Comments on the Draft Proposal of the Act on Amendments to the Enforcement Act

Zagreb, June 2022

AmCham

American Chamber of Commerce in Croatia Američka gospodarska komora u Hrvatskoj

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Introduction

The plan of legislative activity for 2022 in the Republic of Croatia includes, among other things, adopting the Act on Amendments to the Enforcement Act.

On September 15, 2021, the Ordinance on forms in the enforcement procedure, the methods of communication by electronic means between the participants in the procedure, and the allocation of cases to the notary public (hereinafter: the Ordinance), which serves as an introduction into the above-mentioned amendments, entered into force.

On June 3, 2022, the Ministry of Justice and Public Administration opened an e-consultation on the Draft Proposal of the Act on Amendments to the Enforcement Act, which marked the official start of amending the enforcement procedure, including the plan that the final proposal of the act should be adopted and enter into force (probably) at the beginning of 2023, i.e., when the euro becomes the official currency in the Republic of Croatia.

Since the amendments to the existing act are extensive and certain institutes are to be significantly amended or abolished, AmCham Croatia has decided to draft a position paper on the enforcement proceedings, according to the current positive practice of active participation in the preparation of important legislation. The position paper includes additional proposals, based on examples from practice, for improving certain parts of the Enforcement Act to increase efficiency and facilitate the process for the benefit of the parties involved.

State of play in Croatia

As mentioned in the Introduction, from September 2021 in Croatia, enforcement based on authentic documents is initiated using electronic communication. This has not yet proved to have accelerated the enforcement process. Indeed, the percentage of the final enforcement orders within three months from the day of initiating the process plummeted from 95% before the implementation of the new rules to 5% for proposals submitted in accordance with the new regulations.

We are optimistic that this situation is temporary, as digitalization was necessary. We want to point out that, despite the initial difficulties, the process continues in the right direction, and we are grateful to the Ministry of Justice and Public Administration for their openness to collaboration and adopting expert proposals from practice.

Encouraging questions related to other institutes of the enforcement procedure, primarily based on enforcement documents, is a priority of the legislative, business, and other subjects who use the procedure on a daily basis or participate in it. Even though many institutes and ways of instituting enforcement proceedings have over time been significantly enhanced, there is room for further improvement and we believe that these Amendments to the Enforcement Act will take that direction.

Legal remedies – practical implementation of enforcement proceedings

A number of legal remedies and other instruments declarable at different stages of the procedure significantly slow down enforcement, including reasons that allow the declaration of these remedies and their suspensory effect on the enforcement procedure. The following text contains several examples of situations in which there is room for further improvement, and concrete recommendations on how to achieve it. Below is a list of the topics covered:

- Formal non-suspensory effect of legal remedies;
- Issues of complaints brought after the expiry of the period prescribed and appeals against a writ of execution based on an authentic document;
- Bailiff's activities during the enforcement procedure and the use of debentures in the enforcement procedure.

Formal non-suspensory effect of legal remedies

On the one hand, the provisions of the Enforcement Act establish the formal non-suspensory character of legal remedies, such as appeals against a writ of execution issued on the grounds of an enforceable document. On the other hand, the non-suspensory character of legal remedies is not prescribed, while in practice, the declaration of such legal remedies always has a suspensory effect, such as the application for cancellation of the enforcement clause and appeals against a writ of the award of immovable property. Even though provisions of the Enforcement Act do not prescribe the non-suspensory character of legal remedies, in practice, the declaration of such legal remedies leads to the stay of enforcement action and prolonged enforcement proceedings. Therefore, in practice, the suspensory effect of legal remedies is acknowledged, although it is non-existent. In enforcement procedures, appeals are rarely upheld since they are brought chiefly to prolong the

procedure. Because of this, the enforcement procedure, which by its character is an urgent implementation procedure, becomes long and tiring in practice.

In this context, we point to the subject of Article 50 of the Enforcement Act (hereinafter: the EA). It is unclear why certain grounds appeals are decided upon by the Enforcement Department of the Municipal Court while others are under the jurisdiction of the Municipal Civil Court. For example, when bringing an appeal against the writ of execution based on reasons mentioned in Article 50(1)(1–6, 8) of the EA, the appeal is referred to a higher court, which leads to a stay of the enforcement procedure. Therefore, the provision of Article 51 of the EA, which foresees that the first-instance court decides on appeals that are founded, and the higher court decides on appeals that have been found as unfounded by the first-instance court, is not applicable in practice.

