Recommendations for Judiciary Improvements

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American Chamber of Commerce in Croatia Američka gospodarska komora u Hrvatskoj

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Introduction

During the first two "post-pandemic" years (even though the end of the pandemic still hasn't been officially declared), the Republic of Croatia has seen many changes, as well as international distinctions. This primarily refers to the decision on Croatia becoming a member of the eurozone, i.e. the adoption of the euro as the official currency, as well as joining the so-called Schengen area, i.e. the lifting of border controls between Croatia and the vast majority of EU/EEA member states. These two changes signal the final integration into all relevant EU systems, but they also raise the bar of expectations from Croatia as one of the developed countries of the world.

In spite of constant amendments to regulations and the legislature's best intentions to make certain progress, the judiciary in Croatia still presents impediments to the development of the Croatian economy. It is the opinion of AmCham that continued improvements to the judiciary are needed in order for Croatia to come closer to the level of countries which are now our equal partners, in addition to still being our role models.

The recommendations for improvements to the judiciary laid out in this position paper and elaborated through 5 specific points which have been analyzed in detail and evaluated as potential drivers, can be applied in further legislative activities and the development of strategies and policies. The recommendations below constitute a concise overview of potential focal points during the next legislative term, aimed at contributing to the development of the competitiveness of the Croatian economy and attracting investments to the Republic of Croatia.

Recommendations for Judiciary Improvements

1. The Specialization of Judges

Law, especially in times of constant digital revolution, is becoming increasingly complex and demanding. Just like in medicine, expecting that lawyers should be "*generalists*" or general practitioners in a manner of speaking, equally well-versed in multiple fields of law, is becoming not only a thankless endeavor, but also irresponsible, and one would say, impossible. Unfortunately, this is exactly what is expected in the courts, partly due to the model of assigning cases to judges. Even though the law provides for exceptions to the process of assignment of cases, they are just that – exceptions.

The current system of assigning cases leads to judges in litigation divisions of courts (especially of commercial courts) presiding over court proceedings on the same day

in cases related to the compensation of contractual damages, complex copyright cases, and disputes related to strict regulatory frameworks (such as competition law). The judges frequently cannot be adequately prepared to preside over and understand so many different and completely unrelated cases, which leads to complications during the litigation process itself (longer time to prepare for the hearings), but also in terms of court rulings, which are much more likely to be overturned or altered by a higher court. This is exacerbated by the fact that, especially in more complex commercial disputes, the parties are represented by lawyers who are closely specialized in that field of law and that type of dispute.

AmCham proposes the **introduction of mandatory specialization of judges** (through education, guidance, and enabling the activities of mentoring young judges and gaining experience practicing law in the private sector), and the consequent **diversification of court divisions**, which would employ specialized judges (and where cases would continue to be assigned automatically, but within a specialized division based on the type of dispute). The above specialization would lead to judges being able to much more efficiently and with a greater degree of confidence preside over cases that they have been adequately educated and prepared to try. The percentage of upheld decisions given at first instance would certainly increase, and litigation proceedings would ultimately be much faster and much more efficient, benefitting the disputing parties. In the Republic of Croatia, a certain degree of specialization has already been introduced in certain types of disputes; Art. 7 of the Act on Territorial Jurisdiction and Seats of the Courts stipulates that only certain commercial courts shall adjudicate disputes related to traffic law (maritime and air transport) and disputes related to intellectual property and copyright.

The above specialization could be paired with another administrative change – the **automatic (digital) delegation of judicial cases based on type and quantity**, so that courts with a lower influx of cases in the coming period, or courts employing judges who are specialists for certain types of disputes, would take over cases from courts which have a backlog of cases or courts which lack judges specializing in a certain area of law, without the formal and slow delegation procedure prescribed by the regulation currently in force, while additionally taking into account the complexity of the case and the geographical distance between the location of the parties and the location of the new court (or alternatively the possibility of having remote hearings, which renders the physical location of the competent court irrelevant).

