

Recommendations for judiciary improvements

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

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Introduction

The COVID-19 pandemic and the earthquake that struck the city of Zagreb have also affected the justice system of the Republic of Croatia, causing a suspension of almost all judicial processes. The Zagreb Commercial Court, the most important commercial disputes court in the Republic of Croatia, was closed for two months, reducing the real protection of businesses and individuals to the minimum. Additional delays were also caused by the court employees being inadequately equipped to work from home. At the courts that managed to organize proceedings in separate courtrooms or outside the courthouses, the work limitations caused by the epidemiologic situation and the adjustment to this new situation caused a large drop in productivity.

Inability or fear of mobility additionally slowed down the proceedings, especially those of foreign companies and foreign natural persons.

Once the epidemiologic measures are relaxed and economic activities recommence, it is to be expected that the justice system will be overloaded by new cases (foreclosures, bankruptcies, litigations, etc.), and in combination with the existing backlog, this will contribute to creating additional business insecurity in Croatia.

AmCham is making the following recommendations for the operation of courts as well as amendments to the Croatian Companies Act in order to additionally improve the efficiency and predictability of the Croatian justice system.

Recommendations for operational court improvements

1. Introduction of two shifts in courts

During 2020 and the first half of 2021, we recommend adjusting regulations and organizing court operations in two shifts at all courts which are capable of doing so, i.e. which have enough employees. Introduction of work hours from 7 a.m. to 9 p.m., overtime hours (together with the private sector – lawyers, experts, etc.) and setting a goal, i.e. taking on the commitment to resolve, for example, 50% more cases per month/year, would result in the reduction of the existing backlog and the creation of suitable conditions for the improvement of the Croatian justice system with respect to its efficiency and predictability.

2. Automatic delegation by case type and number

We propose an automatic delegation of court cases according to their type and number, so that the courts with a smaller influx of cases in the period ahead take over cases from busier courts without a formal and slow delegation process, 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.

3. Introduction of deadlines for each step of the court proceedings

We propose considering the possibility of introducing deadlines for each step of court proceedings, so that, for example, the period between a complaint being lodged and the first instance judgment in all “regular” commercial cases lasts one year at the maximum (shorter for some special types of cases), and that the deadline for deciding on an appeal and sending a notice of the same is 6 months at the maximum. An extension of the deadlines would be granted only in exceptional cases and it would be subject to the parties’ decision. Procedural discipline should be significantly more rigorous (for judges, parties, witnesses and other participants).

Disputes not resolved by courts within the prescribed time-limit should not be tallied as a case resolved by the officiating judge. Instead, such cases should result in deduction of points in calculation of annual efficiency using the Methodology for Assessment of Performance of Judicial Duty.

4. Promoting ADR

Alternative dispute resolution (ADR) such as arbitration and mediation should be more heavily promoted in order to reduce the amount of new disputes. In addition, binding mediation, or negotiation as a prerequisite for beginning proceedings in certain types of disputes (such as commercial, labor and similar) should also be considered. In addition to the existing proposal on introduction of mandatory mediation meeting set out in the AmCham position “Mediation as a Way of Achieving a More Efficient Judiciary”, 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 duration of the case is exceeded, the law would mandate mediation attempting to resolve the unresolved dispute in parallel to efforts employed by judicial authorities. Such mandatory mediation would be coordinated by mediation commissioners at courts where such system is already in use or at the central national judicial arbitration commission which should be established regardless of this particular proposal.

Thus generated mediation within the framework of the judiciary would be referred to the existing mediation centers outside the judicial system and they 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 expenses of preparation and the first mediation meeting, while any further meetings would be paid 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 cut down 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, such cases should result in deduction of points in calculation of annual efficiency using the Methodology for Evaluation of Performance of Judicial Duty.

5. Amendments to the Methodology for the Evaluation of Judges

We are proposing amendments to the Methodology for the Evaluation of Judges (Official Gazette No 125/2019) by creating incentives for efficient work of judges and surpassing of the Framework Standards for the Workload of Judges. The above may be achieved through amendment of provisions of Article 7 paragraph 6 of the Methodology for the Evaluation of Judges by prescribing that the judge performance score is 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 Workload of Judges. The above amendment would reward and penalize judges equally in relation to fulfilment of the Framework Standards for the Workload of Judges. According to the existing Methodology for the Evaluation of Judges, the judges are only penalized for failure to fulfil the Framework Standards for the Workload 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.

This proposal represents no additional cost for the budget and the proposed amendment to the Methodology for the Evaluation of Judges would reward increased work efficiency of the judges. Establishment of positive incentives will allow each judge to improve their evaluation score.

6. Creation of a national court registry

We propose merging the court registries into a single national registry with clear and publicly available (i.e. published online) interpretations of applicable regulations. We also propose considering implementing a 30-day time-limit for the Court of Appeals regarding resolution of appeals in registry cases. The newly established national registry and other forms of increased efficiency would lead to two important consequences. Operation of such a body would provide a budgetary relief to the existing registries and thus obtained funds could be redistributed to support the system outlined in proposals 3 and 4. In addition to this benefit, establishment of the national center would prevent development of diverse practices regarding naming of companies in the Republic of Croatia. In this context, cooperation should be established between the national court registry and the registry of trademarks maintained by the State Intellectual Property Office which would lead to a reduced possibility of registration of already protected trademarks.

