

**DISPUTE RESOLUTION
IN POST COMMUNIST SOCIETIES
- FEASIBLE OR A DREAM?**

BY ROBERT M. NELSON

GOWLINGS

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DISPUTE RESOLUTION IN POST COMMUNIST SOCIETIES - FEASIBLE OR A DREAM?

BY ROBERT M. NELSON¹

Introduction

Attempts to introduce dispute resolution techniques into Russia (part of the former U.S.S.R.) and Albania have been challenging! The role of law² and the right to resolve disputes, both within the Court System and also outside it, by mediation or arbitration, are severely tested in societies emerging from decades of oppressive rule! But the intense and exhilarating struggle this challenge presents forces us to revisit basic ADR principles and also to understand more clearly barriers to ADR which lie hidden in our own countries.

In order to be able to create the conditions necessary for ADR to succeed, changes are needed in the social and legal systems in post-communist countries so that ADR may offer a viable means of conflict resolution and help to alleviate court overcrowding. ADR projects, including negotiation and mediation, if built with respect for the intellectual struggle for development of a post-communist society, may create not only effective dispute resolution but also build confidence in a re-constituted free legal system.

Conditions in Albania and Russia

Five hundred years of domination by the Ottoman Empire and almost fifty years of domination by an iron-fisted Albanian dictator – Enver Hoxha – brought the judicial

¹ The author, a Canadian lawyer, arbitrator and mediator and partner at Gowling Lafleur Henderson LLP, as Director of the Gowlings Team worked to introduce modern commercial dispute resolution methods into Russia (1999-2000) and Albania (2002-2004) for their respective governments and the World Bank. The author remains convinced that ADR will succeed in Russia and Albania. He particularly wishes to complement the energetic Board of the Arbitration and Mediation Centre of Albania and its gifted Executive Director, Fatbardh Ademi.

Mr. Nelson wishes to thank Patricia Wong (Student-at-law) for her assistance in preparing this paper.

² A system in which the laws are public knowledge, are clear in meaning and apply equally to everyone.

system in Albania into disarray. Albania's post-communist years, starting in 1991, have been rocky and marked by periods of violent civil unrest. All the turmoil of these years has resulted in a judiciary badly in need of rehabilitation, not only to enable Albania to conform to EU standards but also to restore confidence in the law and the judiciary with the populace.

Russia's post-communist hang-over is accentuated by its fall from a world dominating super power to a third level emerging nation. Unlike Albania, which is prepared to accelerate its legal reform efforts in order to join the European Union, Russia has no such aspirations. ADR will only succeed in Russia if it can be demonstrated that it works for the Russian people. There are worrying signs that Russia is returning to a "safe harbour" of government domination and authoritarianism.

ANALYSIS OF THE SPECIAL NATURE OF POST-COMMUNIST CULTURE IN ORDER TO ENSURE THAT ADR CAN SUCCEED

A. Psycho-Social Aspects of Conflict Resolution Culture in Post-Communist Countries:

A country's conflict resolution culture is influenced by its social and political history. It is beyond the scope of this paper to provide a detailed account of the social and political history in post-Communist countries and its effect on social expression. However, I will briefly outline some common factors arising in states emerging from years of Communist rule and discuss their effects on negotiation behaviour.³

1. Authoritarianism

Acknowledging the validity of individual difference is a prerequisite to recognizing the need to resolve conflict. Many years of Communist rule have had the effect of quashing notions of individual difference and thus, drastically influencing ideas and approaches to negotiation.

³ Ellen Yamshon & Daniel Yamshon "International Corner: Transfer, Adaptation, and Success of the CRI Mediation Model in Post-Communist Russia" 1998 3 *Harv. Negotiation Law Review*. 123.

Although the Communist state has been dissolved in these countries, it is acknowledged that the ethos of Communism still permeates and affects attitudes of the citizenry towards dispute resolution. Cynthia Alkon describes the relationship between Communism and the lack of conflict management skills among citizens of post-Communist countries⁴:

Communist systems did not teach people how to manage and deal with conflict. People learned under these systems that disputes were bad, potentially dangerous, and should be avoided. They also learned that when there was a dispute, those in power won. Power and position were the decisive factors in resolving disputes, rather than justice and law. People did not learn how to negotiate or how to handle an open dispute.... Conflict was “regarded as unnecessary and contrary to the principles of Soviet society.

