Exploring the New Croatian Mediation Framework: A Leap Forward or a Setback?

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Abstract In 2023, Croatia enacted the new Amicable Dispute Resolution Act, aimed at providing a new framework for mediation, negotiation, and similar non-adjudicative amicable dispute resolution methods. Despite its ambitions, the changes were not fully implemented, and the new framework has not been unanimously welcomed by the mediation community. The new legislation causes some concerns, as some of the new inadvertent provisions are unclear, or leave dangerous legal gaps leading to uncertainty, with a negative impact on the further expansion of mediation. This chapter offers a critical overview of these changes.

1 Introduction

Although mediation is often considered an autonomous dispute resolution method that more effectively satisfies clients' interests than any form of adjudication,[1] the development of the mediation framework in Croatia has been predominantly viewed through the lens of judicial efficiency.

The first Mediation Act of 2003 (hereinafter: MA 03')[2] was, along with the Arbitration Act of 2001 and the Civil Procedure Act (hereinafter: CPA)[3] Amendments of 2003, a part of a legislative package addressing court backlogs.[4] Even though it was influenced by early recommendations by the Council of Europe and the European Commission, as well as the UNCITRAL Model Law on International Commercial Conciliation of 2002, it still remained somewhat conservative and sceptical towards

[1] Nolan-Haley (2021), p. 155.

[2] OJ, no. 163/2003, 79/2009.

[3] OJ, no. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023.

[4] Uzelac et al. (2004), p. 34, Šimac (2013), p. 5.

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the wider use of mediation.[5] The MA 03' was amended in 2009, as a measure to implement 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 (hereinafter: Directive).[6] Two years later, the completely new Mediation Act (hereinafter: MA 11')[7] made further adjustments to implement the Directive. It widened the types of cases that can be mediated and also served as a basis for mediation proceedings regulated by special laws, including court-annexed mediation, previously introduced to the CPA.[8] The need for such amendment was evident because, within the first decade of the implementation of the MA 03', there were multiple concurrent mediation tracks influencing outlooks for the further development of mediation.[9]

The flexibility of the statutory provisions allowed ample room for the mediation initiative to flourish. However, as the second decade drew to a close, the statistics failed to justify the expectations. The precise information on the number of mediations carried out in private remained unknown,[10] while it was estimated that parties in only 0.6% of cases resort to court-annexed mediation.[11] This led the Government to the conclusion that further adjustments to the mediation framework were necessary, coinciding with the imperative to plan investments and reforms under the Recovery and Resilience Mechanism as the European Union's response to the economic repercussion of the coronavirus outbreak.

In the National Recovery and Resilience Plan (hereinafter: NRRP) of 2021,[12] the Government envisaged the establishment of a new Centre for mediation, which was supposed to be in charge of mediation (most likely instead of courts) and accrediting of private mediation centres and mediators.[13] When the working group was established in January 2022 to draft the amendments, no one in the mediation community actually considered them necessary. However, the mandate of the working group was set in stone by the NRRP, and the Ministry of Justice (hereinafter: Ministry) made it clear from the outset which adjustments were non-negotiable.[14]

In order to make sense out of such a mandated, but simultaneously clearly unrequired reform attempt, an initiative was born on the part of the working group to

[5] Uzelac et al. (2004), pp. 34–36.

[6] OJ L 136, 24.5.2008, pp. 3–8.

[7] OJ, no. 18/2011.

[8] Arts 186.d–186.e CPA.

[9] Triva and Dika (2004), p. 923. Many of those were state-run (e.g. family mediation) or quasi-state run (e.g. consumer ADR). Uzelac et al. (2010), pp. 1304–1306.

[10] Šimunović (2023), pp. 109–110.

[11] NRRP (2021), p. 727.

[12] It is accessible at (Croatian only): https://planoporavka.gov.hr/UserDocsImages/dokumenti/Plan%20oporavka%20i%20otpornosti%2C%20srpanj%202021..pdf?vel=13435491.

[13] NRRP (2023), p. 728.

[14] Uzelac and Brozović (2023), p. 2.

use this opportunity to introduce a broader Amicable Dispute Resolution Act (hereinafter: ADRA)[15] which would, similarly to recent Montenegrin counterpart,[16] lay down the rules not only for mediation but also for some new amicable dispute resolution (hereinafter: ADR) methods, such as structured negotiations and early neutral evaluation. Drawing inspiration from the Belgian *Commission fédérale de mediation* (hereinafter: Belgian *Commission*),[17] the national Centre for ADR (hereinafter: CADR) could act as a main promotor and coordinator of ADR activities in Croatia.[18] The suggestions seemed to have been accepted by the Ministry and the ADRA drafting process started. The circumstances of its drafting, however, could at the very least be described as chaotic. Despite the initial rush, the Ministry ceased the drafting activities for months and eventually—when it simply ran out of time—unilaterally intervened in the text, without having any serious debate in the working group about any of the solutions. Ideas about introducing new methods, such as early neutral evaluation, were mostly dropped, the CADR's role was only partially accepted, and there were some not well-thought-out amendments to the existing rules on mediation. Now neither the mediation community nor the persons who drafted the initial draft are satisfied with the end result.[19]