The same problem occurs when bringing an appeal based on reasons mentioned in Article 50(1)(7, 9–11) of the EA. In such cases, the debtor is referred to a civil procedure, which in practice always leads to a stay of the enforcement procedure. Rubricated civil procedures are simple, mostly unfounded, and initiated only to prolong the enforcement procedure. The provision in Article 52(4) of the EA empowering the court of first instance to decide on appeals unilaterally is not applied in practice due to non-existent evidence and the concerns of the judges at the court of first appeal. Contrary to the provisions of Article 50(7) and Article 52(6) of the EA, these appeals are deemed suspensory by the courts, and enforcement is suspended until the adoption of the final decision in the civil proceedings.

A similar problem occurs in canceling the enforcement clause issued by a notary public as a notarial act (Article 36(6) of the EA). Namely, in the special non-contentious procedure, debtors have the right to challenge the enforcement clause issued by the notary public as the notarial enforcement clause. Currently, the municipal courts decide on such appeals in the special non-contentious procedures. More often than not, the appeal is used precisely to prolongate the enforcement procedure since, in practice, the submission of such appeal is suspensory in character, even though it is not provided for as a reason to prolongate the enforcement procedure in the sense of Article 65 of the EA.

In view of the above, what follows are **AmCham's recommendations** for improving and accelerating the enforcement procedure, which is, we believe, the goal of the legislative bodies.

Amendment to Article 50(7) of the EA

We are proposing to **amend the proposed Article 50(7) of the EA**, so it reads as follows:

"*The appeal of the debtor against the writ of execution shall not prolongate the enforcement proceedings, unless otherwise provided by this Act. In cases where the appeal is brought and the requirements to stay the enforcement procedure are not met, the first-instance court shall continue the enforcement proceedings by taking the next action within 15 days of receiving the appeal.*"

Amendment to Article 36(6) of the EA

We are proposing to **amend the proposed Article 36(6) of the EA**, so it reads as follows:

"*The application for the cancellation of the enforcement clause issued by the notary public according to the notarial act or decision, submitted outside the enforcement procedure, is decided upon under a non-contentious procedure by the municipal court in whose jurisdiction is the headquarters of the notary public. The application for the cancellation of the enforcement clause shall not stay the enforcement procedure, and the first-instance court instituting the enforcement proceedings shall continue the enforcement procedure without delay by taking further enforcement actions.*"

Issues of complaints brought after the expiry of the period prescribed (Article 53 of the EA) and appeals against a writ of execution based on an authentic document (Article 58(1) of the EA)

With respect to the above-described issues concerning the suspensory character of legal remedies, in the following text, we will also point out that the debtor may, based on the reasons from Article 50(1)(7) and (9–11) of the EA, bring an appeal against a writ of execution after the decision has become final if the reason could not have been declared within the period prescribed for the appeal against that writ due to valid reasons. Justification of the inability to declare the reasons for appealing sooner is not questioned in practice, whereas, contrary to Article 53(5) of the EA, the legal remedy is considered suspensory, which leads to prolongation of the enforcement procedure. Due to the above, in practice, this institute is subject to misuse, resulting in proceedings delays. With regards to the institute of counter-enforcement, under which the debtor is reimbursed for potential damage, modeled after the decisions presented earlier under (1), an acceptable period within which the first-instance court will continue with the enforcement proceedings should be determined.

Furthermore, in relation to the provision of the EA which establishes that an appeal against a writ of execution based on an authentic document must be substantiated, as it will otherwise be rejected, it should be emphasized that in practice, the courts

do not entirely reject the unsubstantiated appeals. Instead, the procedure is continued as civil proceedings concerning an appeal against an order of payment. For instance, the debtor declares that the debt has been time-barred without presenting evidence, and in practice, in cases of such appeals, the writ of execution is canceled, and the procedure is continued as civil proceedings. Extensive judicial practice exists according to which any sort of observation on the writ of execution is interpreted as a substantiated appeal by the courts. One example is a sentence by the County Court in Bjelovar from August 27, 2015, ref. no Gž Ovr-179/15-3, according to which "*When no concrete reasons to challenge the enforcement debt have been presented in the appeal, but the content (statement of grounds) of the appeal implies that the debtor herewith challenges the grounds or level of the debt, the appeal shall not be rejected as unsubstantiated*."

There is no doubt that such practice impairs and slows down the enforcement procedure. Since the Enforcement Act does not prescribe what is considered a substantiated appeal, in practice, almost no appeals are evaluated as unsubstantiated. Therefore, we **recommend** that the Enforcement Act define which elements should be included in every substantiated appeal and in which cases the appeal that does not contain those elements will be rejected.