Communism forbade people to say what they thought or to live as they felt. Spontaneity of any kind could be considered treason or insanity. Communist dogma emphasized the collective rather than the individual. Stress was placed on unanimity and the merging of individual differences⁵. This attitude makes the institutionalization of alternative formal structures difficult because discord is understood as an unacceptable expression of individualism or non-conformity. In post-Communist societies, those seeking private services of a third party to address conflict rather than having a judge or court decide on the issue may be considered a breach of the ideology of communal solidarity.

In a report on findings about teaching the first conflict management courses at a technical university in Russia, Howell and Bystiantsev observed that the younger generation of Russians were caught in a contradictory situation of choosing ‘extreme individualism’ and the socialist concept of ‘liberalism’ that suppressed the rights of individuals in the interest of society.⁶

Furthermore, in many conflict situations, Russians defer substantially to authority and fail to recognize individual rights, particularly the right to express oneself. Russian

⁴ Cynthia Alkon, “The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs” 2002 *J. Dispute Resolution* 327.

⁵ Yamshom, *supra* at note 1.

⁶ Sergey Bystriantsev & Robert Howell, “The Experience of Two Sociologists,” 1995 *Pac. Psychol. Ass’n Ann. Meeting* 8 (found within Yamshom article).

conflict resolution behaviour has been characterized by some as capitulation and avoidance. Bystriantsev and Howell noted that the phenomenon of totalitarian control “was present from the top down; that a group of students had difficulty understanding that individuals had any right to express their interests to anyone of higher status or in a position of authority including their parents.”⁷

Another indication of the high degree of authoritarianism in post-Communist countries is the lack of legal framework for mediation in Russia. The Russian legal system does not have a law on mediation nor does it have detailed rules of evidence or well-developed case law that protects the interests of parties that participate in the mediation process. The Russian Federation *Arbitrazh* Procedure Code contains fairly cursory provisions defining evidence. The Code seems to rely on the view that judges are adequately trained to weigh evidence.

Albania has recently passed a Modern Mediation Law based essentially on the latest UNCITRAL Model.

The tendency of post-Communist countries to have an authoritarian culture is an impediment towards the implementation of a successful ADR program. People in post-Communist countries may be more comfortable with a judge or a court in the resolution of their problems as opposed to a mediator, who has no power to enforce a judgment, because of the social tendency to defer substantially to authority.

In Albania, the Gowlings ADR Project (2002-2004) had difficulty in attracting students to the mediation course⁸. Initially, all the proposed students wanted to be an arbitrator, a figure of authority and power.

An additional effect of authoritarianism is that when people in post-Communist countries do enter a mediation, they look to the mediator as an authority figure; they expect mediators to take directive action.⁹ As will be discussed later in the paper, the tendency toward authoritarianism is reinforced by the Civil Code that is often the

⁷ Bystriantsev, *supra*, at note 4.

⁸ Eventually Gowlings did train four gifted individuals as mediators as well as 9 arbitrators.

⁹ Yamshon, *supra*, at note 1.

centre of the justice system in post-Communist countries. A way to use the authoritarianism that is prevalent in post-Communist countries as a way of effectively promoting ADR would be to encourage judges in these countries, who are in positions of authority, to refer cases to ADR and publicly promote it.

2. Distrust of Freedom

At a basic level, mediation is negotiation carried out with the assistance of a third party. In contrast to an arbitrator or judge, a mediator has no power to impose an outcome on disputing parties. The role of the mediator is to assist the parties in finding a solution which acceptably meets their interests. In comparison to the court process, mediation is viewed as a process that is less governed by authority. The goal of mediation is for the parties, themselves, to craft a resolution to their common problem. But the essence of mediation is the wise and controlled use of freedom in the free crafting of a resolution of the dispute.

The political history of post-Communist countries has led to a strong distrust of freedom. Communism demands that the law is seen to service the state and the community rather than the individual. Years of total government control has created a citizenry that is suspicious of private dispute resolution processes.

