution and mediation in all suitable cases wherever the other side agrees to it.
- WB-DRC (or other body) will adopt measures to ensure monitoring of the implementation of this initiative, and periodically publish reports with statistical data.

By adopting the above or a similar pledge, and by establishing the appropriate practice, the WB6 economies will show that they are willing to adopt and promote modern, internationally recognised methods of conflict prevention and resolution, which will be beneficial for Western Balkan citizens, companies, organisations and institutions, as well as all investors. It will open the door and support spreading of the ADR culture to many potential areas of dispute. In the long term, it will improve good neighbourly relations and regional stability.

Almost 70% of the survey respondents stated that this measure would have a positive effect on the development of mediation in the Western Balkans.

c. **Draft model contractual dispute resolution clauses for commercial contracts (directing disputes to the regionally accredited list of neutrals (see Recommendation III (c))**. Standard cross-border commercial contracts should include mediation and other ADR clauses to resolve disputes instead of litigation, whenever possible. These clauses can be drafted and made available to potential users via WB-DRC. Over 80% of the surveyed respondents feel that such a measure would have a positive effect on mediation.

d. **Promote international agreements with major businesses and professional associations.** The regional reach is helpful for identifying and promoting international agreements with major businesses and professional associations. Such agreements would encourage the use of mediation and will be likely to increase the demand for mediation services.

e. ***Promote agreements with*** *the South East Europe Associations of Mediators Network established by the RCC* ***and other mediation centres outside the region***. Given the geopolitical context of the Western Balkans region, promotion of agreements with other mediation centres outside the region will provide access to good international standards and the latest innovative ADR research. Moreover, this may contribute to international corporations being more likely to respect and use the WB-ADR services.

124 Balkan Barometer 2021, Regional Cooperation Council, June 2021, available at https://www.rcc.int/download/docs/2021-06-BB2021-Business.pdf/439939a7489554684db46d2c266bfdbc.pdf

II. Stimulate the demand for mediation through promotional activities

One of the first steps in creating a dispute resolution culture is to focus on the users' interest in mediation services. To this end, to make informed choices about the use of mediation, users need to understand what mediation is and how it fits in the spectrum of dispute resolution choices available in the region. Users will demand mediation services when they perceive the possible benefits compared to the associated risks and other known options, such as arbitration or litigation.

Moreover, potential users will turn to their trusted advisors, such as attorneys, who will not shy away from offering their input, usually incorporating their interests in the advice provided. This goal needs to be understood in the context of the current popularity of mediation and the understanding, acceptance, respect and use of mediation services. This requires an immediate establishment of an automatic and ongoing data gathering and monitoring mechanism at the outset of the project to measure the real use and practice levels of mediation in the Western Balkans region (more information is provided within the items listed under the third goal "Increase the quality of mediations and ensure their long-term sustainability").

a. ***Create a visual identity and promote materials for the WB-ADR.*** On the demand side, the WB-DRC will need an effective PR strategy. This requires a visual identity kit with a logo, letterhead, branded promotion materials, and other components of such a professional project. This approach will have the ability to frame the right messages in the right way to reach the potential users, referrals and system influencers (i.e. academia, policymakers).

b. ***Build and maintain a website in all languages of the region.*** The WB-ADR network will consist of a panel of recognised mediators and mediation centres that will need a "Home URL". Best international practices are based on a comprehensive website with all the necessary information about the accredited parties. These directories usually include contact details, information related to the mediation training and experience, and user feedback or an independent summary of it. The principle is to provide user access to certified information about the mediation services listed. In cooperation with CSSP – Berlin Centre for Integrative Mediation[125], RCC has already developed an online platform for mediation in several Western Balkan languages.[126] With some additions, it can be modified to house information about the WB-ADR network of mediators.

c. ***Run awareness workshops for users and stakeholders.*** The benefit of having a network brings about the opportunity of an integrated approach to public awareness activities. For example, WB-ADR can target prospective users regionally to build their capacity to understand what mediation is and make informed choices about using mediation services. To this end, WB-ADR can organise awareness workshops for users and stakeholders.

d. ***Run promotional campaign offline and online.*** Mediation awareness raising efforts in the WB-ADR region should include regional, national and local campaigns, online and offline promotion, public and private initiatives, various focused audiences of the general public targeted, publications, events, champions among individuals with good public standings, and other components. It is suggested that in its development, the mediation awareness raising campaigns should rely on the following values:

   - Empowerment (understanding, trust and respect for mediation and mediators; self-determined users making informed choices)
   - Excellence (high standards for mediation and mediation awareness raising activities; practical approach, oriented towards the problems and interests of the parties)
   - Leadership (key messages supported by public figures and other mediation champions; ongoing public support for mediation awareness raising)
   - Inclusivity (mediation awareness raising should be done in consideration of existing dispute resolution methods, such as arbitration or litigation and with respect to other professionals, such as lawyers)
   - Transparency (mediation users are privileged to unhindered access to information about the use and the benefits of mediation)
   - Accountability (participants to mediation raising awareness take ownership for choices and results and measure themselves against high standards of integrity and responsibility)
   - Honesty (mediation awareness raising needs to be done with honesty and to be focused on the interests of the potential beneficiaries of mediation, therefore reflecting the fundamental approach in mediation, interest-based communication)
   - Do no harm (in principle, any mediation awareness raising effort should *do no harm*)

e. ***Other activities that will progress the goal of gradually increasing the recourse to regional cross-border mediation***. This heading should include any other activities that will serve the purpose of building the demand for mediation services in the Western Balkans region. One example focusing on the long-term included here is working with academia to develop mandatory ADR curriculum in universities. This should not be limited to law faculties, but also to business schools, social and political sciences, psychology, etc. Another example is to design and initiate study tours for policymakers from all WB6 to other economies of the region and/or EU Member States where mediation is already a significant reality (i.e. Italy) and to task them with designing more effective policies.

III. Ensure high-quality dispute resolution services in line with the best international standards

Starting from the group of WB6, the third function of WB-DRC is to increase the quality of mediations and ensure their long-term sustainability (availability of mediation providers). The network of mediation providers, united by the same values based on quality standards for mediation services should result in a very high-quality provision of mediation services in the Western Balkans. The network of mediators and mediation providers will principally benefit from research activities, mutual learning opportunities, identifying and exchanging best practices in meditation administration, development of working methods for case management, facilitating cooperation between mediation service providers, and dissemination and awareness-raising activities on mediation standards and quality. Most importantly, this goal would be achieved by developing standards on the provision of professional mediation services that will apply to the mediators and mediation centres accredited for this purpose. One of the ways is to enhance existing network of mediators, such as the South East Europe Associations of Mediators Network established by the RCC, which should be further upgraded and promoted.

This goal targets mediators and mediation service providers throughout the Western Balkans region. However, as a result of the activities included here, a large number of citizens and beneficiaries that

125 https://www.cssp-mediation.org/
126 https://www.balkanmediation.org/about/

are not based in the WB6 will also benefit from the project. Increased cooperation and exchange of information between mediation service providers throughout the wider region and the development and adoption of quality standards for mediation service providers are expected. This will, in turn, improve the uniform and coherent application of international mediation standards and the quality of administration of mediation. The activities described below include the intangible benefits of regional cooperation and mutual exchange of service providers in the Western Balkans region and the tangible outputs of standards, guidelines and codes.

a. ***Draft common mediation rules.*** The mediators and mediation providers that will be accredited by the WB-ADR Secretariat will have to provide mediation services that are aligned to the WB-ADR Mediation Rules. This integrated approach will ensure the needed transparency and predictability of a sustainable market for domestic and cross-border mediation services. The mediation rules will need a certain extent of generality to accommodate the different mediation legal frameworks in the six WB economies.

b. ***Set-up an accreditation scheme for mediation centres and mediators.*** The entire WB-ADR system is based on the "regional certified quality mediation services" concept. To make this work, the WB-ADR will need to adopt a set of standards to ensure the high quality of the mediation services provided. One example we include here is having training standards for mediators, with curriculum requirements and criteria for trainers and assessors. Another example refers to standards for providers of mediation services (i.e. mediation centres) that may need to follow minimal criteria to ensure the institutionalised approach. Such criteria may refer to the administration of cases, the physical space available for mediation or to the number of mediators in the panel. One very important element of the accreditation will be the costs associated that will need to be reasonable and result from an extensive stakeholder consultation process supported by independent facilitation. Also, the accreditation may be limited to 2-3 years, and reaccreditation may depend on the proof of minimal practice (i.e. 10 cases in 3 years) and continuous professional development (20 CPD hours per year).

