

# Recommendations for Strengthening the Use of Mediation in Croatia

*Zagreb, December 2017*



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American Chamber of Commerce in Croatia *Američka gospodarska komora u Hrvatskoj*

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# Introduction

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Alternative Dispute Resolution (ADR) has been recognized in Europe as an appropriate instrument for achieving better efficiency of legal systems, as a prerequisite for growth and development of the internal market.

American Chamber of Commerce in Croatia (AmCham) has also recognized the need to strengthen alternative dispute resolution and has, in June 2016, adopted the position paper “Mediation as a Way of Achieving a More Efficient Judiciary”, with specific recommendations for strengthening the use of mediation within the Croatian judicial system.

In August 2016, the European Commission published the “Report on the Application of the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters<sup>1</sup>” (hereinafter referred to as: the Report) which presented data collected through studies on the implementation of the aforementioned Directive and through online public consultations. Furthermore, in September 2017 the European Parliament adopted a Resolution<sup>2</sup> on the implementation of the abovementioned Directive (hereinafter referred to as: the Resolution), confirming all the relevant points of the Commission Report.

The aim of this document is to elaborate on the existing AmCham recommendations and to present new ones for strengthening the use of mediation, in line with the conclusions of competent European authorities presented in the Report and the Resolution. For this purpose, an overview of the European framework and the situation in Croatia shall be given, with a particular reference to a specific aspect – alternative consumer dispute resolution, as well as a summary of the existing AmCham recommendations from the above mentioned position paper, as a basis for future recommendations with the objective of affirmation of alternative dispute resolution methods in general, and in particular within the business community, which has to constantly adapt to new business conditions where ADR asserts itself as a particularly appropriate solution due to its characteristics, mainly flexibility and informality.

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<sup>1</sup> Report on the Application of 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 ‘Mediation Directive’); available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1512750277658&uri=CELEX:52016DC0542>

<sup>2</sup> European Parliament resolution of 12 September 2017 on the implementation of 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, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0321+0+DOC+XML+V0//EN>

## European Framework

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Affirmation of mediation as a significant way of resolving disputes within the European framework was confirmed with the adoption 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<sup>3</sup> (hereinafter referred to as: the Directive), the main goal of which is to facilitate access to amicable dispute resolution and to promote such manner of dispute resolution while taking care to maintain balance with regards to litigation.

Despite the obvious advantages of mediation, in practice the Directive has not lead to expected results, and it has been estimated that in the five-year period following its adoption this manner of settling disputes was applied in less than 15% of cases, which, considering the indisputable advantages of amicable dispute resolution, has led to talks about the “European mediation paradox”. The situation is still unsatisfactory – according to the latest data presented in the Report, mediation is used in less than 1% of court cases in most EU Member States.

However, the general conclusion presented in the Report is that the application of the Directive has brought additional value to the European Union and that the enforcement of the Directive has had a significant influence on the legal systems of some Member States. On the other hand, the Report also states that certain difficulties regarding the functioning of national mediation systems were identified in practice. These were mostly related to the lack of mediation “culture” in the Member States, insufficient knowledge on how to handle cross-border cases, low awareness of mediation and the functioning of quality control mechanisms for mediators. Through public consultations it was also established that mediation is still not adequately familiar and that a “change in culture” is still necessary to ensure citizens’ trust in the procedure, as well as that judges and courts are still reluctant to refer their clients to mediation.

However, studies have also pointed to a basic consensus on the fact that mediation results in substantial savings in a wide range of civil and commercial disputes, and in many cases significantly shortens the time required to resolve the dispute in question.

Finally, the Report concludes that there is no need for a revision of the Directive, but that its implementation could be further improved, and in order to do so, Member States should increase their efforts with regards to promoting and encouraging the use of mediation, using various ways and mechanisms envisaged in the Directive itself.

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<sup>3</sup> SL 136 from 24/5/2008

## Situation in Croatia

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In Croatia mediation is regulated by the Mediation Act<sup>4</sup>, which entered into force on the date of accession of Croatia to the European Union.