In order for a mediation to be successfully implemented in light of the high distrust of freedom involved in the ADR process, people need to be educated about what happens during ADR. It needs to be made clear that mediators are to facilitate, not coerce settlement.¹⁰ Parties must understand that in mediation they cannot be forced to settle. A part of the distrust of freedom among people in post-Communist countries is a level of uneasiness about the lack of structure in the ADR process when compared to the court process. Parties need to understand that mediation is a voluntary, consensual and non-binding process. It must be emphasized that the mediator has “no authority to impose a settlement”, and hence no coercive power; however, the mediator does have persuasive power, which may be influential in assisting the parties

¹⁰ Robert M. Nelson, *Nelson on ADR* (Scarborough, Ont. : Thomson Carswell Ltd., 2003) at 287.

to resolve their differences.¹¹ In order to combat the obstacle of high distrust of freedom in the ADR process, parties need to be educated to understand, and accept, that ADR will not be used as a tool of coercion and tyranny. Current figures of authority in post-Communist societies, particularly Senior Judges, must advocate ADR for it to be successful.

Another factor that contributes to the distrust of freedom in post-Communist countries is the high level of political and economic instability.¹² It is an understatement to say that business plans made in such an environment may be frustrated by uncontrollable events. Ultimately it may take a generation of freedom and stability in post-Communist societies before the citizens in such societies begin to move away from authoritarianism and start to trust the freedom that vehicles such as ADR offer.

3. Lack of Legal Consciousness

Legal consciousness refers not only to one's respect for the law but also an innate confidence in the laws' protective powers and due process. The lack of legal consciousness in post-Communist countries leads to a cynicism about any sort of private dispute resolution process and thus serves as an impediment to the successful implementation of ADR. For example, North Americans and Europeans (as an example) generally trust that the legal system they are engaged in is fair and that the best interests of the parties will be served. In a post-Communist country such as the Russian Federation, the level of legal consciousness is underdeveloped¹³. The reason for this is that laws were abused and/or ignored by Soviet leaders throughout the Soviet period and, as such, no semblance of "trust" developed among the citizenry; rather, apathy or ridicule of the law was the norm.

The link between the lack of legal consciousness in post-Communist countries such as Russia and the level of corruption will be explored further in the corruption section of

¹¹ Nelson, *supra*, at note 7.

¹² CPR Institute for Dispute Resolution, "Commercial Mediation in the Russian Federation," online: CPRADR, <http://www.cpradr.org/pdfs/RussiaReport.pdf>.

¹³ Sally Stoeker, "From Partiinost' to Zakonnost' The Languid Creation of Legal Consciousness in Russia" online:<http://www.american.edu/traccc/Publications/Stoeker%20Pubs/Languid%20Creation%20of%20Legal.pdf>

this paper. It is proposed that the lack of legal consciousness that is prevalent in Russian societies is an obstacle to the successful implementation of ADR in post-Communist countries. It is essential that any ADR program that is implemented does not contribute to this lack of legal consciousness. Thus, ADR systems must not be used as fresh instruments of coercion and tyranny. If they are allowed to be tainted with the brush of corruption, the ADR system is little better than the existing institutions, which it is trying to improve upon.¹⁴

B. Corruption in post-Communist countries

One of the factors that works against the acceptance of ADR as a legitimate tool of conflict resolution is the perception that it may be used as a tool of corruption against the parties involved. This concern is a result of the atmosphere of corruption that accompanied the post-Communist regime. After generations of communism, people learned that not following the law was necessary for survival. The Communist governments did not inspire trust or confidence. People learned that their governments lied to them and withheld information. When Communism ended, corruption replaced party ideology in the new governments, which were often led by former communists.¹⁵

1. Judicial Corruption

Judicial corruption is a serious issue in post-Communist countries. A recent estimate of bribes, of all types paid annually in Russia, totalled more than the equivalent of U.S. \$ 33 billion in 2001.¹⁶ A conservative estimate of the bribes annually received by court officials including judges was equivalent to at least U.S. \$274 million.¹⁷ Of course, since neither bribe payers nor bribe recipients report the amount of money exchanges, there is no way to assess the accuracy of these estimates.

¹⁴ Nelson, *supra*, at note 7.

