

# **THE CHALLENGE OF ESTABLISHING A COMMERCIAL MEDIATION PROGRAM IN CROATIA**

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## **SITUATION IN CROATIA**

Croatia is a beautiful country, situated on the eastern side of the Adriatic Sea with scenic mountains and miles of inviting beaches. After years of communist domination, Croatia is emerging as a western-oriented capitalist democracy. As a result, Croatia is reaping the rewards of this transition but also encountering some significant commercial-related problems.

In transitioning from its communist past, Croatia is experiencing the same problems in its commercial dispute resolution practices as its western counterparts. To many in the business community, the most significant commercial problem for Croatia is litigation. Croatia, in fact, is one of the most litigious societies in the world, rivaling if not surpassing the United States in the filing of lawsuits. At the beginning of 2002, the Croatian court system was sinking under the weight of 1.5 million pending cases generated by a nation of only 4.5 million people.

The Croatian business community and the overloaded judiciary recognized the need for change. This situation stimulated an interest in alternative means of dispute resolution and planted a seed for a commercial mediation program.

## **INITIATION OF THE COMMERCIAL MEDIATION PROGRAM**

The initiation of the Croatian mediation program began in December 2002. At that time, CSR working under contract for Booz Allen Hamilton {BAH} on a USAID project started with an assessment of the viability for initiating both a court annexed and a commercial mediation program.

The program assessment consisted of a series of round-table discussions with the business and legal communities throughout the country and individual meetings with corporations, trade associations, and legal entities such as the law school and members of the judiciary. The round-tables were designed to determine whether or not an alternative to litigation for resolving commercial disputes was needed and would be supported by the business community. The individual meetings were designed to find the types of commercial cases that could benefit from mediation and to develop an interest in the use of commercial mediation. The Chief of Party for BAH in Zagreb and the local USAID

representative were largely responsible for identifying participants and coordinating schedules for the assessment meetings. This assistance was crucial to the assessment.

Feedback from the roundtable and individual corporate meetings revealed a high degree of frustration within the business community with the existing judicial system as the primary means of dispute resolution. Their complaints were fairly typical for a business community. The roundtable participants and corporate officials expressed their dissatisfaction with the high costs of litigation, the extensive delays in getting enforceable judicial decisions, and the unpredictability of results. Further, there was apparent consensus that a commercial mediation initiative had the best chance for success. As a result, the court-annexed mediation initiative was dropped.

Creating a sustainable national mediation program poses many challenges. The project was designed with a multi-faceted approach – establishing stakeholder ownership; creating market demand; building institutional infrastructure; providing legislative support and policy assistance; conducting mediator training; and generating publicity. A major hurdle facing CSR at the outset was the accelerated schedule for completing the project which had to be completed in 14 months rather than the anticipated three years.

A significant initial challenge for CSR was finding champions within the Croatian business and legal communities to sponsor the commercial mediation program. During 2003, two organizations, the Croatian Employers Association (“HUP”) and the Chamber of Economy, came forward as champions.

Next, CSR had to design a training program that would provide a core of skilled Croatian mediators and an administrative structure to support a totally independent Croatian mediation program. This was accomplished with a multi-tiered training program consisting of a basic mediation course, an advanced mediation skills development course, a mediation practicum, a train-the-trainers workshop, and a mediation case management session.

## **MEDIATION TRAINING**

In developing a mediation training program in Croatia, the challenges CSR faced were numerous but not insurmountable. Although the CSR mediation training program was designed around our existing training programs in the United States, we had to constantly check our assumptions because of differences in culture, language, dispute resolution awareness, and teaching methods while factoring in the burdens of distance and travel. What we found was that we were able to successfully present the mediation training program after considering these matters and making appropriate adjustments. At times we had to adjust on the spur of the moment during the training session. Here are some of the valuable lessons CSR learned from this experience.

**Local administrative support** is absolutely essential. A local administration person performs so many critical functions that they are almost too numerous to list. Some of these functions that would be impossible to do or do well without local support are

scheduling training sessions, arranging for adequate training sites, providing refreshments and meals for participants, contracting for translation services of translators and the translation of written materials, purchasing training supplies, and even arranging for transportation to remote training sites.