In this Act, mediation is defined as any procedure, whether conducted in court, at a dedicated mediation institution or elsewhere, in which parties attempt to settle their dispute by mutual agreement, with the assistance of one or more mediators who help them reach a settlement but who do not have the authority to impose upon them a binding solution.

Mediation procedure may be carried out at any regular and specialized first-instance and second-instance court, at all stages of litigation, including during the appeal procedure. Mediation procedure can also be carried out outside of courts by various mediation centers established at professional associations.

Due to some important differences between mediation in courts and mediation conducted at the abovementioned centers, it can be said that there are two separate mediation systems in Croatia that are somewhat in competition, and it is possible that this is a contributing factor to the unsatisfactory state of affairs. Despite the existing legal framework and the establishment of appropriate mechanisms, the number of cases in Croatia in which mediation is used is still insignificant. Mediation, regardless of the type, enjoys the support of key institutions, however, stagnation in the use of the method can be observed in the Croatian practice of dispute resolution. Since the development of the ADR system has been recognized as a segment of particular interest for Croatia, due to its impact on the national judicial system, the economic and social development and international legal cooperation, it is clearly necessary to identify the reasons that have led to the stagnation and then systematically work on their removal.

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<sup>4</sup> Official Gazette No. 18/11

## Specific aspect – alternative resolution of consumer disputes

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Legislation on alternative dispute resolution in cases that include the electronic aspect of commerce (e-commerce) has been recognized as one of the levers for encouraging growth, strengthening trust and ensuring progress towards the completion of a single market, at the European Union level.

Parallel to the development of mediation as an alternative way of resolving disputes, the bodies of the European Union have been intensely working on the protection of consumers as the weaker party in any contract, which has been recognized as a priority for the establishment of a functioning internal market. However, even though there are approximately one hundred directives relating to this issue currently in force, consumer protection is still considered inadequate and new ways of improving it are always being sought after.

One of the ways is the introduction of amicable dispute resolution in consumer disputes, which was achieved through the adoption of the Directive 2013/11/EU of the European Parliament and the Council of 21 May, 2013, on alternative dispute resolution for consumer disputes and amending Regulation (EC) no. 2006/2004 and Directive 2009/22/EC<sup>5</sup> and of 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 and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC<sup>6</sup>.

These instruments should help alleviate the consumers' lack of trust in efficient dispute resolution. In short, they establish the traders' obligation to inform the consumers about ADR bodies authorized to handle potential disputes through the use of mediation, and about ways to file complaints. In this, a designated online platform plays a crucial role. It is an interactive website that offers a starting point for initiating the mediation process and it allows consumers and traders to settle disputes by connecting them to a local ADR performing institution. The platform was launched in February 2016<sup>7</sup>. Since a general lack of awareness of the possibility of amicable dispute resolution is recognized as one of the main obstacles to the development of mediation, it is explicitly requested that traders include a link to an ADR performing institution on their websites. The established mechanism should offer a way of simple, efficient, quick and cheap out-of-court resolution of disputes.

Croatia was obligated to introduce an alternative consumer dispute resolution system in accordance with European legislation. Thus, on December 12, 2016, the

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<sup>5</sup> SL L 165/63 from 18/6/2013

<sup>6</sup> SL L 165/1 from 18/6/2013

<sup>7</sup> <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.chooseLanguage>

Act on Alternative Consumer Dispute Resolution<sup>8</sup> entered into force. With this, the aforementioned European legislation was transposed into the Croatian legal system, fulfilling, on the legislative level, the precondition for alternative resolution of domestic and cross-border disputes deriving from consumer contracts, before domestic authorities authorized to perform alternative dispute resolution, and using the designated European platform.

## Existing AmCham recommendations

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In the previous position paper on the subject of mediation from 2016 (“Mediation as a Way of Achieving a More Efficient Judiciary”), an inadequate legal foundation contained in the Civil Procedure Act and a low level of awareness of the advantages of mediation, not just among the general public but within the judicial system itself, were identified as the key shortcomings for the development of mediation in Croatia.