¹⁵ Alkon, *supra*, at note 2.

¹⁶ Ethan Burger, "Corruption in the Russian Arbitrazh Courts: Will there be Significant Progress in the Near Term?" *International Lawyer*, 38: 1; Spring 2004.

¹⁷ Burger, *supra*, at note 13.

Corruption and bribery is also a serious problem for the judiciary in Albania.¹⁸ The degree of corruption in Albania is linked to the significant degree of turmoil that the country has experienced. Albania's post-communist years have been rocky and marked by periods of violent civil unrest. In 1997, the country dissolved into violent civil disorder after a pyramid scheme collapsed, depriving many Albanians of their life savings. Both before and after 1997, the Albanian judicial system was in disarray. Albanians expect the judicial system to be corrupt and inefficient and the judicial system rarely fails to deliver on those expectations.¹⁹

Because the courts are places where conflicts are resolved, reforming the judicial system needs to be a priority. A suggestion for legal and judicial reform is to increase judicial salaries in post-Communist countries so that qualified judges can be retained and judges can support their families in a reasonably secure environment without having to resort to illicit sources of income such as funds derived from bribery.²⁰

2. Political Interference in the Courts

A contributing factor to corruption in the courts is the degree of political interference in the court system. For example, the Russian court system is dominated by local political leaders. Local dominance is a part of the legacy of the Soviet era's practice of "telephone justice" where a Communist Party official would call a judge to tell him how a particular case should be decided. Although the Russian Constitution provides for separation of powers, the reality is that judges are still frequently influenced by "suggestions" by government authorities and wealthy individuals.²¹

In their judgements, Russian judges are more likely to favour large local enterprises over smaller enterprises, entrepreneurs and foreigners. Judges often mask telephone justice by deciding cases on the basis of form over substance, for example, by ruling on the basis of technicalities to dispose of troublesome cases, rather than resolving

¹⁸ Legal and Judicial Reform in Albania.

Online: <<http://www.newalbaniangeneration.com/judicialreform.doc>>

¹⁹ Alkon, *supra*, at note 2

²⁰ Legal and Judicial Reform in Albania, *supra*, at note 15.

²¹ Burger, *supra* at note 13.

such cases on their merits.²² As a result, the judicial system is stacked against non-local and politically weaker parties, unless bribery occurs. Thus, political interference in the courts is a contributing factor to the degree of corruption in the court system.

3. What are the implications of judicial corruption on ADR?

Since corruption is so widespread in the judicial system in post-Communist countries, in order for ADR to be accepted by the public, it is absolutely essential that arbitrators and mediators be fair, balanced, and not corrupt. ADR systems must not be perceived by the public as instruments of corruption. There must be a zero-tolerance policy for corruption among those who are a part of the ADR system. There also needs to be unbiased, independent and uncorrupt courts to enforce mediated solutions and arbitrated decisions²³. Thus, for ADR to be successfully implemented, it is necessary to strive for judicial reform so that judges in post-Communist countries do not need to rely on funds from corruption, such as bribes, to support themselves. It is difficult to interest the judiciary to refer cases to mediation, if the cases are a personal profit source.

C. Feminism in Post-Communist Countries

The historic male domination in Communist societies also makes the advent of mediation difficult. An exploratory study on domestic violence in Albania revealed that Albanian society has a history of male domination in which women are taught to obey their husbands and accept submissive roles, a reflection of the strong patriarchal traditions of the Balkans.²⁴ With the fall of the communist regime in 1991, Albania went through a period of deep and dramatic social, political and economic change. Gender equality is a principle that is new to Albanian society and has not yet been embraced by a significant percentage of the population. Although in recent years

²² Burger, *supra*, at note 13.

²³ Nelson, *supra*, at note 7.

²⁴ Adrian Baban, "Domestic Violence in Albania: An Exploratory Study"

important changes have taken place in Albania, women's subordinate status remains well entrenched.²⁵

Despite the fact that Albanian women increasingly entered the labour force during the last 50 years, traditional gender roles in the family are still preserved. In Albanian culture, it is considered a shame for men to let women make decisions, or admit that the woman has a better perspective and take her perspective into consideration when making decisions.²⁶ The pronounced gender roles in Albanian culture seem to suggest that dispute resolution through force and/or the adversarial process is a more 'masculine' way to resolve problems whereas mediation may be considered a 'feminine' way to resolve disputes.