**Scheduling** requires adjusting to local norms, customs, and business practices. In creating a training calendar, CSR had to give consideration to different national and religious holidays, conflicting business conference dates, and even school vacation dates during both summer and winter. Also, we discovered that there was a great preference for weekend training dates, including Sundays, due to participant work schedules.

**Participant selection** was not a direct responsibility of CSR. Although CSR established general criteria for the selection process, the class roster was determined locally by BAH and USAID. This process created some very interesting and potentially sensitive mixes of subordinates/supervisors, law students/law professors and trial court judges/appellate court judge, particularly during role-play exercises. In general, this mix of professionals was not a problem except in one or two instances where we had to quickly intervene to change the dynamics of the group by coaching the reluctant participant.

**Role-plays** were tailored to reflect local names and locations and realistic commercial problems. The more “tailored” the role plays, the better the participation and experience. Although role-plays were a new training experience for many of the participants, the Croatian tailored role-plays were readily accepted and extremely successful in reinforcing training concepts.

**Law and local legal practice** presented its own unique problems because of Croatia’s civil law background which created challenges for instructors with a common law background. We had to take account of civil law in writing role-plays to present realistic commercial problems, drafting agreements to mediate, preparing “enforceable” settlement agreements, and teaching the concept of confidentiality. Although mediation was not prohibited under Croatian law, it was interesting from a cross-cultural dynamic that our Croatian program participants were uncomfortable using mediation unless, and until, the legislature passed a statute authorizing the use of mediation. Fortunately, Croatia passed a mediation law in late 2003.

**Language** was not a major barrier but only because of instructor preparation. Prior to a training session, all materials including handouts, role-plays, videos, and power-point slides were translated. Additionally we had excellent simultaneous translation at all training sessions. However, when there were problems, they occurred spontaneously. These surfaced when English words had several Croatian meanings such as “agreement” and English concepts that did not translate well into Croatian. These concepts included “reality check”, “intake person”, “elevator speech”, “testimonials”, “value-added”, and even “interest-based”. We learned the importance of previewing materials with the translators to avoid ambiguity and miscommunication.

**Motivation** was high and interest was great. The participants were eager to learn and could readily adapt to different training techniques. Participant attendance and meeting training schedules were never an issue. Also, the CSR training program was a mixture of lecture and experiential learning that was very different from the normal Croatian training regimen of pure lectures.

**Observations** of actual mediations enhanced the participant training experience. CSR with the cooperation of the Los Angeles County Bar Association (LACBA) and the Los Angeles office of JAMS was able to supplement the participants' classroom training schedule with a realistic mediation experience. This included the opportunity to observe actual mediations, to discuss mediation techniques with the mediators, and to view the administrative operation and the physical office structure of a mediation business operation.

## **IMPLEMENTATION**

Implementation is always the biggest challenge when creating a sustainable mediation initiative. In implementing a lasting mediation program for Croatia, CSR focused on four significant areas: providing systems design guidance, designing promotional plans and stakeholder outreach, giving technical assistance, and creating professional recognition for mediators.

**Systems design guidance** was provided to assist corporations and other private and public entities working in the commercial arena to develop mediation programs. CSR and the LACBA met with potential Croatian mediation administrative managers to fully acquaint them with mediation administration requirements and mediation office procedures

**Promotional plans** were developed to market mediation and reach out to the business community to generate cases to mediate. Further, the plan called for constant communication with all stakeholders and potential users of mediation to keep up the program momentum. In essence, we created a "buzz" in the commercial community. The plans included the use of mediation pamphlets and brochures, newspaper articles, testimonials from senior members of the business community and judiciary, conference presentations, and community roundtables.

**Technical assistance** on the mechanics of mediation was also provided. This included; the writing of agreements to mediate, case management and confidentiality forms, and settlement agreements; mediation ethics; and the business and marketing aspects of creation of a mediation practice.

**Professional recognition** for mediators was another goal of the implementation phase of the program. This was accomplished by the formation of the Croatian Association of Mediators. The Association is considering a newsletter for mediators, mediation-focused conferences, and standards for the continuing education of mediators.

## **SUMMARY**

Croatia has established a commercial mediation program. At this time, commercial cases are being generated for mediation and several are actually scheduled. However, only time will allow the business community to evaluate mediation's success. For Croatia the future for commercial mediation is now.