2. Amendments to the Methodology for the Evaluation of Judges' Performance

We believe that introducing a **methodology of rewarding judges for settling disputes in a timely manner while maintaining a sufficient level of quality** would prove to be a necessary and beneficial move, aimed on the one hand at

ensuring that a greater percentage of cases is concluded within an acceptable time frame and substantial level of quality, while at the same time increasing the satisfaction of parties and members of the public, as well as the perception of the effectiveness of the judiciary. As an added benefit, every judge would have the possibility of receiving an adequate reward for their contribution. This could be achieved, for example, by introducing, in addition to the current basic salary, an additional, variable component of the remuneration, established as a scoring system as outlined below:

We are proposing **amendments to the Methodology for the Evaluation of Judges' Performance** (Official Gazette No 125/2019) by creating incentives for efficient work of judges and surpassing of the Framework Standards for the Performance of Judges. The above may be achieved by amending the provision of Art. 7, para. 6 of the Methodology for the Evaluation of Judges' Performance by prescribing that the judge performance score be increased on the basis of quantity of work by 0.25 points for each percentage point above 100%, rounded up, if the judge rendered more than 100% of decisions concluding proceedings in the evaluated period in compliance with the Framework Standards for the Performance of Judges. The above amendment would reward and penalize judges equally in relation to their fulfilment of the Framework Standards for the Performance of Judges. According to the existing Methodology for the Evaluation of Judges' Performance, the judges are only penalized for failure to fulfil the Framework Standards for the Performance of Judges with 0.25 points for each percentage point below 100%, rounded up, while incentives for increasing efficiency above 110% are absent. The above amendment would mean that individual judges may achieve more than 60 points for work results through corresponding amendments to Article 7 of the Methodology for the Evaluation of Judges' Performance.

Instead of looking only at the number of completed cases, the evaluation methodology should certainly include corrective factors for the complexity of the cases handled by the judge (ensuring, for example, that meeting the norm with regard to the number of cases is not scrutinized for the judges who handle extremely complex cases that require far more effort than a larger number of simple cases combined), as well as having the methodology contain provisions for rewarding judges who have specialized in a certain type of case through education and experience in case practice.

Considering that the new Civil Procedure Act also introduced time limits for concluding proceedings in certain instances, the methodology needs to contain provisions outlining the possibility of introducing sanctions for failure to meet the time limits, as well as rewards for above-average efficiency. In this regard, we would suggest not rewarding points for individual resolved cases to judges if the time limit for delivering a ruling has been exceeded in the relevant case and if there were no

exceptional and duly justified circumstances leading to the time limit being exceeded. On the other hand, a certain number of bonus points could be awarded to judges whose efforts would lead to an amicable settlement to the dispute, or to judges who would settle the dispute far before the statutory time limit, on the basis of which the judges would be entitled to certain benefits.

In their own right, these proposals represent a minimal additional cost to the budget, and the proposed amendment to the Methodology for the Evaluation of Judges' Performance would reward increased work efficiency of the judges. Introducing positive reinforcement measures will allow each judge to improve their performance evaluation score.

3. Promoting ADR

Alternative dispute resolution (ADR) such as arbitration and mediation should be more heavily promoted in order to reduce the number of new disputes. The need to rely on ADR was also recognized by the legislature, and public consultation with regard to the draft Amicable Dispute Resolution Bill was initiated on December 30, 2022. Among other provisions, the Amicable Dispute Resolution Bill introduces new legal concepts (structured negotiations and early neutral evaluation), and provides for the establishment of a public Center for Amicable Resolution of Disputes. We welcome the legislature's intention to popularize one of the options for alternative dispute resolution, and below we present our reasoning on the most significant changes and further proposals.

Article 9 of the draft Amicable Dispute Resolution Bill stipulates the obligation to try to resolve the dispute amicably before initiating civil or other court proceedings. Laying down the aforementioned duty of the parties is problematic, bearing in mind that it applies to absolutely all types of procedures, which would be contrary to the purpose of point 13 of Directive 2008/52/EC, which stipulates that mediation should be a voluntary process between the parties, and potentially contrary to the right of access to the courts within the meaning of Article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The introduction of a full obligation to take part in mediation before initiating any legal proceedings certainly does not make sense. The above especially refers to enforcement, considering that in a significant majority of cases (more than 90%) there is no dispute before the initiation of enforcement proceedings, and that creditors almost without exception call on debtors to resolve the dispute amicably, i.e. to settle their obligations without initiating court proceedings. In this sense, we find it necessary to refer to previous precedent set by Hungary, which also introduced a full obligation to take part in mediation before initiating any legal proceedings, but which nevertheless abolished this obligation before the new Civil Procedure Act entered into force because the measure proved to be ineffective.