It is conceivable that the paternalist nature of Communist rule reinforced these patriarchal attitudes and practices. While domestic violence is a worldwide problem, it is, perhaps, most tragic in the newly emerging democracies of Central and Eastern Europe. Held in the firm grip of Communist control for over fifty years, their single decade of newfound freedom has brought social upheaval and led to an increase in domestic violence.²⁷

Considering that arbitration is a process where an appointed authority figure (i.e. an arbitrator, or 'private judge') renders a decision after hearing the parties' case, and mediation is a process where a neutral helps the parties arrive at a settlement of their dispute, it is reasonable to assume that socio-cultural tendencies in post-Communist countries may result in a preference for arbitration.

In post-Communist countries, mediation may be viewed as a feminine way to approach a conflict. Because post-Communist countries such as Russia and Albania are still very male-dominated cultures and women have a sub-ordinate status in these countries, a 'feminine' way of approaching conflict such as mediation may not be highly regarded. However, this phenomenon should not prevent mediation from

²⁵ Baban, *supra*, at note 21.

²⁶ Baban, *supra*, at note 22.

²⁷ Susan Smolens, "Violence Against Women: Consciousness and Law in Four Central European Emerging Democracies—Poland, Hungary, Slovakia, and the Czech Republic" (2000) 15 *Tul. Eur. & Civ. L.F.* 1.

eventually establishing itself and flourishing in post-Communist countries. Thus, for mediation to be successfully implemented in post-Communist countries, it is essential that it is not seen as ‘feminine’. If the proponents and supporters of mediation are largely male, then it may be more easily accepted in post-Communist societies.

D. Legal Framework for ADR

1. Legislation

One of the problems with the existing legal framework for mediation in Russia is that although mediation is being used to resolve certain types of disputes (in Russia) on a small scale, it is largely occurring within a legal vacuum.²⁸ There is currently no law in Russia that governs mediation. While parties who choose to mediate a dispute are likely to enter into a formal agreement governing the conduct of the mediation, it is by no means absolutely certain that Russian courts will enforce such rules to the degree they are inconsistent with provisions of applicable Russian Federation legislation.

In contrast, Albania has a law governing mediation. As part of the approach to establishing a solid foundation for the development of ADR in Albania, it is very important to ensure a sound legislative framework. As referenced in my book:

“..The country’s laws must recognize and enforce mediated agreements and arbitrated decisions. There must be a basic Arbitration Act which governs arbitrators. One comment coming out of a study of Sri Lanka’s Commercial Arbitration system was that in order for arbitration to be successful it was necessary to:

...ensure that the legal framework of laws and rules for arbitration is adequate to support efficient arbitration, and that parties may have confidence that courts will respect the finality of arbitral awards.²⁹”

An important feature of Albania’s mediation law is Article 12. This section ensures the confidentiality and privilege of mediator sessions and protects mediators from

²⁸ Ethan Burger, “Making Mediation Viable in Russia and Ukraine: The Need for an Appropriate Legal Framework” (1998) *East/West Executive Guide*, Vol. 8, Number 9.

²⁹ Nelson, *supra*, at note 7.

subpoenas and other legal mechanisms. In order for ADR to be successfully implemented, one major obstacle that needs to be addressed is, as noted earlier, the distrust of freedom in the ADR process. It is essential that parties that participate in ADR are sure that the information that is disclosed in a mediation cannot be used against them in another forum. A key factor to the success of mediation in post-Communist countries is to encourage society to respect the people acting as mediators. Thus, it is necessary to have legislation to achieve this end and which provides for those people acting as mediators to be legally immune from either criminal or civil action.³⁰ One of the suggestions to make ADR, in particular mediation, a more viable option in Russia is for it to adopt a mediation law similar to the one in Albania.

2. Enforcement and Legal Support

While the passage of laws is critically important for ADR to take hold and flourish in post-Communist countries, equally important is the issue of enforcement. Even if there is comprehensive legislation governing ADR, it is equally important to have uncorrupt and unbiased courts to enforce mediated agreements.