In view of the above, we recommend the following:

Amendment to Article 53(3) of the EA

We are proposing to **amend the proposed Article 53(3) of the EA**, so it reads as follows:

"*Bringing an appeal described in Article 53(1) shall not prevent instituting enforcement proceedings and the recovery of the bailiff's debt, unless otherwise provided by this Act. In the cases where the appeal described in Article 53(1) is brought and the requirements to stay the enforcement procedure are not met, the first-instance court shall continue the enforcement procedure by taking the next enforcement action within 15 days from receiving the appeal."*

Amendment to Article 58(1) of the EA

We are proposing to **amend the proposed Article 58(1) of the EA**, so it reads as follows:

"*In the appeal against a writ of execution based on an authentic document, the debtor shall determine in which part they challenge the writ concerned. In order for the appeal against a writ of execution based on an authentic document to be valid, it must include the designation of the writ of execution being challenged, the reasons for challenging that prejudice the legality and regularity of the writ of execution, evidence to bolster the claims and the debtor's signature. An appeal that does not*

include the elements prescribed by this article shall be considered unsubstantiated and rejected as incomplete, without inviting the debtor to complete it."

Bailiff's activities during the enforcement procedure and the use of debentures in the enforcement procedure

In practice, enforcement procedures tend to be inactive due to justified and unjustified decisions of the court. However, bailiffs fear the exclusion of enforcement, based on Article 72(3) of the EA, in situations where the case is inactive because the court has not taken any actions suggested by the bailiff for over a year. Therefore, we propose that **the aforementioned provision** (Article 72(3) of the EA) be **entirely removed**, as it is in the bailiff's interest to complete the enforcement procedure. Alternatively, we propose an **amendment to the provision and its clarification**, so it is no longer applied in the cases where the court is obligated to take action, such as delivering the documents to the judicial expert so that they can prepare findings and opinions or setting a date for determining the value of immovable property.

Furthermore, in those cases where a debenture is the enforcement document, extrajudicial enforcement should be initiated to determine that enforcement is impossible to conduct in order to institute judicial enforcement proceedings. However, since in the prevalent judicial practice (with exemptions such as the Commercial Court in Split), a debenture is considered a security and, as such, it can circulate as a single copy, judicial enforcement proceedings based on a certified copy are not permitted. The aforementioned presents a disadvantage for the creditor in relation to other creditors (the creditors that have a claim based on documents other than debenture, such as enforcement judgment, writs of enforcement issued by a notary public, etc.) since it is obligatory to request the debenture be returned from the Croatian Financial Agency (FINA), which leads to the loss of the creditor's priority and the possibility of simultaneous extrajudicial and judicial enforcement proceedings. In that sense, we are proposing that the Enforcement Act should prescribe that judicial enforcement proceedings can be instituted based on a certified copy of the debenture issued by FINA, where FINA shall also confirm that the copy corresponds to the original and that the original document is kept at FINA.

Enforcement on income

The announced amendments to the Enforcement Act published on the e-Consultations portal of June 3, 2022 propose to abolish the institute of enforcement on income. The proposal is not in accordance with the vital necessities of the

procedure, EU legislation, or practice. The following table contains examples of countries in Europe and their statuses of the existence of the enforcement on income institute.

ENFORCEMENT ON INCOME – EUROPE											
Croatia	Hungary	Bulgaria	Slovenia	Slovakia	Czech Republic	Serbia	Bosnia and Herzegovina	Switzerland	Germany	Greece	Russia
yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	yes

These amendments annul the most significant potential problems which would inevitably arise if the institute were simply abolished. There are many problems in practice that arise from misuse or the principles upon which the system rests; debtors with no open accounts, benefit payment in cash (envelope wages), benefit payment to accounts in international banks, Revolut, soon benefit payment in cryptocurrency that will not be received through accounts and thus neither through FINA, arrangements with the employer on benefit payment into a third-person account, etc. This renders enforcement of accounts impossible, enables avoiding the settlement of liabilities, and pushes bailiffs into enforcement of other types of property, which are more problematic for the debtor (vehicles, immovable property). The amendment to Article 181 thereby annuls the aforementioned issues. The described proactive and practical thinking is encouraged by the business community.

However, it must be emphasized that even without the above-described misuse, if enforcement on income were abolished, the bailiffs are left with an alternative of enforcement on bank accounts, through FINA, which is more **problematic** than enforcement on income for the debtors for the following reasons: (i) enforcement through FINA is **much more expensive** for both the bailiff and the debtor because of the fees payable to FINA (the enforcement on salary does not require the debtor to pay additional fees as in the case of enforcement on bank account);

(ii) the increasing number of cases processed through FINA is causing a backlog resulting in significant accumulated debt, which also increases the total debt of society;

(iii) in the cases of enforcement on income, only the income, i.e., the part of income that is legally permitted, is seized from the debtor, whereas in the cases of enforcement on a bank account, the amount that flows into the account is seized, which can mean the entire salary (until the debtor opens a secured bank account) and any other inflow (e.g., the debtor can lose the full amount of a disbursed loan, other income, etc.).