Thus, specific legislative changes aimed primarily at strengthening the role of the judiciary in the use and promotion of mediation were proposed in the document, since judges were deemed to possess the necessary authority. A specific recommendation in line with this was to give the judges the authority to order the parties in a civil procedure to hold an informative meeting on mediation. Apart from the amendments to the Civil Procedure Act in terms of the described proposal on the informative meeting, other changes which were meant to simplify the legal text and to strengthen mediation in courts and outside of the judicial system were also proposed.

The position paper further emphasized the need for the Supreme Court’s support to presidents of county and commercial courts for conducting mediation, which would require strengthening awareness of mediation as a way of amicable dispute resolution complementary to traditional dispute resolution methods which does not jeopardize the existing system, even at the Supreme Court level. Recommendations for strengthening the role of the Ministry of Justice, as well as of the Judicial Academy (and the Croatian Bar Association when it comes to the professional training of lawyers) for the purpose of educating judges on mediation in general, referral to mediation and on mediation skills that could improve the operation in courtrooms, were also presented.

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<sup>8</sup> Official Gazette No. 121/16

# Further recommendations for strengthening the use of mediation in Croatia

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Previous recommendations focused primarily on mediation within the litigation framework and on the changes to the Civil Procedure Act which would increase judicial authority with regards to mediation, and would also result in an increase in the use of mediation not only in courts but outside of the judicial system as well. However, regardless of the specific judicial authority within the Civil Procedure Act, a general framework completely compliant with the European legislature exists in the Mediation Act, offering parties the option of mediation at any point, even before the initiation of court proceedings. There are various centers and educated experts for this very purpose.

Thus, AmCham believes that there is room for strengthening mediation within the existing framework. The main task is once again to raise awareness on mediation, i.e. on “the culture of mediation”, as is mentioned in the Report. Therefore, AmCham wishes to share the following recommendations:

## ***1. Promoting mediation in the context of modern business operations***

In its Resolution, the European Parliament has called on all Member States to “step up their efforts to encourage the use of mediation in civil and commercial disputes, including through appropriate information campaigns providing citizens and legal persons with appropriate, comprehensive information regarding the thrust of the procedure and its advantages in terms of economizing time and money”.

In acting upon this recommendation it would be extremely beneficial for the business community to work on raising awareness of mediation as a way of resolving disputes that is especially appropriate in modern business operations, since it is compatible with the most prominent tendencies and trends. In that sense, the following is particularly prominent:

- The work of European bodies on encouraging the use of mediation was primarily motivated by advantages that this way of resolving disputes offers in cross-border disputes regarding civil and commercial matters. Although the Member States have also extended the application to domestic disputes, this cross-border aspect is extremely important for the business community, since conventional local protection systems have proved to be inadequate for modern business operations.



- In addition to the problem of low awareness of the possibilities and benefits of mediation in general, there is a noticeable lack of awareness of the appropriateness of mediation for resolving disputes in the sphere of commercial law and business operations, since informality and flexibility of mediation are often emphasized and this leads to some questions with regards to the potential of the method in the sphere of non-personal relationships. Considering that the character of business operations in modern conditions is rapidly changing, with informality and flexibility becoming more prominent, it is necessary to accentuate the compatibility of mediation with these trends.
- Resolving court disputes is proving to be particularly problematic in issues that require specialized knowledge such as disputes in the area of intellectual property rights, ICT etc. In the absence of judicial specialization, and when expert knowledge is required, the only option is to obtain expert findings and opinions, which in practice often burdens the content and dynamics of court proceedings and decision-making. The possibility of selecting a mediator who is an expert in a specific field gives parties the opportunity to resolve their dispute with the assistance of a third party that possesses adequate knowledge and experience.
- Mediation is not only an instrument that can be used as an alternative to an already initiated court proceeding, but disputes may be resolved through mediation before and even independently of such proceedings. This is extremely important considering that many disputes do not make it to court, due to a lack of trust in the efficiency of judicial protection. In business operations, such situations often lead to the termination of a specific business relationship without properly resolving the dispute which might be possible through mediation in specific situations.
- As stated in the Report, mediation can also contribute to maintaining good relations between parties because, unlike court proceedings, there is no winner or loser. In the context of business relations, this represents a big advantage over litigation because it also contributes to the continuation of business collaboration.