A critical test of the acceptance and growth of ADR will be the proper enforcement [of agreements reached at mediation] by courts. For example, if a court were to overrule a mediation settlement (or improperly overturn an arbitration agreement), it would greatly undermine receptivity by other potential users and gravely jeopardize ADR's establishment and growth.

It is also essential that the courts in post-Communist countries aggressively encourage the parties to try mediation and that there is some mandatory element to case referral. The success of mediation is highly dependent on the willingness of the courts to cooperate and collaborate in referring cases. This includes their cooperation in identifying cases which may be severely delayed, dormant or otherwise inactive in the absence of the use of ADR.

³⁰ Nelson, *supra*, at note 7.

A key factor that works against the successful implementation of ADR is the unwillingness of individual judges to refer cases to ADR. Thus, it is important that the introduction of court-connected ADR programs must ideally be accompanied by corresponding reform efforts aimed at reducing judicial corruption.

E. Civil Law System in Post-Communist Countries

The strong belief of citizens in post-Communist countries in their civil code is a characteristic that must be considered in developing ADR programs. Intellectually, students of civil law, may find it difficult to link private dispute resolution methods to a Roman Law system. In fact Michael Palmer and Simon Roberts, in discussing the applicability of ADR in a civil law system commented that,

The continental judicial apparatus, inherently more bureaucratic and hierarchical than that found in common law systems, has traditionally given judges a much more active role to play in litigation so that, for example, 'delegation of any procedural step to outsiders is inappropriate or even repugnant. Private procedural enterprise is....almost an oxymoron in the lexicon of hierarchical authority.'³¹

Palmer & Roberts note that the public in a civil law system feels discomfort with the prospect of placing the decision-making power in the participants' hands. In view of the enhanced role of judges in the civil law system, it is difficult for the public to accept that a dispute can be settled by someone who is not a judge. The goal of mediation is, in part, to empower the participants and give them a direct role in their dispute resolution.

It is necessary to examine how other civil law countries such as Argentina and the Philippines have dealt with the challenges to ADR raised by formalistic civil law systems in order to propose solutions for countries such as Russia and Albania.

1. Argentina

³¹ P. Micheal Palmer & Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making* (London: Butterworths, 1998) at 3-4.

Both Argentina and the Philippines have faced challenges similar to Russia including, lack of trust in the judiciary and the government; concerns regarding the enforceability of settlement agreements; scepticism of ADR due to years of fluctuating political, economic and social climates; formalistic civil law systems; and a concern regarding the adequacy of training for creating effective mediators.

In October 1995, Argentina enacted law number 24.537 on mediation and conciliation, mandating mediation in most cases, excluding bankruptcy, criminal issues, writs of habeas corpus, and cases involving the federal government.³² It began with a pilot project that was started in 20 civil courts in Buenos Aires in which mandatory mediation was introduced for civil cases. Court staff were well-trained and judges were involved in this process.³³ In fact, Argentina's *Code of Civil and Commercial Procedure* provides that conciliatory agreements can be certified by the courts, and subsequently upheld.³⁴ This enables parties to have the security of a binding agreement without the concern that a judge might not uphold it.

Judges still maintain some control over the system because they assign the cases to mediators. Further, judges assist mediators with procedural issues, such as service of process, preliminary injunctions and in resolving conflicts that might arise during mediation.³⁵ Judges are also assigned to a case at the beginning in the event that a case ends up being litigated. Since judges have such a strong role to play in the mediation process, this has aided mediation's promotion and utilization. However, it also indicates the reliance, for the success of mediation, on the judiciary's participation in supporting ADR programs.

In the first year that mediation was mandated in Argentina, 81,727 cases were assigned by the civil court of appeals to mediation. Only 22,209 returned to court after attempting mediation.³⁶ Further, additional cases that normally would have been

³² United States Department of State, "ADR Expert Says Mediation Working Well in Argentina" (18 August 2003), online: United States Department of State <<http://usinfo.state.gov/dhr/Archive/2003/Oct/09-721173.html>>.

³³ Legal Vice Presidency, *The World Bank, Argentina: Legal and Judicial Sector Assessment* (Washington, D.C.: The World Bank, 2001) at 64-65.