However, we do believe that the introduction of other types of obligations would contribute to the positive development of mediation as an alternative dispute resolution method, such as the obligation to use mediation for specific types of disputes, introducing the mandatory first mediation meeting, or the obligation to use mediation in the event that the litigation is not resolved within the time limit provided by law. In this sense, prescribing the obligation to attempt mediation for certain types of disputes would contribute to popularizing mediation and to increasing the efficiency of the judiciary (such as in specialized commercial cases, for example in the field of insurance, or in cases relating to inheritance law or certain land-registry cases, etc.). In spite of the existence of certain legislative tools which allow judges to propose mediation to parties at the beginning of civil proceedings, we believe that in such situations it is already too late for a peaceful resolution of the dispute between the parties, that is, there is less chance for the parties to reach a compromise and resolve the dispute in that way. For an example of good practice, we can refer to Italy, where Article 5, paragraph 1 of the 2010 Legislative Decision No 28 stipulated mandatory mediation precisely for certain disputes, for example for disputes relating to ownership of apartments, real rights, inheritance rights (inheritance proceedings), certain proceedings related to family law, proceedings related to leases and lease agreements, compensation for damages resulting from car and boat accidents and healthcare, as well as insurance and financial and banking agreements. We believe that the introduction of a kind of mandatory mediation would help relieve the burden on the courts. However, we also believe that before such a legislative change, it would be necessary to analyze the system and detect the most common type of dispute that, according to the experts, could be avoided through mediation. This is the only approach that can lead to a positive development in the judiciary. Also, in addition to the existing proposal on the introduction of mandatory mediation meetings set out in the AmCham position paper "Mediation as a method of achieving a more efficient justice system", we deem it possible to implement proposal 3 found in these Recommendations by introducing a statutory requirement regarding mediation if time-limits set out in the proposal 3 are exceeded. In other words, if the procedural time-limit for the duration of the case is exceeded, the law would mandate mediation to attempt to resolve the unresolved dispute in parallel to efforts employed by judicial authorities. The mandatory mediation process would be coordinated by trained mediators at courts that already use such a system, or at the Center for Amicable Resolution of Disputes (the establishment of which is proposed by the draft Amicable Dispute Resolution Bill) and other existing mediation centers outside the judicial system. Thus generated mediation within the framework of the judiciary would be referred to the existing mediation centers outside the judicial system and the mediation proceedings would be performed in accordance with rates applied by such bodies and with the minimal participation of the Republic of Croatia which would use the government budget to cover the expenses of preparation and the first mediation meeting, while any further meetings would be paid for by the parties themselves. That would create conditions for the parties to discuss the dispute and

that would certainly lead to a resolution in a high percentage of cases thereby increasing the number of resolved cases and cutting down the duration of ongoing disputes in the Republic of Croatia while reducing the likelihood of inefficient mediation by transferring further mediation costs to the parties.

Disputes resolved through mediation instituted due to excessive duration of the case should not be tallied as a case resolved by the officiating judge. Instead, the Methodology for the Evaluation of Judges' Performance should provide that for such cases, the judge does not receive points that are included in their statistics of resolved cases. Conversely, provisions should be made to reward the judges who encourage parties to enter into mediation during the early stages of the proceedings, in cases where the mediation ultimately comes to a successful conclusion, by awarding a certain percentage of additional points to these judges.