The comprehensive critique of the ADRA and its drafting, also highlighting the lost opportunities, has already been published somewhere else.[20] In contrast, the purpose of this chapter is to critically assess only the most important adaptations made to the mediation framework. After outlining the new features of the mediation legislation, this chapter focuses on three specific sets of amendments intended to facilitate the use of mediation, which, according to the author's view, instead of achieving this goal, result in a complete reversal, maintaining the status quo or even exacerbating existing problems.

2 The Reform in Brief: An Outline of the Changes

While the ADRA was envisioned as a comprehensive framework act governing all forms of ADR, the majority of its provisions are slightly modified versions of those found in the former MA 11' or regulations derived from it. However, the institutional aspect is notably more extensively regulated, and a devoted section regulating the relationship between ADR attempts and court proceedings has been introduced.

Both the MA 03' and the MA 11' entrusted the Ministry of Justice to be in charge of the support and coordination of mediation activities in Croatia. It was assessed,

[15] OJ, no. 67/2003.

[16] Uzelac and Brozović (2023), p. 5.

[17] More information about the Belgian *Commission* is available at: https://www.cfm-fbc.be/fr.

[18] Uzelac and Brozović (2023), p. 3.

[19] Uzelac and Brozović (2023), p. 2.

[20] Uzelac and Brozović (2023).

and rightfully so, that the Ministry did not consistently assume this role,[21] so many of the coordinating and regulatory activities were taken by the new CADR, established by the ADRA. In the final iteration, its responsibilities can be categorized into three distinct groups (Art. 6 ADRA):

- Support and promotion of ADR: coordination of cooperation between different courts, state bodies, and private mediation institutions; publication of the information on available ADR proceedings.
- Regulatory activities: registration and accreditation of mediators, trainers, and private mediation centres; independent training or in collaboration with accredited training centres; issuance of mandatory information and mediation meeting certificates.
- Provision of ADR services: mediation and mandatory informative mediation meetings when other mediation institutions cannot provide such service in a timely and costly manner.

Unlike before, the general standards for the accreditation of mediators, trainers, and mediation centres are now established by law, although they are still elaborated in more detail in the regulation (Art. 7–8 ADRA). These standards directly influence the eligibility for accreditation as a mediator, highlighting the central role of the CADR. This change is not only a matter of pride or a private sense of professional responsibility. Instead, it has significant implications. Now, only accredited individuals are recognized as mediators, a change that also impacts the definition of mediation itself. Only mediation carried out by mediators, as defined in the ADRA, is officially considered mediation (Art. 4 para. 1 ADRA).

Another novelty is the introduction of a new chapter regulating the parties' pre-commencement procedural obligation to attempt ADR (Art. 9–10 ADRA). Initially, it was intended to be an extension of the principle of loyal cooperation of judges, parties, and lawyers, in all types of litigation. The circumstances of ADRA drafting, however, led to considerable limitations of that duty, restricting it solely to employment-unrelated damages claims.[22] The pre-commencement duty entails the obligation to negotiate or conduct mediation if requested by one party, which can be refused only in case of justified reasons (Art. 9 ADRA). Failure to comply results in a brief factual pause in the process and referral to the mediation information meeting (hereinafter: MIM), while further non-compliance is not regulated (Art. 9 ADRA).

The provisions, that regulate mediation proceedings, are almost a verbatim version of the rules contained in the MA 11' with a few departures from the previous regime:

- A new terminology was introduced and used throughout the ADRA: mediation ('*medijacija*') instead of conciliation ('*mirenje*') and mediator ('*medijator*') instead of conciliator ('*izmiritelj*').
- The possible contents of the mediation agreement and corresponding proposal to mediate are now expressly laid down in the law (Art. 13 ADRA).

[21] Šimunović (2023), p. 117. Braut Filipović et al. (2024), p. 171.

[22] Uzelac and Brozović (2023), 9–10.

- The mediator is now explicitly mentioned as the party signing the settlement agreement (Art. 19 para. 1 subpar. 4 ADRA).
- The mediator has to inform the CADR about the outcome and duration of the mediation (Art. 19 para. 2 ADRA).
- Mediation proceedings suspend limitation periods instead of interrupting them (Art. 24 ADRA).
- The costs of the mediation attempt and the participation in the MIM are explicitly included in the costs of subsequent litigation (Art. 26 para. 2 ADRA).
- The definition of the residence for the purpose of defining cross-border mediation was aligned with the definition used in the Brussels I bis Regulation (Art. 27 para. 6 ADRA).
- The enforcement of an international settlement agreement may be refused by the court on the grounds moderately inspired by Art. 19 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation[23] and even more closely by Art. 5 Singapore Convention on International Settlement Agreements Resulting from Mediation[24] (Art. 28 ADRA).