7. Holding court hearings via electronic means of communication

We propose considering an option of holding court hearings using electronic means of communication. The advantages of digitalisation have become evident during the period of lockdown caused by COVID-19 pandemic and the earthquake that struck the city of Zagreb. It can be assumed that the advantages of digitalization will be even more apparent in case of future negative epidemiological circumstances in Croatia. According to the Civil Protection Headquarter of the Republic of Croatia and the Croatian Institute of Public Health worsening of the epidemiological situation during fall and winter is most probably inevitable. Therefore, we believe that possibility of holding court hearings via electronic means of communication should be considered, if technical possibilities allow it, when such deterioration occurs.

Since electronic communication via information system with most of the courts functions well, we believe that introduction of this possibility as an alternative to the physical holding of court hearings would be a good solution to epidemiological challenges that can be expected in the near and distant future.

Recommended amendments to the Croatian Companies Act

Registration in the court registry of commercial courts should be quick and simple. This was also one of the recommendations of the World Bank that could contribute

to a significant increase in the Republic of Croatia's Doing Business rank, which is important to investors when deciding whether to invest into a country.

The current pandemic and the inability or fear of mobility have additionally complicated the process, especially when it comes to foreign companies and foreign natural persons.

This is why we outline a few recommendations for simplifying this process below.

1. Amendment to Article 412 of the Companies Act regarding managing company shares

The judgment and order of the High Commercial Court of the Republic of Croatia, reference number PŽ-6739/16, from 11 December 2019, took the view regarding the application of Article 314 of the Civil Obligations Act that the legally prescribed form of a contract or other legal transaction also applies to the authorization for the conclusion of this contract or carrying out this legal transaction in relation to Article 412, paragraph 3 of the Companies Act, which states that a contract concluded in the form of a notarial act or a private document certified by a notary or a judicial decision is necessary to transfer business shares.

In accordance with the above, foreign transferors/transferees from countries whose legal systems do not recognize the corresponding institute of notarial act or private document certified by a notary would not be able to authorize a transfer of business shares in the Republic of Croatia without unreasonable costs (of travelling to the Republic of Croatia or other country whose legal system recognizes a corresponding institute).

This is why we find that an amendment to the Article 412 of the Companies Act is necessary, which would exceptionally (analogue to the provision of Article 287, paragraph 3 of the Companies Act) **enable the transfer of business shares on the basis of an authorization whose signature is certified by a notary.**

We propose that the stated article (**paragraph 3**) reads as follows:

(3) A contract concluded in the form of a notarial act or a private document certified by a notary or a judicial decision which replaces this contract is necessary to transfer business shares. This contract is also necessary to assume the obligation of transferring business shares. A transfer of business shares on the basis of an authorization which is not in the form of a notarial act or a private document certified by a notary is valid if the signature of the transferor or the transferee in the authorization is certified by a notary. The lack of a prescribed form of contract for assuming the obligation of transferring business shares is voided by concluding a contract on the transfer of business shares in the form of a notarial act or a private

document certified by a notary. Partnership agreements do not have to be amended to transfer business shares.

2. Amendment to Article 472 of the Companies Act regarding the summary procedure for winding up companies

Pursuant to the provision of Article 472, paragraphs 1 to 4 of the Companies Act, in order to carry out a summary winding up procedure, the company members must provide a decision on the summary winding up procedure without liquidation in the form of a notarial act or a private document certified by a notary as well as give a specific statement in which, among other things, every member undertakes to settle, severally with the other company members, all of the remaining company obligations if they are subsequently determined to exist.

In view of the court registers of commercial courts, which claim that the above statement can only be given to a Croatian notary, which also causes unreasonable costs for foreign company members, it is our view that the article in question should also be amended accordingly, i.e. it should be **possible to make a decision on the termination of a company on the basis of another similar guarantee which is valid in the country where it was issued or to give a statement in the corresponding form in the company member's country of residence.**

We propose that the stated article (**paragraph 4**) reads as follows:

(4) The decision from paragraph 2 of this Article shall be made in the form of a notarial act or a private document certified by a notary. Exceptionally, the decision from paragraph 2 of this Article which was made and signed on the basis of an authorization that was not in the form of a notarial act or a private document certified by a notary shall be valid if the signature of the members in the authorization was certified by a notary in a country in which the institute of notarial act or private document certified by a notary is not recognized. The statement of the company members from the previous paragraph shall be made in the form of a notarial act or a private document certified by a notary or, in the event that a company member is headquartered outside of the Republic of Croatia, in the corresponding form which enables the company member to assume the responsibility severally with all of his assets in accordance with that country's legislation.

Conclusion

In order to improve legal certainty in the operation of judicial authorities and stimulate entrepreneurs to do business and invest in the Republic of Croatia, certain amendments to the legislation are necessary.

The recommendations for operational court improvements are aimed at solving the problem of additional backlog during the COVID-19 crisis as well as long-term increase in courts' efficiency by speeding up proceedings with prescribed deadlines and further promoting (forcing) alternative dispute resolution such as arbitration and mediation. Merging the existing court registries into a single national registry (following the example of a large number of EU countries) would significantly harmonize the existing diverse practice in registration procedures and facilitate the establishment of companies by entrepreneurs, while holding court hearings using electronic means of communication would speed up the proceedings and reduce the costs of parties, witnesses and experts.

The recommendations for amendments to the Companies Act will remove the obstacles foreign entrepreneurs face in transferring business shares or winding up inactive companies on the territory of the Republic of Croatia in a simple way which does not require them to be physically present. This will prevent them from refraining from doing business in the Republic of Croatia because of potentially facing a long and expensive winding-up procedure in the event of cessation of business.

For additional information, please contact:
American Chamber of Commerce in Croatia
Andrea Doko Jelušić,
Executive Director
T: 01 4836 777
E: andrea.doko@amcham.hr