³⁴ *Ibid.* at 63.

³⁵ *Ibid.* at 65.

³⁶ Legal Vice Presidency, *supra* note 14 at 66.

brought to court were voluntarily resolved by mediation, avoiding the court system entirely.

2. Philippines

Mediation has also gained success in the Philippines. The Chief Justice of the Supreme Court of the Philippines highlighted some of the key issues facing the judiciary in the Philippines, such as: congestion, delay, [graft???], corruption, and limited economic and human resources.³⁷ These issues have made it difficult for Filipinos to trust the legal system.

ADR was introduced to help address some of these issues. The stated purpose for promoting mediation is the same as mentioned for other countries, that is, the desire to relieve the courts' dockets, and make justice more accessible and efficient. In 2001, the Philippine Department of Justice piloted a mediation project which was held in several cities. Ninety-three percent of the cases that were referred for mediation settled.³⁸ The mediation program was a success, and in October of 2001, mediation was formally instituted as a court-referred and court-related form of dispute resolution.

3. What can be learned from Argentina/ Philippines case studies and applied to civil-law post-Communist countries?

As in Argentina and the Philippines, it is necessary to have judicial support and leadership in introducing mandatory mediation. In fact a judicial champion is critical to success. Due to the enhanced role of the judge in the civil law system, it is necessary for judges in post-Communist countries to have an integral role in promoting mediation to ensure its success. This will create legitimacy in the process and is more consistent with the civil law system. For mediation to succeed, it is incumbent on the judiciary and lawyers to refer cases to mediation.

³⁷ The Asia Foundation, "News and Events: Philippines's Chief Justice Outlines Judicial Reform Efforts" (20 May 2003), online: The Asia Foundation <http://www.asiafoundation.org/Locations/philippines_davide.html>.

³⁸ Department of Justice, Republic of the Philippines, "News and Events: DOJ Launches Nationwide Mediation Project" (March 22, 2004), online: Department of Justice, Republic of the Philippines <http://www.doj.gov.ph/news_03-22-04.html>.

Another step to developing legitimacy in the ADR field is to legislate the procedure pertaining to mediation and arbitration. Having a set procedure within the civil code would further develop mediation's legitimacy in the local legal community and would clarify outstanding confusion about the process. Ideally, this would mean that lawyers and the judiciary would be more inclined to support and promote ADR. A positive development in favour of ADR implementation is that more civil law countries such as Albania are legislating for mediation. It is necessary for this to continue in other civil law countries for ADR be successfully implemented.

F. Conclusions

This paper has highlighted some of the factors in post-Communist countries that will help or hinder the successful implementation of ADR. In summary, any country wishing to make a major commitment to a greater use of ADR must ensure that the following legal principles are followed:

- The laws of the country must recognize and enforce mediated agreements as well as decisions of arbitrators;
- Arbitrators and mediators must be fair and balanced and free from corruption;
- It is basic that mediators are to facilitate, not coerce, settlement; arbitrators are to treat parties fairly and render decisions based on the evidence;
- Parties must understand that in mediation they cannot be forced to settle;
- Society must respect the people acting as mediators so that mediators are legally immune from either criminal or civil action;
- Parties to a mediation or arbitration must have access to independent legal advice and the ADR process must not preclude the right to counsel; and
- Unbiased and independent courts must exist to enforce mediated solutions and arbitrated decisions.³⁹

³⁹ Robert M. Nelson, *Nelson on ADR* (Scarborough, Ont.: Thomson Carswell Ltd., 2003) at 285-288.

In addition, the successful implementation of ADR relies largely on the public's perception of it and the judiciary's support. ADR needs to gain respect as an alternative to litigation in post-Communist societies. There are many issues that arise in the transformation from a Communist regime to a democracy that serve as impediments to a successful ADR system. In many post-Communist countries people do not expect the legal system to be responsive, to follow the law, not to be corrupt or to be a fair and impartial dispute resolver. ADR projects, including negotiation and mediation, if built with an understanding and respect for local cultures, help address these problems by building faith and confidence in the legal systems. ADR holds tremendous potential to transform legal cultures in post-Communist countries struggling with widespread judicial corruption and popular distrust of the legal system.