From this brief overview, it appears that the main objective of the ADRA was to centralize the system and enable better coordination of different ADR activities, while also aiming to formalize and affirm the mediation profession and encourage the preference for mediation over resorting to courts. In the subsequent chapters, we will explore whether these objectives were indeed achieved.

3 ADR Coordination and Promotion

3.1 All Parallel Mediation Tracks Under One Umbrella?

From the very beginning and the first proposal, the ADRA was conceived as the overarching framework in the field of ADR aimed at bringing order to the fragmented system where multiple parallel mediation tracks exist.[25] The general subsidiarity rule was thus introduced, prescribing that the ADRA would apply *mutatis mutandis* to ADR proceedings regulated by special laws to the extent not provided otherwise (Art. 1 para. 2 ADRA). In theory, this presented an opportunity to establish a comprehensive framework, which could be applied in all mediation tracks: mediation at private centres, court-annexed mediation, family mediation, consumer mediation, and employment mediation. However, the drafting process of the ADRA hindered the

[23] The text is available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf.

[24] The text is available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.

[25] Uzelac and Brozović (2022), pp. 1–2.

discussion and full implementation of that idea. On top of that, last-minute unilateral changes worsened the lack of coordination among the tracks.

For instance, when mediation institutions were defined in MA 11', they were described as a legal entity, body of a legal entity, or organizational unit of a legal entity that organizes and conducts mediation (Art. 3 MA 11'). However, the last-minute change resulted in a provision, which no longer mentions the organizational units as potential mediation providers (Art. 4 ADRA). Such a fundamental shift raises several issues. Does this revised definition imply that the ADRA is not applicable to court-annexed mediation since it is carried out by organizational units? Does at least the procedural part of the ADRA apply, whereas institutional aspects are reserved for private mediation centres only? If so, what are the qualifications needed to become a mediator who can enter the list of mediators determined by the president of each court (Art. 186.d para. 3 CPA) and carry out court-annexed mediation? So many questions are raised and can be solved only by careful interpretation of the new provisions.

The general subsidiarity rule, mentioned above, offers limited guidance on these matters. However, concluding that court-annexed mediation is not mediation within the meaning of the ADRA seems unacceptable. After all, the possibility of carrying out mediation in courts is implicitly mentioned in other provisions (Art. 3 para. 2 and Art. 4 ADRA). It is truly inconceivable that certain general principles, such as confidentiality, neutrality, or party control (Art. 5 ADRA), would not apply to such mediation.[26] It would also be unreasonable to conclude that the rules regarding the initiation (Art. 13 ADRA), conduct (Art. 16–18 ADRA), and conclusion of proceedings (Art. 19 ADRA) do not equally apply to court-annexed mediation.

There seems to be no compelling reason, on the other hand, to conclude that the rule laying down consequences of a pending mediation (Art. 24 CPA) should also apply here. If the claimant has already submitted its claim, thereby initiating court or arbitral proceedings, it has already interrupted the limitation period and submitted the claim in a timely manner (Art. 241 Obligations Act), so there is no deadline left to be suspended after the mediation has started. Likewise, there is no need to apply the enforceability rules (Art. 20 ADRA), as the settlement agreements reached in court-annexed mediation are concluded in the form of a court settlement (Art. 186.d para. 7 CPA) which is already an enforceable title (Art. 23 Enforcement Act).[27]

Whether the institutional rules of the ADRA will apply to court-annexed mediation is yet to be seen in practice, but from the wording of the provisions and current practice, it would seem that the answer would most likely be negative. The official statistics show that the courts do not inform the CADR about the duration and outcome of proceedings as specifically required from private mediation centres (Art. 7 para 8 and 19 para. 2 ADRA). The fact that all judges and judicial advisors, who

[26] This should also apply to the rules derived from those principles, such as the rule on the nomination (Art. 14 ADRA), the removal of mediators (Art. 15 ADRA), the consequences of breach of confidentiality (Art. 21 ADRA) or the admissibility of evidence in other proceedings (Art. 22 ADRA). The rule specifying that the mediator is nominated by the CADR in the absence of a consensual proposal from the parties (Art. 14 para. 3 ADRA) should not be applied, as the case allocation would, just like any other court case, be carried out randomly by the ICMS.

[27] OJ, no. 112/2012, 25/2013, 93/2014, 55/16, 73/2017, 131/2020, 114/2022, 06/2024.

are already registered, are now considered mediators regardless of their previous training,[28] raises concerns about the issue of qualifications for the future. It would certainly be commendable, if not implicitly required, for the new court mediators to also undergo basic training just like anyone else pursuing a mediation career.