These are serious reasons that may cause damage to the debtor. We believe that, even though enforcement on income imposes an unnecessary administrative burden

on employers, the parties to the procedure and the overall debt of society should not bear the brunt of the described load shedding.

However, if enforcement on income is abolished, it is necessary to ensure a decrease in the compensation payable to FINA for implementing enforcement on monetary funds.

It should be emphasized that abolishing enforcement on salary would not significantly decrease the unnecessary administrative burden imposed on employers, as they would still have to calculate the part of the salary to be paid to a regular and to a secured account. The only difference is that, instead of being paid to the bailiff, the part which is not secured would be paid directly to one of the debtor's accounts and the secured part to another. It is clear that the purpose of this amendment would not be achieved.

Misuse in the procedure

The enforcement practice in Croatia sees frequent procedural misuse conducted by the parties. We would like to highlight several frequent examples and propose a solution to limit or prevent them.

Sale of immovable property by auction

In Croatian enforcement procedures, an auction boils down to a mere collection of initial offers and selection of the highest bid. Frequent misuse of the system has been noticed in practice: 'fictitious' bidders participate in the auction and offer the highest bid only to withdraw it and avoid paying the purchase price. The immovable property is then awarded to the next highest bidder. There is a reasonable concern (evident from statistically processed data on conducted auctions) that two fictitious bidders can raise the purchase price only to withdraw their bids and ensure that the immovable property is awarded to the third-highest bidder who knew that the fictitious bidders would withdraw. The fictitious bidding demotivates all other bidders, and the purpose of auctioning is called into question. Furthermore, the other bidders did not have the opportunity to offer a higher price but remain with their initially collected bids. A more practical solution would ensure actual **bidding** for the bidders so that the achieved highest bid wins instead of the highest initial bid (as is currently the case).

Settlement of interest claims from the purchase price of the immovable property (Article 114(4) of the EA)

It is set under the aforementioned provision that interest is to be settled in the same order as the main debt, but only in the amount that covers the period of the last

three years until the decision on awarding the real estate to the buyer. The remaining interest is settled after the settlement of other debts towards secured creditors, in accordance with the order of priority. **In practice, many 'fictitious' liens are registered after the registration of the bailiff's mortgage and prevent the full settlement of the bailiff's claim.** It has been suggested that such 'fictitious' liens serve to prevent the full settlement of the bailiff's claim and simultaneously ensure that the debtor is awarded a part of the purchase price 'through a third person' registered as a secured creditor after the bailiff. A direct legislative intervention should **abolish the restriction** according to which interest is settled only in the amount that covers the period of the last three years until reaching a decision awarding the real estate to the buyer, i.e., it is necessary to **enable the full settlement of the bailiff's claim.**

The possibility of determining enforcement against joint and several debtors

Croatian law recognizes forms of legal entities whose liabilities are ex-lege undertaken by other persons jointly and severally (e.g., obligations on the part of an institution are undertaken by its founder, according to the Institutions Act). However, it is impossible to determine enforcement against such persons if it is based on an enforcement document containing the name of the debtor, the person whose obligations are ex lege jointly and severally undertaken by them, which enables hiding behind a 'corporate veil' and impairing and prolonging the process of settling the claim or preventing the settlement due to the length of the civil proceedings that should precede it. A direct legislative intervention in **Article 32 of the EA**, which sufficiently regulates only the determination of enforcement in the case of a transfer of debt, or **a special provision in Article 32(a) of the EA** should foresee that enforcement can be determined against a person who is not listed as a debtor in the enforcement procedure but who is responsible for the debt jointly and severally with the debtor, according to provisions of a separate law.

Special provisions on consumer protection in enforcement procedures

The new Section 3, Article 73(a) of the announced Amendments to the Enforcement Act published on the e-Consultations portal of June 3, 2022 proposes that in enforcement procedures where the enforcement is determined and instituted based on enforcement documents arising from consumer contracts, the court responsible for enforcement shall ex officio review the consumer contract to determine whether or not it contains unfair (void) provisions.

The above is a result of adopting the conclusion from the session of the Supreme Court of the Republic of Croatia (Su IV-87/2022). The conclusion contains the same

statement and an addition according to which the aforementioned could be applied in procedures based on enforcement documents that have not undergone a judicial review, i.e., the described procedure did not contain the enforcement procedure based on a court judgment. However, the procedure based on a court judgment is treated in the same way as other enforcement documents. We believe that the above described is unnecessary and that the Act should retain the same distinction as the Conclusion.