c. ***Maintain a list of regionally accredited mediator centres and mediators***
For mediation to become a viable alternative to the court and the first choice of businesses in cross-border transactions, it is essential that commercial entities in the Western Balkans have easy access to mediators and mediation centres accredited in accordance with the highest standards. WB-DRC can perform a convening function of an institutional mediation provider that would establish and maintain a list of qualified mediators, licensed to mediate in cross-border disputes. Constant monitoring and user-evaluation of the services provided by the accredited mediators would be essential to measure the client satisfaction and make corrections in order to maintain a high standard of service. Regional stakeholder survey showed that over 85% of the respondents feel that such a list would have a positive impact on mediation in cross-border disputes.

d. ***Use a unified fee schedule***. Other essential criteria for the users' decision to use mediation services include service fee schedule. With a simple approach, unified in the Western Balkans region, users will plan and budget the resources needed for mediation services, regardless of the delivery location, in-person or online. The accredited mediation providers will, of course, need to accept to use the unified fee schedule, as well as to have the quality of services monitored by the WB-ADR Secretariat.

e. ***Set up an online case management platform to manage cases.*** The successful implementation of the WB-DRC network depends mainly on case management software for the network allowing for streamlined case management, consistent approach to data gathering and quality monitoring, easily accessible files and documents for mediators, case managers and parties, and online submission of mediation requests. Such platforms require significant resources to be designed, developed, tested and improved continuously, but the benefits are extraordinary and make the difference between formal mediation projects and "real ones".

f. ***Act as case management regional office with one or two staff members***. The WB-ADR Secretariat can provide the needed case management support to accredited mediators, potentially exchanging a reasonable fee. Again, thanks to the regional reach, shared efforts add up and create the pool of resources that can support the development of the needed tools for successfully implementing the WB-ADR concept.

g. ***Run meetings with the network members periodically***. Periodic meetings with network members will be likely to create the regional community of practice that is essential for the development of the WB-ADR network in the long term. The WB6 can take turns in organising these meetings that, depending on the pandemic situation, can be organised in person or online.

h. ***Monitoring results.*** A thorough data gathering mechanism will be essential for the quantitative and qualitative assessment of mediation services provided within the WB-ADR network. Once an electronic database with all the accredited mediators and mediation centres is created and published on its website, the WB-ADR Secretariat will develop a data gathering and monitoring mechanism. The benefit will be the accessibility of real-time, automatic mediation statistics with minimal reporting duties from accredited mediators and mediation centres and the ability to measure the effectiveness of the activities and policies proposed for the development of mediation. This requires IT support and commitment on behalf of accredited mediators and mediation centres to use the system.

8.3. How to effectively implement the Recommendations

To implement the above recommendations in a quick manner it is advisable to:

- Create and manage the Western Balkans Dispute Resolution Centre within the RCC at least for its first years of operation until it reaches its financial and organisational autonomy, having considered that the RCC has significant experience with regional mediation initiative such as the South East Europe Association of Mediators Network and Balkan Mediation online platform.[127] In addition, the RCC has an important role in implementation of the CRM Action Plan, which makes it the most suitable existing organisation for the role of a regional mediation provider in the Western Balkans.
- Develop a detailed five-year business, financial and marketing plan for the establishment and running of the Western Balkans Dispute Resolution Centre.
- Develop detailed Terms of Reference to search for possible international institutional donors that can finance its establishment and the first two/three years of activities.
- Partner with one or few established international mediation centre(s) to ensure a quick start of operations and secure transfer of proven successful know-how.

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9. LIST OF TABLES AND ANNEXES

9.1. Annex 1 - Draft ADR/Mediation Pledge

Whereas

Cross-border trade is considered as a corner stone of regional cooperation and strengthening of the good neighbourly relations and regional stability;

Mediation is an efficient mechanism for resolving civil and commercial disputes in Western Balkans;

Mediation and other ADR methods enable individuals, companies, organisations and institutions to develop good relationship and communication, and achieve solutions that are in accordance with interests and needs of all stakeholders and interested parties;

Mediation and other ADR methods of peaceful dispute resolution promote the atmosphere of conciliation and cooperation, instead of confrontation and litigation, while the conflicts are resolved in more humane ways, and

Mediation and other ADR methods are becoming the most dominant tool for prevention and early conflict resolution worldwide, and is in accordance with the recommendation of the Council of Europe and directives of the European Union,

Therefore,

Leaders of WB6 economies wish to lead by example, making the region more attractive for investment, and bringing companies closer to the EU Internal Market through development and implementation of mediation and other ADR methods in cross-border civil and commercial disputes in the Western Balkans.