A somewhat distinct set of challenges arises in the context of family mediation as another concurrent mediation track. The new definition of mediator and mediator providers (Art. 4 ADRA) appears to have left further exacerbated the longstanding dilemma that emerged with the official introduction of family mediation in the Family Act (hereinafter: FA)[29] back in 2014. According to the FA, family mediation can only be conducted by a mediator listed in the official family mediator registry, who must undergo specific training (Art. 341–342 FA). This training significantly differs from the basic 40-h training with an exam required to enter the CADR's registry. It entails either specialized postgraduate studies or a minimum of 140 h of education, 40 h of supervised practice, and 20 h of supervision after having 2 years of experience working with children. In the literature, it has already been noted that these special provisions apply only to free mediation schemes within social work networks, whereas the same service can be provided by private centres and courts.[30] Once more, the only coherent interpretation appears to be that only the procedural aspects of the ADRA apply to family mediation, to the extent they are not already covered by the FA,[31] while institutional rules are sufficiently regulated by the FA and the corresponding regulations.

Employment mediation partly shares the same issues as family mediation, depending on its type. According to the Labour Act (hereinafter: LA),[32] in collective employment cases, where mediation attempt is mandatory (Art. 205 LA), the mediation is carried out by mediators on the special list published by the Economic-Social Council (Art. 206 LA). The Economic-Social Council is a separate three-partite body consisted of the representatives of the Government, unions, and employers' associations, with the task of promoting labour rights and balanced relationship between employers and employees (Art. 221 LA). It introduced special rules on the appointment of mediators and their remuneration, partly departing from the solutions in the MA 11' and now the ADRA.[33] This would mean that both institutional and procedural rules of the ADRA are not applicable to collective mediation cases, providing there are special rules laid down in the LA and its regulations. When individual employment disputes are in question, they depend solely on the parties agreement (Art. 136 LA), which puts in the arena of general rules.[34] Both institutional and procedural rules of the ADRA equally apply to these disputes.

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[28] Art 11 Regulation on registry of mediators (OJ, no. 100/2023).

[29] OJ, no. 103/2015, 98/2019, 47/2020, 49/2023, 156/2023.

[30] Aras Kramar (2017), p. 311.

[31] Such is the case with impartiality and confidentiality which do not apply when the interest of children are affected (Art. 335 and 339 FA).

[32] OJ, no. 9320/14, 127/2017, 98/2019, 151/2022, 46/2023, 64/2023.

[33] They are published on the website https://gsv.socijalno-partnerstvo.hr/nacionalni-gsv/mirenje.

[34] Uzelac et al. (2010), p. 1291.

The least coordination was needed in regard to consumer mediation. In its introductory provisions, the ADRA explicitly stated that it represents the measure to implement Directive 2013/11/EU of the European Parliament and of 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.[35] However, this statement is merely declaratory, as the Directive had already been implemented through the Consumer Alternative Dispute Resolution Act in 2016, which also clarified that it does not affect the applicability of the general mediation framework (Art. 5). Even in the absence of these circular provisions, very few rules in the Consumer Alternative Dispute Resolution Act could be deemed incompatible with the general rules. Therefore, we can confidently conclude that both the institutional and procedural rules of the ADRA are applicable in the case of consumer mediation.

3.2 The CADR as the Facilitator of ADR?

The CADR was established in July 2023 following the issuance of a formal decision by the Ministry of Justice (hereinafter: Decision),[36] as mandated by law (Art. 7 ADRA). Contrary to the initial proposal, which sought to mimic the organizational model of the Belgian *Commission*, ensuring institutional and professional independence from the Ministry through several professional bodies,[37] the Decision outlined a simpler structure for the CADR. This structure includes one director and a board comprising five members, four of whom are representatives of the Ministry (Art. 8–9 Decision). Funding for its activities is primarily planned to come from the state budget, supplemented by a smaller contribution from its own income, which includes fees from training, mediation, and other services (Art. 12 Decision).

This is the main reason why the CADR has not had the opportunity to assume the role entrusted to it by the ADRA. In its initial months, the CADR lacked both premises and equipment to carry out its basic activities. However, in 2024, with improved budget planning, the CADR acquired temporary premises and expanded its personnel, in preparation for its move to new facilities planned for construction in 2026.[38] Alongside the director, it now employs a total of 14 staff members. Budget planning reveals that a significant portion of the modest budget, 87.5%, is allocated to gross salaries and other employee expenses and fees.[39] Despite the management's pro-mediation stance and understanding of the CADR's mission, without adequate support, all these legislative efforts may be in vain.