Likewise, in the context of promoting alternative dispute resolution, the possibility of introducing and promoting other alternative dispute resolution methods should also be considered, referring to methods other than the existing options of mediation and arbitration. For example, for certain litigation proceedings (compensation for damages from car accidents, payments of up to 50,000 euros to which mediation is not applicable) Italy has mandatory negotiations conducted and assisted by lawyers or other trained professionals. The current draft Amicable Dispute Resolution Bill provides for the legal concept of structured negotiations, conducted in accordance with an agreement between the parties, with the proviso that the legal concept in question is not elaborated in detail, and the draft Bill instead indicates that a special law can prescribe the implementation of such negotiations. Furthermore, the Irish judicial system also contains references to the expert assessment procedure as one of the methods of alternative dispute resolution – it is a procedure in which an independent expert (for example, a court expert) who is familiar with the industry from which the dispute arises gives their expert opinion on the dispute in question between the parties. However, the above does not refer to issuing an opinion on the legal solution of the dispute (which can only be given by an independent and impartial court), but on professional issues on which the parties would have to produce experts' reports in court.

In addition to the above, we believe that it would be preferable for mediation centers to have specialized departments with trained mediators for the purpose of mediating complicated disputes from various industries. In countries such as Ireland or Germany, the industry that makes the most use of alternative dispute resolution is the construction industry, which has special professional bodies that parties can turn to for an amicable settlement to their dispute. We believe that providing a wider choice of alternative dispute resolution methods would greatly contribute to the popularization of alternative dispute resolution and, consequently, to reducing the burden on the judicial system. The argument is supported by the situation found in

Ireland, where the developed system of alternative dispute resolution methods has led to a high percentage of cases being resolved through settlement, without ever coming to court.

4. Creation of a National Court Register

We propose the **administrative merger of court registers into a unified national register** with clear and publicly available (i.e. published online) interpretations of applicable regulations. Even though the commercial courts are currently connected into a single court register system by means of a telecommunications connection, in practice there are cases where the same legal provision is interpreted differently by the court register in Zagreb and the one in Split, leading to additional costs for undertakings incurred for the needs of completing the submitted documents and implementing the proposed change to the register – due to the fact that, for example, one court register requires certain documents for entering the same modification, while another court register does not have such requirements, or each of the courts may interpret the implementation procedure in a different way as it relates to details that are not expressly prescribed by law. Such issues are especially pronounced with regard to harmonizing the amounts of share capital and stocks with the introduction of the euro. This leads to undertakings experiencing legal uncertainty since they are unable to rely on the legal provisions and clear case law and must instead depend on the interpretation of individual court registers, which is not uniform. By introducing a national court register, the practice of all court registers would become uniform, and undertakings could form reasonable expectations of what is expected of them when implementing modifications, regardless of the geographic location of the court register. At the same time, since the individual jobs and locations currently employing register clerks and judges would continue to exist in their capacity as specific geographic branches of the national court register, the parties would not be put at a disadvantage due to the potential unavailability of competent persons.

The newly established national register, in addition to other forms of increased efficiency, would lead to two important consequences. The operation of such a body would provide a budgetary relief to the existing court registers, whereby the funds thus obtained could be redistributed to support the system outlined in proposals 1 and 3. In addition to this benefit, the establishment of a national center would prevent the development of different practices regarding the naming of companies in the Republic of Croatia. In this context, cooperation should be established between the national court register and the register of trademarks maintained by the State Intellectual Property Office which would lead to a reduced possibility of registration of already protected trademarks.

5. Infrastructural Changes and the Modernization of Communication With Parties

The National Plan for the Development of the Judicial System From 2022 to 2027 recognizes the need to invest in the infrastructure of judicial bodies in order to achieve greater efficiency and accessibility of the judicial system, given that the existing judicial infrastructure is inadequate, which, among other things, affects the speed of resolving cases, and consequently the perception and trust of citizens in the judiciary.

We welcome the proposed changes, while referring to additional areas where the system needs improvement. Certain courts, especially in more remote parts of Croatia (certain islands), lack the adequate infrastructure for communicating with parties. For example, there are cases in practice where some courts (judges) do not have a landline, which leads to impaired ability to conduct timely communication on certain issues in cases and parties needing to physically visit the court.