For the purpose of promoting mediation which would highlight the aforementioned advantages, apart from the Ministry of Justice, which has jurisdiction over mediation in general, it is essential to include bodies close to the economic community, primarily the Ministry of Economy, but also existing mediation centers.

## ***2. Organizing the list of mediators and mediation databases in general***

Difficulties in obtaining all-encompassing statistical data were established in the attempt to statistically monitor European practices undertaken by the competent authorities, including data on the number of mediation cases, the average duration and success rate of mediation procedures. Without a reliable database, it is very difficult to further promote mediation and increase the public belief in its efficiency. Thus, the establishment and maintenance of national registers of mediation procedures will be considered at the European level. The registers could serve as data sources for the European Commission and could also be used by national mediators so that they may benefit from the best practices across Europe. With the aforementioned in mind, AmCham once again recommends that the Ministry of Justice creates a designated website that would contain relevant data, including a database of licensed mediators which would be modernized and updated with relevant information, as is the case in other European countries, for example in Austria.

## ***3. Establishing a national system for alternative resolution of consumer disputes***

The process of establishing a system for alternative resolution of consumer disputes is only at the beginning and it is extremely important to inform the public in general, and especially the business community, about the obligations and rights arising from this newly established system, through designated information campaigns. In accordance with the European legislature, eight bodies, to which one may file a consumer complaint against a trader with headquarters in Croatia, are currently accredited for alternative dispute resolution. The work of these bodies will be crucial for the development of this segment, and it is therefore necessary to pay it special attention.

## ***4. Educating lawyers***

While the earlier position paper focused on the role of judges, this time it is especially important to emphasize the need to strengthen the awareness of the benefits of mediation among the legal profession in order to strengthen the mediation process in practice, since lawyers represent the first instance in the process of resolving a dispute and are as such crucial to a party's decision on whether to pursue alternative dispute resolution or the traditional court procedure. In that sense, it is necessary to conduct systemic education on mediation for lawyers and for this purpose it would be beneficial to enter provisions on the desirability of mediation into regulations that regulate the legal profession. It is important to emphasize that mediation represents an opportunity to expand, rather than reduce business opportunities for lawyers, as it is often mistakenly perceived.

## ***5. Strengthening the legal foundations of mediation***

It should be pointed out that the European Parliament welcomed the fact that mediation systems were recently subjected to change and revisions in many Member States, while other Member States are considering making amendments to the applicable regulatory framework, including Croatia. Earlier AmCham recommendations, regarding the amendments of the Civil Procedure Act, are fully in accordance with the existing practices in certain countries, and it is to be expected that their implementation would strengthen mediation in the context of litigation. It should be pointed out that the Report of the European Commission states that even though compulsory mediation would encourage the use of mediation as an alternative to resolving disputes in court, such development would be opposite to the voluntary nature of mediation, so a compromise solution in the form of a mandatory mediation meeting represents a well-balanced solution.

## Key Advantages

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As stated in the Report, mediation can be considered as means to improve the efficiency of the judicial system and to reduce obstacles created by long-lasting and expensive court proceedings for citizens and businesses, through which it is possible to contribute to the economic growth in full. In domestic context a particular account should be taken of the considerable overload of courts and the lack of trust in the judiciary system, which can be greatly influenced by strengthening the ADR system.

In the specific segment of ADR in the context of consumer disputes, ensuring access to simple, efficient, fast and inexpensive ways of solving domestic and cross-border online and offline consumer disputes will contribute to raising consumer awareness of their rights and increasing trader and consumer confidence in the single market, which will again have an effect on the economy as a whole through increasing the number of national and cross-border transactions.

## Conclusion

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At this point it can be concluded that advantages of mediation are recognized at the theoretical level and that national and supranational legislative mechanisms have been created for the successful implementation of this tool in business practice, which for the time being is still missing.

The European Union is intensively addressing this issue in specific segments, such as consumer disputes, and at a general level. Furthermore, it is extremely important to track the achievements and align the practice at a local level.

Specific recommendations given in this document are in accordance with the recent conclusions and recommendations of European institutions and in order to further strengthen the use of mediation, with an aim to achieve general economic progress, it is necessary to work on their implementation.

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