It is evident that certain activities, such as conducting mediation or organizing basic and advanced training, are not feasible at this moment due to a lack of adequate

[35] OJ L 165, 18.6.2013, p. 63–79.

[36] Decision of 24 July 2023, class 700-03/23-02/39, no. 514-03-02-01/01/01-23-20.

[37] Uzelac and Brozović (2023), p. 8.

[38] NRRP (2021), p. 750.

[39] The budget is published on the CADR's website: https://cmrs.hr/dokumenti2/.

space and personnel. Consequently, mediation is conducted in private centres, five of which are accredited to provide basic training and/or training of trainers. The registry indicates that over the years, most mediators (55.49%) received their basic training at the most active mediation institution, the Croatian Mediation Association (hereinafter: CMA), while the remainder trained through various projects or individual initiatives. In 2023, the CMA accounted for 86.75% of the training, and the Centre for mediation "Mediator" for 8.61%, illustrating that training is currently primarily conducted by these two private centres, with the CADR only providing accreditation.

The registry of mediators, mentioned above, along with the registry of private mediation centres is an example of one modest but positive change brought about by the introduction of the CADR. Previously, those registries were mismanaged by the Ministry, rarely updated, rendering them ineffective. New information seems to be regularly updated on the CADR's website.[40] Another novelty, introduced by the ADRA, seems to be yielding the first results. Although the obligation to report on the number, duration, and outcome of mediations was already present in the Consumer Alternative Dispute Resolution Act, this obligation has never been taken seriously.[41] Opposed to that, the CADR is effectively required to collect data on mediations carried out in all private mediation centres (Art. 6 para. 1 ADRA).

The CADR's statistics[42] for the second half of 2023 reveal that many, albeit not all, private mediation centres submitted data, though the quality of data varies. Some centres provided detailed information on case types, referral sources, and outcomes, while others provided only brief information. For the first time, there is a glimpse into the use of mediation: 290 proposals were made, 61 accepted, and 30 resulted in settlement agreements, indicating a success rate slightly below 50%. In the first quarter of 2024, there have been 100 proposals, 28 accepted, and 13 settlement agreements. With some effort and interpretation, these figures allow for a more precise estimate of consumer mediation trends.[43]

On the other hand, the data about court-annexed mediation has to be gathered separately.[44] The data shows that in 2023 there were 384 mediations in municipal courts and 199 in commercial courts. In municipal courts, the success rate was 40.10%, and in commercial courts 51.76%. The statistics of family mediation are only available in the reports of the Ministry of Labour, Pension System, Family, and Social Policy. Unfortunately, the 2023 report is currently unavailable, but in 2022, 1428 couples were referred to mandatory mediation meetings, resulting in parental plans negotiated in 368 cases. This indicates a considerably larger number of cases, but with a success rate of only 25.77%, a significantly lower percentage compared to court-ordered or

[40] Both registries are available at: https://cmrs.hr/registri2/.

[41] Uzelac (2018), p. 162.

[42] We are thankful to the director of the CADR Marin Vuković for providing us with this data.

[43] It is difficult to assess the total number of consumer mediations, but it is clear that the number was around 50, which was also the reported number in the European Commission Report 2022, available at: https://op.europa.eu/en/publication-detail/-/publication/bb2564ef-6bd5-11ee-9220-01aa75ed71a1/language-en.

[44] We are thankful to Nika Vrcić for giving us permission to publish data she collected for her graduate paper soon expected to be defended and published.

party-agreed mediation.[45] Following the Constitutional Court decision of April 2023, which abolished the provision on mandatory mediation in divorce proceedings due to alleged infringements of the right to access to courts,[46] one can anticipate that the numbers for 2023 will be more modest and basically insignificant. The individual and collective employment mediation cases, administered by the Economic-Social Council, are also reported separately, with the number of mediations ranging from around 50 up to 150 in some years and the success rate ranging from approximately 25–50%.[47]

While one might argue that in 2024, we are closer to obtaining an accurate picture of the number of mediations in Croatia, official statistics of the CADR reveal only approximately 3% of all mediation cases. If the aim was to have one institution systematically gathering data on ADR (Art. 6 para. 1 ADRA), unfortunately, this goal has not been achieved. All in all, it seems that the CADR is modestly and gradually assuming its statutory role of regulator and facilitator, while still being far from the envisioned role of the overall system coordinator.

4 Affirmation of the Mediation Profession?

Unlike earlier, when such an obligation was merely prescribed by regulation, now explicit statutory provisions require mediators to attend basic training and to continuously pursue professional development (Art. 8 paras. 2 and 4 ADRA). The regulation specifies in more detail the contents of such training and also envisages a special exam. Failure to comply renders them ineligible for mediator registration (Art. 8 para. 1 ADRA), which means they cannot be considered mediators within the meaning of that law (Art. 4 para. 1 ADRA). While these rules represent significant strides towards professionalizing mediation, there are reasons that raise concerns and warrant careful consideration before fully embracing this solution.