Furthermore, we suggest that at the level of each court and permanent service, a contact e-mail address for questions related to court activities be introduced (e.g. info@ogs.hr). The issue with the current situation is, in the event that there is a need to obtain certain information on a specific case and proceedings, the principle of obtaining such information is complex and inefficient for the parties, and presents a considerable burden on judicial officers, and often on the judges themselves, seeing as the judges are sometimes interrupted even when hearings are conducted due to the lack of alternative methods to obtain information (and the fact that in certain circumstances, some information may only be obtained from a judge). By introducing a shared e-mail mailbox for each court, such situations would be avoided, the work of the court would be facilitated, and the parties would have access to the necessary information. Of course, in order for the communication with the parties via the contact e-mail address to be really effective, in addition to the introduction of the contact e-mail address, the courts need to adopt the practice of replying and providing information from the e-mail address in question. Otherwise, just introducing the e-mail address will not lead to any results or positive effects. An example of good practice would be for the party to receive an automatically generated message to the contact e-mail address after sending an inquiry, stating that their inquiry has been received and that it will be processed and answered within the next 24-48 hours, after which the customer would actually receive an answer within the given time limit.

We also suggest that when the case is formed, it receives its primary case number as a reference to the case until the conclusion of the proceedings, even if the case is transferred to another court. Changing the file case number during and after the end of the proceedings greatly complicates the connection of cases, both for the parties

and lawyers, as well as for the judges themselves and other judicial officers (e.g. sometimes the case is unavailable for several weeks because it is in the process of "being assigned a new number"). Thus, upon initiation of the proceedings, the case would be assigned one primary case number, common to the entire judicial system, which would remain the basic designation of the case until the end of the procedure, regardless of the change of jurisdiction. In addition to the primary case number, the courts would each continue to assign their additional case number unique to the current court where the proceedings are being conducted, in order to have their own records. We believe that this would greatly reduce the number of inquiries from parties in the proceedings directed at judges and judicial officers, and for the inquiries that are raised, the time needed by each judicial officer to find and check them would be reduced.

Furthermore, we would like to bring attention to the fact that at the moment written documents are first delivered to the registry office via the e-communication system (and the registry office then prints the documents on paper in most cases), and not directly to the judge, which affects the speed of the procedure and negates the main advantages of e-communication as a fast and efficient digital system. In order to contribute to the speed of delivery of documents and to shorten procedures, we propose that the computer systems of judges be modernized to enable judges to have independent access to e-communication and the ability to manage the documents themselves, i.e. a system where the documents are simultaneously delivered to the registry office and to the judge via their inbox.

Also, during the pandemic, the need to hold remote hearings increased, with some courts adapting well to the change. Remote hearings have been well-received by the parties (reduced travel costs and time needed to arrive at the hearing), but most courts are still not adapted to remote hearings due to inadequate infrastructure or judges' reluctance to use a more modern way of holding hearings. For example, in practice it is evident that some judges do not have appropriate video cameras, which are necessary for audio and video communication with parties during remote hearings. In addition to the above, the latest amendments to the Civil Procedure Act introduced the obligation of sound recording. In order for the above amendment to actually take root in practice, it is necessary for Croatian courts to be equipped with quality sound recording equipment, since this is of crucial importance for the content of court minutes, and thus the protection of the rights of the parties in the proceedings. In addition to equipping courtrooms with modern computer systems and new equipment, in order to achieve their full functionality, it is essential to adequately and regularly educate judges on how to use such equipment and systems, and to instruct them on the advantages they bring for the parties, as well as the judges themselves. In addition, we propose modernizing the proceedings by introducing rules on keeping records exclusively in electronic, instead of physical

form, which is advisable because in this way the courts would become more sustainable.

In addition to the specific proposals for modernizing the system laid out in this point, we suggest considering other ways in which communication with the court will become simpler, more transparent, and faster, seeing as the speed of communication with the court is one of the key elements that affect the speed of the proceedings in general, especially bearing in mind the fact that the latest amendments to the Civil Procedure Act introduced shorter deadlines for the completion of the proceedings.

Finally, the court buildings of courts that are located in the earthquake affected areas need to be renovated. Because of the above, some judges had to be transferred to other locations, which resulted in a slowdown in the work on the cases that such judges have been handling. We believe that new, high-quality equipment and the renovation of court buildings would greatly contribute to increasing the efficiency of judges when performing their duties, thus improving the judiciary as a whole.

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