We, the leaders of the Western Balkans Six (WB6) adopt the following:

ADR Pledge

We, the leaders of the Western Balkans Six (WB6), hereby pledge that we will, in all cross-border civil and commercial disputes involving the Western Balkan citizens, companies, organisations and institution, consider and use mediation and other methods of alternative dispute resolution prior to engaging in court or other formal proceedings, in all suitable cases, whenever the opposing side agrees to it.

We commit to encourage companies operating in the Western Balkans region to include mediation and other ADR clauses in standard cross-border commercial contracts in order to resolve disputes instead of litigation, whenever possible.

9.2. Annex 2 – Questionnaire for interviews with mediation experts

ANALYSIS OF THE RECOURSE TO MEDIATION IN WESTERN BALKANS

Data from selected local experts in Mediation

PART I – COST AND TIME OF COMMERCIAL MEDIATION VS LITIGATION

The first part of this study aims to estimate the **time and the cost of court process and compare it with an estimated mediation process** in Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia and Serbia (Western Balkans), based on the following scenario simplified and adapted from the *World Bank - Doing Business 2021* (https://www.doingbusiness.org/en/methodology/enforcing-contracts).

The dispute: Seller sells goods to Buyer who alleges that the goods are of inadequate quality and refuses to pay. Seller, however, insists that the goods are of adequate quality. Moreover, because the goods were custom-made for Buyer, Seller cannot sell them to anyone else. Seller therefore demands full payment and threat to sues Buyer. The value of the dispute equals 200% of the economy's income per capita as indicated in the table.

As reference, please find the time and cost estimated for litigation by a World Bank expert.

Time and cost of resolving a commercial dispute in Court according to World Bank study doingbusiness								
Economy		**Claim value**	**Court where dispute is referred**	**Time in days**	**Total cost**	**Attorney fees**	**Court fees**	**Enforcement fees**
Albania	*ALL*	1.089.263	Tirana District Court	525	465.115	272.316	62.088	130.712
	EUR	8.875			3.790	2.219	506	1.065
	Percentage				42,7%	25%	5,70%	12%
Bosnia and Herzegovina	*BAM*	17.996	Sarajevo Municipal Court, Commercial Division	595	6.479	4.499	1.440	540
	EUR	9.204			3.313	2.301	736	276
	Percentage				36,0%	25%	8%	3%
Kosovo	*EUR*	7.097	Basic Court of Prishtina, Depart. for Comm. Matters	330	2.441	1.788	554	99
	Percentage				34,4%	25,20%	7,80%	1,40%
Montenegro	*EUR*	13.898	Podgorica Commercial Court	545	3.572	1.570	959	1.042
	Percentage				25,7%	11,30%	6,90%	7,50%
North Macedonia	*MKD*	569.729	Skopje First Instance Court II-Small claims division	634	162.942	92.866	39.311	30.765
	EUR	9.321			2.666	1.519	643	503
	Percentage				28,6%	16,30%	6,90%	5,40%
Serbia	*RSD*	1.182.859	Belgrade Commercial Court	622	6.479	4.499	1.440	540
	EUR	10.098,0			3.313	2.301	736	276
	Percentage				39,6%	14,50%	13,90%	11,20%
		Average in CRM		*542*	*3.183*	*1.950*	*689*	*544*

Mediation: Before going to court, the parties begin a mediation procedure with the most popular mediation provider in the capital city (in order to estimate time and cost, you may consult its website or call for information).

Please add the relevant information for your economy.

Economy		Claim value	Mediation Centre/ Mediator, where the dispute is referred (1)	Time in days (2)	Total cost (3)	Attorney fees (4)	Mediation fees (5)
Albania	*EUR*	8.875					
	Percentage						
Bosnia and Herzegovina	*EUR*	9.204					
	Percentage						
Kosovo*	*EUR*	7.097					
	Percentage						
Montenegro	*EUR*	13.898					
	Percentage						
North Macedonia	*EUR*	9.321					
	Percentage						
Serbia	*RSD*	10.098					
	Percentage						