Starting with the issue of continuous training, elevating it to a statutory requirement is indeed commendable. Notably, this mirrors a strong recommendation in the Directive (Art. 4), with similar lifelong professional development mandated for attorneys, public notaries, and judges. However, the irony lies in the fact that this obligation has become even less stringent. Previously, a failure to undergo advanced training every two years would, at least in theory,[48] lead to removal from the mediator registry. Currently, however, one can only be removed from the registry due to registration errors or death (Art. 8 para. 3 ADRA). Therefore, despite being a breach

[45] The statistics are avaiable at (Croatian only): https://mrosp.gov.hr/UserDocsImages/dokumenti/Glavno%20tajni%C5%A1tvo/Godi%C5%A1nje%20izvje%C5%A1%C4%87e%202022/Godi%C5%A1nje%20statisti%C4%8Dko%20o%20primijenjenim%20pravima%20socijalne%20skrbi%202022.pdf.

[46] Decision of 18 April 2023, U-I/3941/2015.

[47] Data available at: https://gsv.socijalno-partnerstvo.hr/nacionalni-gsv/mirenje.

[48] Since the Ministry did not regularly update the registry, many mediators remained in the list despite never undergoing advanced training. See note 21.

of an explicit statutory obligation, the lack of continuous training no longer leads to the same consequence. The amendment got stuck halfway.

Connecting the registration requirement to the very definition of a mediator, on the other hand, represents a serious departure from the previous regime. Narrowly interpreted, it might seem that mediation not carried out by a licensed and registered mediator is not mediation at all. Many mediation centres have quality mediators who have not undergone any professional training, which obviously jeopardizes the possibility for them to continue their otherwise successful work. On top of that, it is not only their interest that is in question. If carried out by an unlicensed mediator, it is questionable whether the settlement agreement reached would be as enforceable as the one reached before a licensed mediator, and whether initiation of such mediation would suspend the limitation and prescription periods. Strictly speaking, it is not mediation in the sense the ADRA defines it, so the answer to that question should be negative.

This kind of inconsiderate and not well-thought-out amendment departs not only from traditional domestic definitions in Croatian legislation but also from international instruments that were used as a model. Neither the UNCITRAL Model Law on International Commercial Mediation, nor the Singapore Convention, nor the Directive defines mediators as necessarily "registered" or "accredited" persons but emphasize two distinctive elements: the mediator is a "third person" who does not hold the "power to impose a solution".[49] The distinction from the definition used in the Directive is especially problematic. The European Commission was aware that many Member States have different qualifications criteria for mediators, so the rules on accreditation were omitted.[50] Instead there is a general rule obliging the Member States to "encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties" (Art. 4 para. 2 Directive). The intention to preserve the high standards should not, however, impede the goal of ensuring "the proper functioning of the internal market, in particular as concerns the availability of mediation services" (recital 5 Directive). Some Member States effectively tackled this issue.

For instance, in Austria, cross-border mediation can be carried out by unlicensed mediators with the same effect as domestic mediations with licensed mediators.[51] In Belgium, the parties are free to choose any person to mediate their case, but only the settlement agreement reached before a licensed mediator can be homologized and thus become enforceable.[52] Similarly, in Portugal, settlement agreements have to be homologised in order to be enforceable, but that is not required if mediation is carried out by an accredited mediator.[53] Most importantly, all of these different

[49] Compare Art. 1 UNCITRAL Model Law on International Commercial Mediation, Art. 2 Singapore Convention, and Art. 3 Directive.

[50] Feasley (2011), p. 5.

[51] Risak and Lenz (2017), 40–41.

[52] Nigmatullina and Billiet (2017), p. 75.

[53] Walsh and d'Abreu Miguel (2017), p. 633.

distinctions are clearly stated in the law. In contrast to that, these issues are not at all regulated in the ADRA, creating considerable legal uncertainty.

If the Ministry wanted to insist on the quality standards and registration, it could have followed the Austrian example by insisting on the registration for domestic purposes, while allowing different criteria for cross-border mediation. Currently, this could be possible only by way of a stretched interpretation, as the law clearly states in two provisions that all ADRA's provisions are applicable to cross-border mediation (Art. 1 para. 3 and Art. 27 ADRA). Without these necessary amendments, it could be said that the ADRA implemented the Directive to a lesser extent than the MA 11'. Furthermore, in domestic mediation cases, the principle of legal certainty would require clearly regulating the consequences of a mediation carried out by non-licensed mediators, so that both parties and the mediation community can adapt to these legislative expectations.