In general, with regards to the suggested amendment, the court responsible for enforcement would, in the first-instance procedure, be obligated ex officio to review the consumer contract from which the obligation that causes the determination and instituting of the enforcement arises, to determine whether it contains unfair (void) provisions. Furthermore, if the consumer contract includes such provisions, the court responsible for enforcement must ex officio temporarily stay the enforcement proceedings and instruct the debtor to bring an appeal requesting the enforcement to be declared inadmissible. We would like to point out that enforcement proceedings in all cases questioning the fairness of contract provisions will not necessarily result in irreparable damage or that which cannot easily be reimbursed, whose occurrence is a condition for establishing the nullity of a particular contract provision. In practice, this risk is hard to imagine especially in the case of enforcement on monetary debt, where the suggested action makes no sense whatsoever.

The enforcement procedure's meaning and purpose should be kept in mind. The enforcement procedure is a process of forcible settlement of a debt within the shortest period possible. The Enforcement Act establishes financial discipline, and it is set under the provision in Article 13 of the Act that the court responsible for enforcement must act urgently in the enforcement procedure.

Creditors in consumer contracts whose claims become due in most cases first try to settle their claims voluntarily before initiating enforcement proceedings. Notices are sent to the debtors, and they are repeatedly encouraged to pay the due and outstanding debts. Initiating enforcement proceedings is a last resort in settling the creditor's claim. By introducing such an amendment, the creditor is put in a position where they have to prove the non-existence of void provisions in the consumer contract as part of the procedure initiated to settle their claim, which is entirely contradictory to the purpose of the Enforcement Act.

In particular, with regards to the suggested amendment to the procedure, it is of the utmost importance to discuss the provision from Article 7 of the Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts, last amended by the Directive 2011/83/EU of the European Parliament and of the Council of October 25, 2011 on consumer rights. It is established under this provision that it is in the consumers' and market competitors' interest that Member States ensure the

existence of appropriate and efficient means to prevent the constant use of unfair terms in contracts that retailers and service providers conclude with consumers. Member States have thus been tasked with creating appropriate and efficient means to prevent the constant use of unfair terms in contracts that retailers and service providers conclude with consumers.

The aim of consumer protection, according to the Directive, should be the protection of all consumers, not just those who have been subjected to enforcement due to a failure to comply with their contractual obligations. If the fairness of contract terms is reviewed only during the enforcement procedure and only in relation to the debtors, all other consumers, fair payers, will be put in a disadvantageous position in relation to delinquent payers.

It would therefore be sufficient for the regulations governing specific industries and the business of regulatory bodies to determine the contents of such contracts, their general terms, and supporting documents and prescribe the contracting process. That would ensure that the contractors who act entirely in accordance with the regulations and instructions of the regulatory bodies (responsible for determining whether the regulated subject complies with the regulations and requirements set by the regulatory body) and their contracts and documents are considered fair, and it would not be necessary to review them again and thus impose an additional administrative burden on numerous segments of society and government, in particular, the courts.

The above-described Conclusion has been actively implemented before the courts responsible for enforcement since the day of its adoption, and it has already resulted in a high level of dissatisfaction and overburdening of the judges, as well as evident prolongations of enforcement procedures.

Due to all of the above, it is vital that the proposal from the conclusion should NOT be implemented in the amendments to the Enforcement Act.

Conclusion

Amendments to the Enforcement Act are an opportunity for the competent authorities to receive constructive suggestions from the participants in practice, which was our primary motive in creating this document. The Act is fine as it is, the implemented digitalization adds to its quality, and it could become even more efficient if some of the suggested ideas herein were implemented. Amendments in the segments with room for improvement in practice may result in a system sustainable in the long term. That system would be organized in a detailed and systematic manner in its

entirety or at least in the parts that require the highest level of modification and improvement and would be carefully and thoughtfully planned. We have, therefore, presented a series of constructive and practical recommendations and examples which, as examples from the practice of companies that encounter various issues arising from the current Enforcement Act on a daily basis, can be helpful to the legislative body when drafting the new comprehensive act which will be sustainable in the long term. We believe that the legislative body will recognize the importance of the suggestions from practice, i.e., from the economy, and that some of our recommendations will be adopted. We believe that the suggested amendments will render the enforcement procedure more efficient for both the parties and the implementing bodies and that it will become the backbone of a healthy business environment overall and contribute to the recovery of the economy, simultaneously respecting the dignity of the debtors and improving their rights.

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