1. **Mediation Provider.** Please indicate the name of a mediation centre or mediator in the economy capital where the information on average time and costs are obtained.
2. **Time - Duration of a mediation process in days**. Please indicate the average number of calendar days of the mediation process from the day of filing the mediation request to the day of its end. Please note: usually it takes from 30 to 90 days. Do not insert 1 or 2 days that usually represent the duration of the mediation sessions.
3. **Cost - Mediation costs**. Please indicate the estimated cost in EUR, only for the Plaintiff charged by the mediation centre/mediator to administer this mediation including mediator fees and administration costs.
4. **Cost – Attorney fees**. Please indicate the equivalent attorney fees in EUR charged by an average local firm or legal counsel (including value added tax and other applicable taxes) to assist the Plaintiff in mediation.
5. **Comments and Notes**

PART 2 – BALANCED RELATIONSHIP BETWEEN THE NUMBER OF MEDIATIONS AND JUDICIAL PROCEEDINGS

The second part of the study aims to calculate the balanced relationship between the number of mediation and judicial proceedings as the goal stated in Article 1 of the 2008 EU Directive on cross-border mediation. In addition to that, please indicate the number of mediation centres and mediators active in your economy.

Economy	Nr. of incoming civil and commercial cases per year (1)	Estimated nr. of civil and commercial mediations per year (2)	Estimated mediation settlement rate per year (3)	Nr. of active mediation centres (4)	Nr. of mediators (5)
Albania					
Bosnia and Herzegovina					
Kosovo*					
Montenegro					
North Macedonia					
Serbia					

1. Please list the most relevant mediation centres in your economy, including their websites.
2. Your additional notes and comments

9.3. Annex 3 - List of mediation experts interviewed

Name and surname	Economy	Institution
Merita Bala	Albania	Mediator and WIF Fellow
Rasim Gjoka	Albania	Albanian Foundation for Alternative Dispute Resolution
Smiljka Gavric	Bosnia and Herzegovina	Association of Mediators BiH
Bekim Ismaili	Kosovo*	CSSP
Marina Lutovac	Montenegro	Centre for Alternative Dispute Resolution Montenegro
Slave Mladenovski	North Macedonia	President of the Chamber of Mediators
Dusan Korunoski	Serbia	Association of Mediators Serbia

9.4. Annex 4 - Questionnaire for WB6 Stakeholders

RegionalCooperationCouncil

Co-funded by the European Union

MEDIATION QUESTIONNAIRE for stakeholders in Western Balkans

This Questionnaire is a part of the Regional Cooperation Council's (RCC) objective to provide a comprehensive regional analysis of cross-border mediation in civil and commercial matters in the six Western Balkans economies (WB6), and its potential in creating an efficient dispute settlement mechanism envisaged by the WB6 Common Regional Market 2021 – 2024 Action Plan.

Your answers in this Questionnaire are very important for obtaining a comprehensive feedback from mediation practitioners and stakeholders in the Western Balkans region. The Questionnaire has two parts of 14 questions each, and is likely to take no more than 10 minutes to complete. Your responses will be used for the purposes of the RCC Analysis and will remain confidential.

We thank you for your time and contribution.

* Required

Part I

1. Where are you from? *

- ◯ Albania
- ◯ Bosnia and Herzegovina
- ◯ Kosovo*
- ◯ Montenegro
- ◯ North Macedonia
- ◯ Serbia

2. Please indicate your profession? (more answers possible) *

- [ ] Practicing mediator (even if you are a lawyer, judge or other profession)
- [ ] Judge
- [ ] Practicing attorney-at-law (advocate)
- [ ] Company owner, manager, in-house lawyer, staff, etc.
- [ ] Public institution servant
- [ ] University professor or other academic institution professional
- [ ] Civil society member
- [ ] Other: _____

3. Do you think that a 'balanced relationship between mediation and judicial proceedings' exists (in terms of the total number of disputes mediated, compared to the number of disputes litigated, annually, in your economy)?