Currently, continuous training is a loosely enforced obligation, successfully followed by 955 licensed mediators.[54] The statutory obligation will motivate only a small number of mediators, who actually carry out mediations, as they are likely to consider this part of their professional and ethical duty anyway. In our view, the sole state monopoly over registration and accreditation standards will not, by itself, advance the professionalization of the field. Hopefully, broader participation in fundamental training among various professionals, such as educators working with children, will at least foster the adoption of a culture of ADR in the long term. As mentioned earlier, however, such a beneficial coincidental outcome should not compromise Croatia's adherence to its international commitments.

5 Strengthening Incentives for Using Mediation?

In line with the authority expressly granted by the Directive (Art. 5 para. 2 Directive), many Member States have introduced numerous positive and negative incentives to promote the use of mediation. These incentives range from tax benefits and (partial) court fee waivers or reimbursement to suspension of limitation and prescription periods, and adverse cost sanctions for parties that demonstrate a lack of willingness to attempt settling the case amicably.[55]

The ADRA has only modestly contributed to incentivizing mediation in Croatia by explicitly stating that the costs of attempting mediation and participating in the MIM are included in the total costs of subsequent litigation (Art. 26 para. 2 ADRA). This was previously only an implied rule (Art. 151 para. 1 CPA) that courts almost

[54] This does not include family mediators, as 48 of them are registered separately. See: https://mrosp.gov.hr/UserDocsImages/dokumenti/Socijalna%20politika/Evidencije/Registar%20obiteljskih%20medijatora%2024.08.2023..pdf. There is also a separate list of the Economic and Social Council (OJ, np. 116/2016) with 35 people listed.

[55] Menkel-Meadow (2016), p. 30. See also European Parliament (2016), p. 12.

never applied due to restrictive interpretation.[56] During the ADRA drafting, there was no discussion to introduce tax benefits like those in Italy,[57] so income from mediated settlement agreements is still taxed the same way as the income from judgments.[58] The issue with the ADRA, however, is not that it did not introduce many new incentives for using mediation, but that it most likely hindered the existing ones.

The best example is the rule on the effect of mediation proceedings on limitation and prescription periods. Changing a decade-long provision is another item on the list of last-minute changes that have never been subject to serious debate.[59] It actually reintroduced the same rule that was already in force in the MA 09' and the MA 11', stating that both limitation and prescription periods are suspended during mediation (Art. 24 ADRA).[60] Previous versions of this provision had different solutions for each of these periods.

Initially, limitation periods were not affected by pending mediation, unless the parties agreed otherwise, while it interrupted the prescription period, meaning it would restart after the proposal to mediate was rejected or mediation ended without reaching a settlement agreement (Art. 14 MA 03'). In 2011, a considerably more complex provision was introduced. It started with a verbatim adoption of the general principle proclaimed in the Directive that the parties should not be prevented from initiating judicial or arbitration proceedings because of the expiry of limitation or prescription periods during the mediation (Art. 17 para. 1 MA 11 and Art. 8 para. 1 Directive). In the case of limitation periods, this meant that acceptance of the proposal to mediate would interrupt such periods, conditioned upon the successful outcome of the mediation. If the settlement is not reached, the parties still have an additional 15 days after the end of the mediation to initiate court or arbitration proceedings without losing the initial benefit. In the case of prescription periods, they were suspended by the very proposal to mediate, with the suspension extended for 15 days after the refusal of the proposal or the end of the mediation if the proposal was accepted (Art. 6 para. 5 and Art. 17 paras. 2–4 MA 11').

The dual solutions, not necessarily regulated in the clearest way, seemed to have caused confusion in practice,[61] indicating a need for reconsideration. However, this reassessment should have taken place in a debate in which all implications of different solutions would be addressed. Unlike the previous rule, the current one does not work as a strong incentive to mediate in cases where the expiration of limitation or prescription periods is around the corner. For instance, if such periods are expiring in

[56] The costs were recoverable only to the extent the ADR attempt was a procedural requirement to initiate the proceedings (see Supreme Court decision of 10 November 2009, Rev-615/09; and High Commercial Court decision of 26 April 2021, Pž-7826/10).

[57] Indovina (2020), p. 77.

[58] See e.g. Opinion of 26 November 2019, class 410–01/19–01/1558.

[59] Uzelac and Brozović (2023), p. 10.

[60] It justified it as a Directive implementation measure, although the irony is that the Ministry had the same justification in 2009 and 2011.

[61] Uzelac and Brozović (2023), p. 10.

10 days and the suspension only occurs if the proposal to mediate is accepted (Art. 13 para. 2 ADRA), for which consideration the other party regularly has 15 days (Art. 13 para. 3 ADRA), would the potential claimants even undertake such a risk to propose mediation, without knowing whether the other party will positively respond in due time? The issue is even more evident in the case of prescription periods because the proposal to mediate no longer affects their progression on its own.