- ◯ Yes
- ◯ No
- ◯ I do not know

4. How would you assess the efficiency of commercial courts in your economy?

- ◯ Inefficient
- ◯ Mostly delayed, but sometimes efficient
- ◯ Average efficiency
- ◯ Mostly efficient, but sometimes delayed
- ◯ Very efficient

5. What do you think is the biggest obstacle to achieving greater judicial efficiency in your economy? (more answers possible)

- [ ] High cost of the proceedings
- [ ] Too many cases in courts
- [ ] Inadequate number of judges
- [ ] Inadequate number of court staff
- [ ] Procedural legislation
- [ ] Quality of judgments (too many appeals)
- [ ] Other: _____

6. How would you assess your own level of knowledge about mediation?

- ◯ No knowledge
- ◯ Basic knowledge
- ◯ Advanced knowledge
- ◯ Expert practitioner (mediator or lawyer regularly practicing mediation)

7. Do you think that some disputes should be automatically referred to mediation before accessing the courts?

- ◯ Yes
- ◯ No
- ◯ Depending on a dispute type
- ◯ I do not know

8. If you are a mediation practitioner, how many mediations did you conduct/participate in?

- ◯ None
- ◯ 1-5
- ◯ 5-20
- ◯ 20-50
- ◯ Over 50

9. How likely would you be to atempt mediation before the court, to resolve a regional cross-border commercial dispute?

- ◯ Not at all
- ◯ Occasionally
- ◯ On a case-by-case basis
- ◯ Often
- ◯ Always

10. What would be your main concern when considering using mediation in a regional cross-border commercial dispute? (more answers possible)

- ☐ Language
- ☐ Quality of a mediator
- ☐ Impartiality of a mediator (country of origin)
- ☐ Confidentiality of the process
- ☐ Cost of mediation
- ☐ Delay
- ☐ Potential problems with enforcement
- ☐ Other: _____

11. How likely would you be to consider "online mediation" to resolve a regional cross-border commercial dispute?

- ◯ Not at all
- ◯ Occasionally
- ◯ On a case-by-case basis
- ◯ Often
- ◯ Always

12. To what extent do the commercial courts refer cases to mediation in your economy?

- ◯ Not at all
- ◯ Judges just mention a possibility of mediation
- ◯ Judges recommend mediation on a case-by-case basis
- ◯ Judges regularly refer cases to mediation
- ◯ I do not know

13. How often do you utilize dispute resolution clauses in commercial contracts?

- ◯ Not at all
- ◯ Occasionally
- ◯ On a case-by-case basis
- ◯ Often
- ◯ Always

14. How often the attorneys inform the parties in a dispute of mediation as an alternative to litigation?

- ◯ Not at all
- ◯ Occasionally
- ◯ On a case by-case basis
- ◯ Often
- ◯ Always

*

This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

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RegionalCooperationCouncil

Co-funded by the European Union

MEDIATION QUESTIONNAIRE for stakeholders in Western Balkans

Part II

Please rank the likely impact that the following solutions and proposals would have on mediation in your country or in the Western Balkans region (WB6).

Please use the following scale:

1. EXTREMELY NEGATIVE IMPACT
2. NEGATIVE IMPACT
3. NO SIGNIFICANT IMPACT
4. POSITIVE IMPACT
5. EXTREMELY POSITIVE IMPACT

1. Require counsel to inform their clients of mediation as an alternative to litigation and enforce penalties for lawyers who fail to do so.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

2. Require an initial mediation session with a mediator before litigation proceedings with easy opt-out at little or no cost.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

3. Make full mediation mandatory in certain categories of cases.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

4. Grant judges the power to order litigants to mediation in some pending cases.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

5. Assess the productivity of judges based in part on the number of cases referred to mediation.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

6. Impose sanctions for parties' refusal to attend mandatory mediation proceedings, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

7. Provide incentives for parties who chose to mediate, such as providing refunds of court fees or tax credits.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

8. Require that legal assistance (legal representation by a lawyer) be made mandatory to parties in mediation.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

9 . Create an independent Alternative Dispute Resolution Board/Agency to promote and regulate mediation at WB6 level.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

10. Introduce a "Mediation Pledge" for WB6 stakeholders, committing to attempt mediation before accessing the court in cross border commercial disputes.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

11. Create a list of regional mediators and mediation centers, with uniform certification and quality control requirements, to mediate cross-border commercial disputes within WB6 region.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

12. Introduce standard ADR/Mediation Clauses for cross-border commercial contracts within WB6 region.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

13. Promote "online mediation" for all cross-border commercial disputes within WB6 region.

	1	2	3	4	5	
Extremely negative impact	○	○	○	○	○	Extremely positive impact

14. If you have any additional comments, we would be delighted to hear them.

Your answer

If you wish to receive results of the Analysis, please provide the following information*:

Your name:

Your answer

Your profession/organization:

Your answer

Your email:

Your answer

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