But the problem goes even further. Should the proposal and its subsequent acceptance be timely, and the parties indeed attempt to mediate, what happens in case the mediation is not successful? The limitation and prescription periods simply continue to run where they left prior to the initiation of the mediation (Art. 238 para. 2 Obligations Act). Again, in situations of time pressure, it makes no sense to mediate and risk the possibility of being prevented from effectively initiating court proceedings.[62] The additional time of 15 days that existed in the MA 11' successfully circumvented that problem and offered parties, who are willing to mediate, sufficient time to prepare for the subsequent court or arbitration proceedings.

Our critical assessment does not imply that the solution in the MA 11' was the only possible solution to address the issue of limitation and prescription periods or even that it is the best possible solution, although there are such examples in pro-mediation Member States.[63] There are alternative ways to achieve the same purpose, for instance, by using interim measures.[64] The use of interruptions or additional deadlines should also not lead to abuse by creditors.[65] All these different implications can and should be taken into account when deciding on this matter.[66]

Another example where the introduction of the ADRA hindered the incentives is the case of adverse cost sanctions. Since 2019, parties who did not participate in the mandatory mediation meeting to which they were referred by the court risked being unable to recover the costs of subsequent litigation, even in the event of complete success (Art. 186.d para. 9 CPA). The introduction of the pre-commencement procedural obligations to attempt ADR, either by negotiating or mediating (Art. 9 para. 2 ADRA), expanded the types of cases in which the court is required to refer the parties to mediation. Initially, such obligations should have existed in basically all types of litigation as an extension of the principle of loyal cooperation (Art. 10 para. 1 CPA), but in the final version, it was limited solely to proceedings initiated upon employment-unrelated damages claims (Art. 9 para. 1 ADRA). At some point, the Ministry also decided to differentiate between the MIM and the first mediation meeting, which would not be an issue in terms of incentives had they not decided

[62] Garner (2020), p. 29.

[63] Nigmatullina and Billiet (2017), p. 74.

[64] Uzelac and Brozović (2023), p. 10.

[65] Morek (2017), p. 620.

[66] Bilić (2008), p. 150.

to completely omit the provision laying down the consequences of parties' non-appearance at the MIM.[67] The solution was seen in the interpretation of the CPA and its announced amendments,[68] but these only made the problem worse.

According to the current text of the CPA, the adverse costs sanction does not apply if the party does not participate in the MIM, making it completely optional. The whole point of the ADRA was to force parties to show a minimum token of goodwill and to seriously consider ADR, without forcing them to mediate or settle the case. Instead, the adverse cost sanction applies only if the parties agree to engage in mediation during the MIM and later fail to appear at the mediation session (Art. 186.d para. 9 CPA). Not only does the introduction of the MIM become meaningless, but it also raises questions of constitutionality. Specifically, one of the reasons the Constitutional Court abolished the provision for mandatory mediation meetings in family matters was its (incorrect) assessment that parties cannot leave mediation if they choose, which contradicts the principle of party autonomy.[69] Leaving aside the Constitutional Court's incorrect interpretation of the FA,[70] sanctioning non-appearance at the mediation meeting after the parties have agreed to mediate indeed violates the principle of autonomy (Art. 5 ADRA), as non-appearance, in practical terms, is no different from appearing and then willingly leaving the mediation. Whether the Constitutional Court will react, or the Ministry will correct the mistake before any interventions, remains to be seen.

6 Concluding Remarks

The new Croatian mediation framework serves as a notable illustration of how well-meaning intentions, when rushed and lacking thorough, comprehensive debate, can lead to unintended consequences. Many of the ADRA's provisions lack the necessary clarity and undermine already functioning mechanisms. In particular, the CADR's role remains limited, and only with enthusiastic leadership and support from the Ministry can we expect it to assume its statutory role. Challenges persist in coordinating parallel mediation tracks, as new provisions introduce additional complexities. The pursuit of professionalizing the mediation profession raises doubts about compliance with international commitments, while certain rule adaptations diminish incentives for mediation use and pose constitutional concerns.

One cannot conclude that the Ministry is not making any efforts to facilitate the use of ADR. However, many of these efforts seem akin to running on a hamster wheel, only accelerating the return to the same starting point, occasionally even resulting in being ejected from the wheel. An alternative approach would be to introduce a more

[67] Uzelac and Brozović (2023), p. 10.

[68] Brozovic and Zeljko (2023), pp. 495–496.

[69] Decision of the Constitutional Court, U-I/3941/2015, para. 41.

[70] There has never been any doubt that the parties only need to attend the first meeting and actively participate in it. Mediation as a whole has always been optional.

flexible set of rules while simultaneously providing logistical support to mediation centres and a wide array of incentives for both users and providers of these services. This is not only in the interest of the judiciary, which will no longer have to handle cases that can be resolved independently, but also in the interest of the parties, who should be the main focus of the judicial system.

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